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ABSTRACT

The "irreparable harm" standard is an old principle of equity designed to limit court use of injunctions to situations in which the absence of court intervention would produce irreparable injury to legally protected interests. This study describes and analyzes the courts' use of the irreparable harm standard in anti-strike injunction proceedings that involve teachers and school boards. The project includes analyses of previous litigation and legislation concerning the irreparable harm standard's use in teacher strikes. The major portion of the project involved gathering field data in settings where strikes and injunction proceedings occurred during 1978 and 1979. Field data are presented thematically rather than site-by-site. In addition, questionnaires were completed by 129 (82 percent) of the superintendents who experienced strikes during 1978-79. In the appendices are more detailed accounts of case law; data from a number of the field settings; a state-by-state inventory of pertinent statutory provisions; a comprehensive analysis of the treatment of the irreparable harm standard by the appellate courts; and the results of the questionnaire survey of superintendents who experienced strikes. (Author/MLF)

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Final Report

ENJOINING TEACHER STRIKES: THE IRREPARABLE HARM STANDARD

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Center for the Study of Law in Education
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St. Louis

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CONTENTS

ACKNOWLEDGEMENTS iv

INTRODUCTION 1

 Background: The Private Sector 4

 Emergence of the Irreparable Harm Issue in the
 Public Sector 5

THE LAW IN BOOKS 8

 The Law Before Holland 9

 The Holland Case 13

 The Statutes, 1979 14

 Case Law, 1979 18

 The Holland-Type Decisions 19

 "Clear and Present Danger" Decisions 22

 Subsequent Irreparable Harm in the Law Books, 1979 25

TEACHER STRIKES: 1978-79 26

 Survey Summary 26

 Case Summaries 28

 St. Louis, Missouri 28

 Collinsville, Illinois 28

 Daly City, California 28

 Seattle, Washington 29

 Warren, Michigan 30

 Butler, Pennsylvania 31

THE LAW IN ACTION 33

 Plaintiffs' Views of Irreparable Harm 34

 Irreparable Harm Occurs in Many Guises 35

 The Evidence of Irreparable Harm is Largely
 Personal 39

The Teachers' Arguments are Not Credible	44
Dilemmas of Application	45
Defendants' Views of Irreparable Harm	47
Personal Experience Does Not Support the Proposition that Teacher Strikes Create Irreparable Harm	47
Research Evidence Does Not Support the Proposition that Teacher Strikes Cause Irreparable Harm	50
Plaintiffs' Presentations of Evidence Concerning Irreparable Harm Are Not Compelling	52
Irreparable Harm is Relative	56
The Courts Will Find Enough Irreparable Harm to Justify Granting Injunctive Relief	59
The Irreparable Harm Argument is a Useful One to Make	60
The Irreparable Harm Argument Contains Built-In Pitfalls ...	62
The View from the Bench	63
Summary: The Law in Action	70
SUMMARY AND DISCUSSION	70
A Field in Transition	72
Irreparable Harm: Issues and Problems	73
Additional Inquiries	75
REFERENCES	77
APPENDICES	
Appellate Review of Proceedings to Enjoin Teachers' Strikes: The Irreparable Harm Standard and Some Thoughts of the Perceived Benefits of Education	
Statutory Provisions for Injunctive Relief in Teacher Strikes	
A Teacher Strike in Collinsville, Illinois	
Two Missouri Strikes: Hazelwood and St. Louis	
State of Washington: Four Courts	

Michigan: The Warren Consolidated Schools Strike

Pennsylvania: The Butler Area School District Strike

California: The Daly City Strike

Survey of 1978-1979 Teacher Strikes

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Research of the sort reported here requires the support and cooperation of large numbers of people. This project is particularly indebted to the many school board attorneys, teacher organization attorneys, school administrators, teacher organization officials, judges, state agency personnel, and state and national association staff members who so generously shared their time, their thoughts and observations, and their personal files with us. Our promises of anonymity preclude individual acknowledgement of these individuals. Our hope is that the present report, and subsequent reports based on the data which we collected, will be useful to those who have been so helpful to us. In addition to the people we interviewed, we imposed upon the 158 school superintendents who experienced strikes during 1978-79, an astounding 82% of them took the trouble to respond to our questionnaire. Again, it is our hope that this and future reports will be of use to those who contributed to it.

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Bobbe Winters managed the logistics of the research project--no small task. Substantial travel, a complex budget, numerous mailings, an extraordinary array of documents, and delayed manuscripts were handled with grace and skill.

Responsibility for the content of this report rests with us. Suggestions and criticisms will be welcomed.

--David Colton and Edith Graber

INTRODUCTION

Labor injunctions are court orders which restrain labor organizations and their leaders from doing or continuing some act, the right to which is in dispute. Injunctions may be issued to restrict picketing, to enjoin a strike and to direct employees to return to work. Such orders often are issued without benefit of an evidentiary hearing. Yet failure to comply with an injunction, no matter how unfair it may seem, can subject offenders to contempt of court penalties, including fines and jail sentences.

The injunction is an extraordinary manifestation of governmental power. A single judge, acting alone, exercises broad discretionary powers which can be used on short notice to compel or prohibit actions which may have great significance for the affected parties. Injunctions fall within the equity jurisdiction of the courts; well-established principles form the parameters within which the judge exercises his discretion. One such principle is the "irreparable harm" standard. According to that standard, courts should not issue injunctive relief unless a plaintiff clearly shows that an injunction is necessary in order to prevent irreparable harm to some legally protected interest. Thus, if an injunction is to be sought, a plaintiff must persuade a court that irreparable harm is present or imminent; the judge must then determine whether the showing is sufficiently compelling to warrant issuance of an order enjoining the defendants' actions.

Recently, labor injunctions have come into widespread use in response to the growth of teacher militancy. The roots of militance have been traced elsewhere (Corwin, 1965; McDonnell and Pascal, 1979; Rosenthal, 1969; Lieberman, 1956; Myers, 1974; Cole, 1968). Our inquiry focuses on one manifestation of that militance: strikes. Until the early 1960s, teacher strikes were rare phenomena. Then, in 1962, in a widely publicized portent of things to come, New York City teachers walked out on strike. Their strike was enjoined immediately. But the roots of militance were not stilled by the abrupt ending of the New York City strike. In the mid-1960s, the incidence of strikes increased sharply; a decade later teacher strikes were occurring at a rate that exceeded one hundred per year (Weintraub and Thornton, 1976:194). A majority of the early strikes were one-day walkouts which produced prompt settlements even before the courts could be mobilized. But among the strikes which lasted two or more days, nearly three-fourths were accompanied by board efforts (almost always successful) to obtain injunctive relief (Clevinger, 1980).

Predictions that teacher militance would fade in the face of a growing teacher surplus, taxpayer resistance, and an overall lessening of social tension have thus far proven unfounded. Issues of job security, wages and benefits, and control over working conditions have continued to be the focus of teacher militance. In 1978-79, the year in which this study was conducted, there were 158 teacher strikes. In the first six weeks of the 1979-80 school year, there

were nearly 150 teacher strikes. Predictions for the 1980s indicate a continued high level of strike activity by teachers. The use of injunctions to control teacher strikes has become a matter of continuing significance to teachers, school administrative personnel, school boards, courts and legislatures.

The study reported here focuses upon the courts' use of the irreparable harm standard when schools seek to enjoin teacher strikes. Is the standard applied? Why or why not? If it is applied, what evidence of harm is adduced? How do the courts distinguish harm and inconvenience, on the one hand, from irreparable harm, on the other? How do plaintiffs demonstrate to the courts that irreparable harm is present or imminent, particularly if schools are being operated and parents are being advised to send their children? How do teacher defendants argue that strikes do not create irreparable harm, where such argument seems to run directly counter to teachers' claims about the importance of schooling and teaching? How do trial court judges respond to the intricacies of social science evidence about the effects of schooling in general and the effects of the absence of such schooling during a strike? How do judges respond to pressures exerted by teachers, by the board, and by community spokespersons? How do they interpret the often-ambiguous guidance set forth in statutes and case law? Such questions are at the heart of the inquiry whose results are reported here.

At the outset, it may be useful to identify some areas which this research report does not address. It does not concern itself with the pros and cons of collective relationships between public employers and employees, between school boards and teachers. It does not analyze the complex and emotion-laden issue concerning the right of teachers to engage in strikes. It does not explore the causes or effects of strikes. Even the efficacy of injunctions is not of direct concern. This study focuses on the views and assessments of the parties to the injunctive process itself--the boards, the teachers and the courts. Our own views are held in abeyance insofar as possible.

Our curiosity about court treatment of the irreparable harm standard initially was prompted by queries whose roots were practical, pedagogical, and paradigmatic. The practical problems surrounding the use of the irreparable harm standard are apparent to legislators, judges, plaintiffs and defendants. Across the nation, legislators are under intense pressures from both public employers (who urge upon the legislature all manner of strike remedies, including injunctions) and from public employees (who seek the right to strike without judicial interference). Public opinion provides no sure guide; most polls reveal a remarkably even split between those who favor and those who oppose teachers' right to strike (Phi Delta Kappa, 1978:238). As we will see, some legislators have responded by directing the courts to use the irreparable harm standard, i.e., to refrain from enjoining strikes unless there is a genuine threat of harm. Other legislatures have directed the courts to ignore the standard, thus making injunctive relief more readily available

to employers. In most states, the statutes are silent. But the courts cannot wait for legislative guidance. They must deal with petitions for injunctive relief whether or not there are statutory standards. Thus the courts need to determine whether to use the irreparable harm standard and, if so, what constitutes irreparable harm. Plaintiffs and defendants must base their litigation strategies, to some extent at least, on assessments of whether the irreparable harm standard will be a factor in the court's response to a petition for injunctive relief. One objective of this study, then, is to describe and analyze current experience for we believe that reports of that experience can inform and guide those individuals who will consider and be involved in the injunctive process in future strikes.

The pedagogical implications of judicial treatment of the irreparable harm standard are also intriguing. Research on effects of schooling in the 1960s and 1970s was discouraging; scholars found few instances where those effects, if any, were ascertainable. This might mean that there were no effects or that the techniques for measuring such effects were not adequate. The question of effects of schooling arises in the injunctive process. One of the most obvious arguments available to boards in supporting their case for an injunction is that the lack of instruction during a strike is detrimental and harmful to children. In court, they would be expected to substantiate their case with evidence that schooling has positive effects for children and its absence has negative effects. We anticipated that a full array of social science evidence about the effects of education would be argued and disputed in show cause hearings.

If that were the case, we were intrigued by an apparent conundrum facing teachers: how could they, faced with the task of countering board arguments that strikes were harmful, produce counterarguments? It would not seem logical for teachers to maintain that it made no difference that schools were closed, for such a contention runs against the entire basis for having schools and teachers. One possibility was that teachers would disaggregate school effects, distinguishing areas of no harm, some harm, and irreparable harm. Teachers, that is, might go beyond the simplistic research which equates "effects of schooling" with overall achievement test scores. Another possibility was that teachers would argue that injunctions irreparably harmed labor-management relations in education and that such impairment in turn would harm the teaching-learning process. If that were the case, study of court proceedings involving the irreparable harm standard might yield insights into another important issue in pedagogy-- the impact of working conditions upon school outcomes. In short, we thought the adversarial proceedings involving the irreparable harm standard might elicit some insights and evidence in a forum which educational scholars customarily overlook.

Bolstering these practical and pedagogical queries were a number of interests traceable to theoretical developments in social inquiry. In the area of political science, for example, studies in the 1960s and 1970s stripped away the apolitical myth in which educators had carefully cloaked their endeavors. Teachers and school managers were

shown to behave like other interest groups, advancing their agendas in legislative and judicial forums. Thus we were intrigued by the possibility that labor injunction proceedings, and treatment of the irreparable harm standard, might be interpreted in terms of political power and interest, and not simply as matters of law and evidence. Political scientists and sociologists also have been developing new paradigms for examining the judicial process and function. The traditional appellate court bias, which focuses research on the words set forth in published court opinions, has begun to yield to inquiry models which focus on the behavior of judges and the social functions played by courts and by litigation. Attention has shifted from the results of litigation to the litigation process itself. Such shifts in the strategy of inquiry are not merely of academic interest. They affect what we know and the way we know it. And that has implications for the practical problems discussed above.

Background: The Private Sector

Some purchase on the significance and complexity of the irreparable harm concept can be obtained by examining the experience of labor and management in the private sector of the economy (Smith, et. al., 1974; Berman and Greiner, 1972). In the 19th century, management found that injunctions were extremely effective devices for preventing or terminating work stoppages. Old principles of equity, presented by skilled corporate attorneys to judges sympathetic to property rights, gave rise to a routine strike-breaking tactic: a business faced with a work stoppage would file a complaint alleging that the stoppage would cause irreparable harm to property rights, and that only an injunction could prevent such harm. The injunction, if issued, ordered workers to remain at their positions pending a hearing of the case. Failure to comply with the injunction made the workers and their organizations vulnerable to contempt of court proceedings, fines, and jail sentences. The procedure was highly effective as an anti-labor device, and by the 1920s the labor injunction had been invoked untold hundreds of times.

Labor leaders asserted that the labor injunction was unfair, for it aligned the coercive powers of government with the interests of management, rather than maintaining a posture of governmental neutrality in labor-management disputes. By the 1920s labor was directing much of its growing political power toward the task of securing legislation which would limit or ban the use of injunctions in labor-management disputes. In 1930 this campaign received a substantial boost in the form of a book published by Harvard Law Professors Felix Frankfurter and Nathan Greene. The Labor Injunction (1930) documented the development and use of the labor injunction in America, and included a scathing denunciation of the way in which the courts were using the injunction and the legislatures permitting its use. In Frankfurter's view the labor injunction was a major abuse of the courts' equitable powers. Frankfurter criticized the routine way in which

the irreparable harm standard was used; the courts were uncritically accepting plaintiffs' claims about the nature and irreparable character of harm. Moreover the nature of the labor injunction, said Frankfurter, prevented defendants from challenging the plaintiffs' contentions. Frankfurter suggested that these abuses of judicial power constituted a serious threat to the integrity and legitimacy of law and legal institutions in America.

Frankfurter's book was instrumental in the adoption of the Norris-LaGuardia Act late in the Hoover administration. The Act virtually banned the use of labor injunctions by federal courts. Many states soon followed with "Little Norris-LaGuardia" acts which banned the use of labor injunctions in state courts. These acts brought an end to the era of "government by injunction" in the private sector of labor-management relations. They paved the way for New Deal legislation regularizing the collective bargaining process in ways which largely precluded the need for judicial intervention. However in 1947, following a deluge of post-war strikes, Congress stepped back from its complete ban on injunctions; the Taft-Hartley Act provided for the restoration of labor injunctions under conditions of "national emergency".

Emergence of the Irreparable Harm Issue in the Public Sector

In the 1950s public employees, who had grown to one-fifth of the total labor force, began to seek the right to bargain collectively with their employers. For a long time the very idea of collective bargaining for public employees was strange and unacceptable to policy-makers and to much of the public. Even today many public employees do not have the right to bargain collectively. The first major breakthroughs in public employee bargaining came with passage of Wisconsin's public employee bargaining law in 1959 and with President Kennedy's 1961 executive order encouraging collective organization among federal government employees. For teachers--the largest category of civilian public employees--the real beginning of the collective bargaining movement usually is associated with the New York City United Federation of Teachers' winning of bargaining rights in 1961.

Despite initial widespread resistance to the idea of collective bargaining for teachers and other employees, both the practice of bargaining and legislative authorization for it now are widespread. By 1979 thirty-one state legislatures had authorized or required teacher bargaining (Colton, 1980d). In many other states the practice is common even in the absence of authorizing legislation.

In notable contrast to the private sector, where bans on anti-strike injunctions preceded adoption of collective bargaining legislation, the use of injunctions against teacher strikes generally has not been restricted. Indeed, many public employee bargaining acts

authorize the use of injunctions against public employee strikers. Hundreds of injunctions have been issued in teacher strike situations. Thus, in principle, the irreparable harm standard should have become highly developed through its employment in teacher strike injunctions. In practice however, the standard has not received much attention, by either courts or legislatures, until very recently. The reasons for the early disregard of the irreparable harm standard, and for its emergence now, provide an important part of the rationale for this study.

One reason for past inattention to the irreparable harm standard was that it was buried in an avalanche of discussion about whether public employees should have the "right to strike". Few issues of public policy have attracted so much commentary and rhetoric. There is no need to recapitulate the arguments here, other than to point out that concepts of "sovereignty," "public interest," "non-delegation," "essentiality," "market controls," "the necessities of the collective bargaining process," "the vulnerability of public employers to public pressures," "fair allocation of public funds," and a host of other claims have been invoked to argue for or against the legitimation of public employee strikes. (The arguments are presented in Wellington and Winter, 1971; Zagoria, 1972; Aboud and Aboud, 1974; Kheel, 1969; Burton and Krider, 1970; and Advisory Commission on Intergovernmental Relations, 1969). In the midst of these arguments and analyses the concept of irreparable harm initially received scant attention. Today however realism is beginning to appear; rhetoric is giving way to analysis. The analyses by Wellington and Winter, and by Livingston (in Zagoria) touch upon the harm problem, and their comments merit attention. Wellington and Winter oppose public employee strikes primarily because they are worried about the public employer's vulnerability in the face of a strike--a vulnerability which produces distortions of the distribution of public revenues. In addition, however, they claim that many public employee strikes, including those by teachers, do not create the sorts of emergency situations that warrant invoking the powers of the courts. "In education", say Wellington and Winter, "most experience has shown that the risk is to political careers rather than to the health and safety of the public. Lost school days can be recaptured, often at times of the year that might make teachers think twice before striking". Since Wellington and Winter assume that strikes may not be enjoined absent a showing of irreparable harm, they conclude that use of the irreparable harm standard would restrict the availability of injunctive relief.

Livingston comes at the problem from an entirely different perspective. He emphasizes the serious pedagogical harm which is associated with teacher strikes. However he believes that the use of adversary proceedings such as injunctions increases the harm. For example he worries that a board, in its efforts to halt a strike, may try to turn community pressures against teachers. He says "it is hardly disputable that such hostility has a long-range negative impact on the quality of education in the school system." Livingston cites the 1968 New York strike and the 1971 Newark strike to support this claim. Colton (1977) found evidence that injunctive proceedings turn at least

portions of a community against teachers. Livingston goes further, pointing out the risks of imposing fines and jail sentences upon teachers: "a student's respect for a teacher, and thus the teacher's effectiveness in dealing with him, can be seriously impaired if that teacher is held in contempt of court or given even a short jail term." Here we have a paradox: injunctions are supposed to prevent the occurrence of irreparable harm, but they may in fact aggravate such harm.

The analyses by Wellington and Winter and by Livingston point up the dilemma which confronts courts and legislatures: injunction proceedings which turn upon the irreparable harm standard may be ineffectual or even counterproductive. In the face of such dilemmas, the courts and the legislatures may try to evade confronting the issue of irreparable harm.

However evasion of the issue creates another problem, and it rapidly is becoming a significant one. Our courts are in an exposed and vulnerable position after two decades of activism, and there is pressure from within the judiciary and from without for the courts to seek a lower profile (Bickel, 1970). An obvious way to do so, in the case of anti-strike injunction cases, is for the courts to invoke the irreparable harm standard. Such a strategy likely would decrease the number of injunction cases coming to the courts because boards would be less likely to request injunctive relief if they were held to tough standards of evidence of irreparable harm. What we are suggesting, in short, is that the courts, for their own reasons, may now be more interested in giving serious consideration to the matter of irreparable harm. Such reasoning may have influenced Indiana's Chief Justice, who, in a dissent, chastised his colleagues for taking it upon themselves to determine that peaceful strikes by public employees were harmful; such determination should be made by the legislature, he said (Anderson Federation of Teachers v. School City of Anderson, 251 N.E. 2d 15, 1969).

A second consideration which may have deflected attention away from irreparable harm standard is related to the deep ideological and occupational split about the proper form for collective bargaining legislation for public employees. In part the issue is whether the laws governing private sector bargaining should govern public sector bargaining. A second split has been over the question of whether legislation covering collective bargaining should cover teachers only, or whether it should be broad-based legislation applicable to all public employees. The issue involves the "essentiality" of teachers as contrasted to other public employees; essentiality would appear to involve issues pertaining to the harm resulting from teacher strikes. There is need for clarification of the matter.

A third consideration which has affected the policymakers' attention to the irreparable harm standard has been the ancient principle of common law is that public employees simply may not strike. Until the 1960s, public employees generally adhered to this principle

(however, see Ziskind, 1940). Strikes against the sovereign have been assumed to be per se harmful and hence enjoined. Thus, even in states whose statutes were silent on the matter of public employee strikes, the courts issued injunctions against public employee strikes without inquiring into the evidence or criteria which supposedly cause harm to the public employer. Missouri is such a state. Recently, however, and particularly since the adoption of limited right-to-strike statutes in a few states, the old sovereignty doctrine has lost its potency. With the rejection of the traditional notion that public employee strikes are automatically enjoined, it has become necessary to inquire more closely into the conditions under which they are enjoined. This factor enhances the importance of the irreparable harm standard.

Finally, coincident with the development of public sector bargaining laws, but quite separate from that development, there has been another legal development which has enormous potential for the manner in which the irreparable harm question is approached. Litigation involving desegregation, student suspensions, special education, and school finance has directed attention to the concept of a student's right to an education. The concept now is sufficiently developed that it may become a consideration in injunction cases. For example, if the exclusion from school of disruptive or handicapped children raises constitutional issues, it seems likely that school board attorneys may invoke these same issues in the face of teacher strikes which have the effect of excluding students from school. At least one judge already has cited the concept of student rights in enjoining a teacher strike (Graber, 1980b). If there is a trend toward such thinking, it may be that the old sovereignty doctrine--the historic basis for enjoining public employee strikes--may simply be replaced by the new doctrine of student rights. One purpose of the study is to trace the evolution and incidence of just such issues.

In the preceding paragraphs we have noted the reasons which historically have tended to inhibit judicial and legislative attention to the concept of irreparable harm in teacher strikes, and we have noted the factors now tending to enhance such attention. If our analysis is correct, then current public policy should be in a state of flux, full of inconsistencies, contradictions, and contentiousness. We look at specific recent developments in the courts and the legislatures, our analysis is confirmed: to an increasing extent the irreparable harm issue is being confronted directly, but in widely diverse ways.

THE LAW IN BOOKS

Earlier, we noted that research paradigms are changing. Roscoe Pound noted the distinction between the "law in books" and the "law in action" and asserted the need to study both in order to understand the impact of law (Pound, 1910). Pound was challenging the myth that the law appeared to be fixed and certain and that application of law

in books to particular instances was fairly automatic, predictable and rational. Instead, he noted that social characteristics of actors and variation in social situations resulted in adaptation and innovation in the administration of law. Research growing out of Pound's seminal initial impetus (and that of the legal realists) has acquired increasing-sophistication. Thus, it is important not merely to note that there is a difference between the law in books and the law in action; that quickly becomes a truism. In addition it is important to note where such divergences occur, how they may be explained, and what they teach us about the social, political and legal processes of interaction.

We first examine the law in books which pertains to the use of the irreparable harm standard in injunction proceedings precipitated by teacher strikes. This includes both the statutes enacted by legislatures as well as the case law growing out of adjudicated cases. Readers interested in more detailed accounts should refer to the appendices. Colton (1980d) presents a state-by-state inventory of pertinent statutory provisions. Applaton (1980) presents a comprehensive analysis of the treatment of the irreparable harm standard by the appellate courts. Case accounts of individual strikes (e.g., Graber, 1980a; 1980b; 1980c; Colton, 1980a; 1980b; 1980c) present the enacted and case law in specific states where strikes occurred.

The Law Before Holland

Before World War II the prevailing attitude was that public employee strikes were wrong. The harsh response of Calvin Coolidge to the Boston police strike of 1919 helped propel him into the White House. Even Franklin Roosevelt, a nominal friend of labor, observed in 1937 that government employee strikes were "unthinkable and intolerable". In such a climate of opinion, legislation pertaining to strikes and injunctive relief seemed superfluous. Moreover, given the absence of litigation concerning public employee strikes, case law was virtually non-existent.

Things changed somewhat immediately after World War II. There was a flurry of post-war strikes by teachers and other public employees. A few states responded by adopting legislation which encoded the established attitude: public employee strikes were illegal and were to be harshly repressed. New York's Condon-Wadlin Act, Michigan's Hutchinson Act, Ohio's Ferguson Act, and Pennsylvania's Public Employee Anti-Strike Act of 1947, for example, outlawed public employee strikes and established sanctions so severe that public employers later were loathe to apply them. Typically these statutes made no provisions for injunctive relief in the event of a public employee strike; evidently ordering striking public employees merely to return to work, was deemed to be too mild a response to a strike.

The principal policy question at mid-century focused on the legality of public employee strikes rather than on the propriety of using injunctions to halt such strikes. Where the statutes were

silent, as they were in most states, judicial clarification sometimes was sought. A leading case arose in Norwalk, Connecticut. In 1946 a teacher strike there had been followed by a bargaining agreement. Subsequently the threat of another strike, coupled with uncertainties regarding the rights of the board and the teachers, led to a delaratory judgement action. In Norwalk Teachers' Association v. Board of Education of City of Norwalk, 83 A. 2d 482 (1951) the Connecticut Supreme Court, ostensibly eschewing "abstract principles of law", observed that

Under our system, the government is established by and run for all of the people, not for the benefit of any person, or group. The profit motive, inherent in the principle of free enterprise, is absent. It should be the aim of every employee of the government to do his or her part to make it function as efficiently and economically as possible. The drastic remedy of the organized strike to enforce the demands of unions of government employees is in direct contravention of this principle (Norwalk:484).

The court then went on to enunciate a position which remains today as the oft-quoted central tenet of school board requests for injunctive relief from teacher strikes:

In the American system sovereignty is inherent in the people. They can delegate it to a government which they create and operate by law. They can give to that government the power and authority to perform certain duties and furnish certain services. The government so created and empowered must employ people to carry on its task. Those people are agents of the government. They exercise some part of the sovereignty entrusted to it. They occupy a status entirely different from those who carry on a private enterprise...To say that they can strike is the equivalent of saying that they can deny the authority of government and contravene the public welfare (Norwalk:485).

In Norwalk the injunction question was not squarely before the court. But the court, evidently oblivious to the thinness of its argument, nonetheless suggested that injunctive relief would be available to public employers:

[The right of government employees to strike] usually has been tested by application for an injunction forbidding the strike. The right of the governmental body to this relief has been uniformly upheld. It has been put on various grounds: public policy; interference with governmental function; illegal discrimination against the right of any citizen to apply for government employment (where the union sought a closed shop). The following cases do not necessarily turn on the specific right to strike, but the reasoning indicates that, if faced with that question, the court would be compelled to deny that right to

public employees. For example, Perez v. Board of Police Commissioners, 78 Cal. App. 2d 638, 178 P. 2d 537, held that the board could, by rule, prevent police officers from joining a labor union. If it could do this, it would certainly be upheld in an attempt to enjoin a strike... (Norwalk, 484).

In 1957 the New Hampshire Supreme Court addressed the question of injunctive relief more directly. Teachers in Manchester struck and the lower court approved a request for injunctive relief, even though it found that the strike was "conducted in a completely peaceful manner, without violence, picket lines, disturbances or damage to person or property." Thus, said the state's supreme court, "if this strike was properly enjoined, it must be because public policy renders illegal strikes by school teachers in public employment." The court, citing Norwalk and similar cases with approval, found no New Hampshire statute which "abrogate [d] the right of the sovereign to be free from strikes by public employees." Thus, held the court, it had been proper to enjoin the strike (City of Manchester v. Manchester Teachers' Guild 131 A. 2d 59, New Hampshire Supreme Court, 1957). "Public policy", discerned somehow from legislative silence, justified issuance of an injunction.

At the same time that the New Hampshire case was being decided, a teacher strike in Pawtucket, Rhode Island, was being enjoined. In seeking injunctive relief the board alleged, among other things, that failure to enjoin the strike would result in substantial and irreparable injury to public school students, that the school year would be disrupted and the schools closed, and that the superintendent and board would be prevented from carrying out their statutory duties. The trial court judge observed that a strike indeed had occurred, that the schools did not open, and that the educational process had been halted. He enjoined the strike. On appeal the Rhode Island Supreme court took note of the lower court's observations on the effects of the strike but then held that "the strike in the instant case was illegal and therefore was properly enjoined". Evidently then, allegations and findings about harm were superfluous, and not prerequisites to the award of injunctive relief (City of Pawtucket v. Pawtucket Teachers' Alliance 141 A. 2d 624 (1958)).

A similar ruling was issued a few years later in Illinois (Board of Education v. Redding 59 LRRM 2406, Il. Sup. Ct., 1965). In 1964 a strike by school custodians in a mid-state district forced a shutdown of the schools. However when the school board sought injunctive relief the local judge, evidently adhering to traditional notions of equity, found that the school had failed to show that the strike was causing irreparable injury. The board's petition for injunctive relief was dismissed. The board appealed. The Illinois Supreme Court, citing Pawtucket case with approval, held that

[T]o be thorough and efficient, school operations cannot depend upon the choice or whim of its employees, or their

union, or others, but must necessarily be controlled only by duly constituted and qualified school officials (Redding, 1965:2409).

Thus the lower court evidently was wrong on public policy grounds. But the Supreme Court also reviewed the factual record, and it observed that

The uncontroverted proof in the record here shows that the normal functioning of the plaintiff's schools has been impeded and obstructed by the strike...and serves to demonstrate the wisdom of the majority rule that a strike by public employees is illegal (Redding, 1965:2409).

The "proof" cited by the court included the following:

(1) attendance figures were abnormally low, a circumstance which could indirectly affect State aid plaintiff would get on the basis of daily attendance averages; (2) milk and bread deliveries, as well as the deliveries of surplus foods, were not made to the school cafeterias when deliverymen would not cross the picket lines; (3) schools were not cleaned and no personnel were available for such cleaning; (4) the employees of a roofing contractor refused to cross the picket line to complete repairs on a leak in a school roof; (5) the transportation of pupils to school was affected; and (6) the board closed the schools.

[Later], between September 11 and 24 the picketing continued and the school operated, but with the following deviations from normal: (1) cleaning was done by volunteers and temporary replacements but the cleanliness of the buildings was below standard; (2) no personnel were available to fire furnaces and operate hot water systems; (3) physical education classes had to be curtailed in the junior high school due to lack of hot water; (4) it became necessary to buy a new type of water heater for one of the cafeterias in order for dishes to be washed; and (5) principals and other supervisory personnel were forced to perform many duties aside from their regular educational duties (Redding, 1965:2408).

The Supreme Court remanded the case to the lower court "with directions to enter a decree granting the injunctive relief prayed for in conformity with the views expressed herein". But there were two views: one resting on the weight of the legal authorities cited by the court and the other focusing on the factual consequences of the strike. Was illegality a sufficient justification for injunctive relief? Or must there be, in addition, evidence of harm? The court didn't say. Future Illinois plaintiffs would have to argue both ways.

The Holland Case

Michigan was one of the states which adopted a no-strike law for public employees immediately after World War II. Then in July 1965 Michigan became one of the first states to adopt a law providing for collective bargaining for public employees, including teachers. The law barred strikes, but made no provisions concerning injunctive relief. In the summer of 1967 a number of districts failed to conclude agreements with their teachers, and when the school year began more than 40 strikes erupted. An injunction issued in the Holland strike reached the state's Supreme Court, which then issued a very significant decision (School District for the City of Holland v. Holland Education Association 157 N.W. 2d 206 (1968)). The court viewed the situation broadly:

To the extent possible, in order that our decision be precedentially meaningful, we will discuss those basic issues which relate to the legal concepts which we consider must govern... (Holland, 1968:208).

After disposing of a number of other questions the court considered whether the legislature's failure to provide for injunctive relief in the face of strikes meant that the courts could not act. The Court concluded that that could not have been the legislature's intent. At the same time however, the legislature could not have expected the courts to grant injunctive relief in every public employee strike, for that would "destroy the independence of the judicial branch of government". Having thus established a rationale for exercising broad equitable powers in the face of public employee strikes, the court turned to the question of "whether...the chancellor had before him that quantum of proof or uncontradicted allegations of fact which would justify the issuance of an injunction in a labor dispute". The court found that he had not:

We here hold it is insufficient merely to show that a concert of prohibited action by public employees has taken place and that ipso facto such a showing justifies injunctive relief. We so hold because it is basically contrary to public policy in this State to issue injunctions in labor disputes absent a showing of violence, irreparable injury, or breach of the peace.

...
Simply put, the only showing made to the chancellor was that if an injunction did not issue, the district's schools would not open, staffed by teachers on the date scheduled for such opening. We hold such showing insufficient to have justified the exercise of the plenary power of equity by the force of injunction (Holland, 1968:210).

While the court failed to specify what would constitute the necessary "quantum of proof", it did establish that in Michigan at least, mere illegality would not warrant relief. Traditional standards of equity were to be applied.

Holland dramatically altered the policy issues surrounding teacher strikes. Before Holland the Norwalk line of reasoning was virtually unchallenged in the law books: strikes were enjoined because they were illegal, Holland introduced a competing argument: illegal strikes were not enjoined in the absence of a showing of irreparable harm, violence, or breach of the peace. In ensuing years then, it would be necessary for the legislatures--to the extent that they addressed the issues at all--to treat separately the question of whether the strike was illegal, and whether it was enjoined. Courts across the nation henceforth could expect defendants to plead for judicial extension of the Holland approach.

Rather than reviewing subsequent developments in chronological fashion, we will review the state of the law as it existed when this study began. Overall the law in 1979 was characterized by ambiguities, gaps, discrepancies, and change. Compared to the situation in 1968 when Holland was announced, the law regarding injunctions (including the application of the irreparable harm standard) was far more complex, and far less clear.

The Statutes, 1979

An inventory of the statutes in force at the end of 1978 reflects enormous diversity among states. When one gets down to the level of word-by-word analysis of statutes, the diversity is mind-boggling. Strikes are defined in different ways. Impasse procedures vary. Access to the courts is constrained in different ways. Some states have public employee labor boards; others do not. Some have omnibus laws; others categorize public employees in terms of their "essentiality" of their services; still others have special laws for special categories of personnel (e.g. firefighters, state employees, teachers). The main features of the statutes are charted elsewhere; we will not repeat that work (Education Commission of the States, 1978; Midwest Center for Public Sector Labor Relations, 1979).

Of particular concern here are state statutory provisions concerning teacher strikes and injunctive relief therefrom. The

Insert Table Here

accompanying Table categorizes states in terms of three questions:

1. Is there a law providing for collective relationships between teachers and school boards? (Here we ignore distinctions about the type of relationships, e.g. "meet and confer", "consult", "collective bargaining", "collective negotiations".)
2. Are there provisions concerning teacher strikes?
3. Are there explicit provisions concerning the availability of injunctive relief from teacher strikes?

**STATUTORY PROVISIONS FOR INJUNCTIVE RELIEF
FROM TEACHER STRIKES***

	Teacher-Board Collective Relationships Authorized	Teacher-Board Collective Relationships Not Authorized
All Teacher Strikes Prohibited	CONNECTICUT Delaware FLORIDA INDIANA IOWA KANSAS MAINE Maryland MASSACHUSETTS Michigan	Ohio Texas Virginia
	MINNESOTA NEBRASKA NEVADA NEW HAMPSHIRE NEW YORK N. Dakota Oklahoma Rhode Island S. DAKOTA TENNESSEE	
	ALASKA HAWAII OREGON PENNSYLVANIA WISCONSIN VERMONT	
Limited Right to Strike		
No Provisions Concerning Teacher Strikes	California Idaho Montana New Jersey Washington	Alabama Arizona Arkansas Colorado Georgia Illinois Kentucky Louisiana
		Mississippi Missouri New Mexico N. Carolina S. Carolina Utah W. Virginia Wyoming

*States having statutory provisions concerning the availability of injunctive relief are shown in BOLD FACE TYPE.

As the table indicates, there are sixteen states (principally in the southeast and mountain states, but also including Illinois) where the statutes are silent with respect to all three questions. In these states questions concerning the legality of collective relationships, strikes, and injunctive relief have been left entirely in the hands of the courts, attorneys general, and local officials. In three other states (Ohio, Texas, and Virginia) the only statutes are residuals, from the 1940s, when teacher strikes sometimes were statutorily declared to be against public policy. (Among these nineteen states in which teacher-board relationships are not authorized were six which experienced teacher strikes during the 1978-79 school year. Case accounts of strikes in two of these states (Illinois and Missouri) in the Appendices (Colton, 1980a; Colton, 1980b).

The remaining thirty-one states, which authorize teacher-board collective relationships, include eleven with no statutes regarding the availability of injunctive relief from teacher strikes. All of these states authorize collective relationships between teachers and school boards, but the statutes differ with respect to their provisions concerning the legality of teacher strikes. Five of the eleven states (California, Idaho, Montana, New Jersey, Washington) are silent on the strike question, and of course they also are silent with respect to the availability of injunctive relief. The other six specifically prohibit teacher strikes, but these states also make no provision for injunctive relief (Delaware, Maryland, Michigan, North Dakota, Oklahoma, Rhode Island). These eleven states then, like the nineteen cited above, have left it to the courts to define conditions affecting the availability of injunctive relief. Seven of the eleven states had teacher strikes in 1978-79. To us these states were particularly interesting, because they provided settings where we could study the exercise of maximum judicial discretion in applying the irreparable harm standard to enjoin teacher strikes. The Appendices report case studies of strikes in three states in this group: California, Washington, and Michigan. (See Graber, 1980c; Colton, 1980c; Graber, 1980a).

The remaining twenty states have adopted legislation pertaining to the legality of teacher strikes and the availability of injunctive relief in the event of such strikes. (Not surprisingly, all twenty of these states also have adopted statutes providing for some sort of collective relationships between teachers and school boards.) Statutory provisions concerning labor injunctions in these states exhibit three distinguishable strategies. The first approach reflects a posture of legislative disinterest: teacher strikes are prohibited, but the statutes do no more than provide that injunctions may or must be solicited in the event of a strike. These states do not specifically require the courts to award injunctive relief, nor do they discourage such awards. Nothing is said about the use of the irreparable harm standard in these state statutes.

A smaller group of states, four in number, encourage the courts to award injunctive relief. Nevada specifies that an injunction shall be awarded upon a showing that a strike has occurred or will

occur; here the irreparable harm standard is implicitly waived. The mere existence of a strike, or the threat of a strike, justifies relief. Nevada's waiver of the harm standard is accompanied by a statement of legislatively ascertained "fact": the continuity of government services is declared to be essential to the health, safety, and welfare of the people of Nevada. Thus, unless Nevada courts are willing to challenge the fact-finding capabilities of the legislature, there is no possibility of finding that a teacher strike does not impair an essential service. Florida's statute is similar. Iowa is much more explicit with respect to the harm standard. Its statute specifies that "the plaintiff need not show that the (strike) would greatly or irreparably injure him." Maine's statute similarly provides that "neither an allegation nor proof of unavoidable substantial and irreparable injury" is required as a prerequisite to preliminary injunctive relief. In these states then, it appears that the legislatures have taken steps to head off Holland-type decisions wherein the courts might withhold injunctive relief on the basis of an insufficient showing of irreparable harm. But differently, where there is a clear legislative intent to assure that teacher strikes are enjoined, the irreparable harm standard may be statutorily removed as condition for the award of relief.

The remaining six states (Alaska, Hawaii, Oregon, Pennsylvania, Vermont, and Wisconsin) grant teachers the right to strike under certain circumstances. Of particular interest, from our point of view, is the fact that all six states permit otherwise-legal strikes to be enjoined upon a finding of some sort of harm.

None of the six states has legalized all teacher strikes. Instead, each state has created a "window": a teacher strike is legal only if certain preconditions are met, and it remains legal only so long as certain consequences are avoided. Generally, the preconditions are designed to assure that collective bargaining procedures are followed before a strike is initiated. Where strikes occur outside the permitted area, they are illegal and enjoined in much the same fashion as in other states where strikes are illegal. (The statutes in some of these states--particularly Vermont and Alaska--are somewhat ambiguous regarding the distinctions between legal and illegal strikes, and the conditions for injunctive relief in both. See Colton, 1980d).

Pennsylvania's statute provides one of the clearest descriptions of the procedures to be followed in seeking to enjoin an otherwise-legal strike:

If a strike by public employees occurs after the collective bargaining processes set forth in section 801 and 802 of Article VIII of the act have been completely utilized and exhausted, it shall not be prohibited unless or until such a strike creates a clear and present danger or threat to the health, safety or welfare of the public. In such cases the public employer shall initiate, in the court of common

pleas of the jurisdiction where such strike occurs, an action for equitable relief, including but not limited to appropriate injunctions and shall be entitled to such relief if the court finds that the strike creates a clear and present danger or threat to the health, safety or welfare of the public... Hearings shall be required before relief is granted under this section and notices of the same shall be served in the manner required for the original process with a duty imposed upon the court to hold such hearings forthwith (Pa. Stat. Ann. title 43 S1101.1003 (Purdon)).

The statutory language in Alaska and Oregon is very similar. Wisconsin and Hawaii also are similar, except that they omit the word "welfare". In Vermont an otherwise legal teacher strike becomes enjoined if it presents "a clear and present danger to a sound program of school education which in the light of all relevant circumstances it is in the best public interest to prevent". Thus Vermont is the only one of the six right-to-strike states which explicitly directs attention to the relationships between strikes and educational programs.

None of the six statutes mentions irreparable harm, per se. Yet the phrase "clear and present danger to the public health, safety, and welfare" (and the variants of this phrase) seems to be closely akin to the irreparable harm standard. However the task of ascertaining meaning is not (fortunately) ours; it belongs to plaintiffs, defendants, their attorneys, and the courts.

Case Law, 1979

In the years following Holland case law developed rapidly, as the increasing number of teacher strikes spawned more and more litigation, and as teachers and boards sought court clarification of uncertain points of law. (At the same time it should be noted that frequently the parties seek to avoid such clarification, evidently figuring that an adverse decision would be worse than continued uncertainty.) In most jurisdictions it was the Norwalk view, rather than the Holland view, which prevailed. In a Delaware case, for example, the teacher defendants urged the trial court to accept the Holland standard. The court would not. The Holland philosophy, said the court

is contrary to the judicial experience in the State of Delaware, and contrary to our clear precedents. Second, a review of our precedents in light of (Holland) only emphasizes the wisdom of the Delaware decisions and the extremely shaky foundations suggested by the reasoning of these three cases.

Delaware law is clear. We have... recognized in judicial opinion the general common law rule that, even in the absence of an express statutory provision, public employees are denied the right to strike.

...In cases of illegal strikes by public employees irreparable harm would generally seem apparent from the interference with the rights of others by illegal acts (State v. Delaware State Educational Association, Del. Ch. Ct. 326 A. 2d 868, (1974)).

A recent New York case follows roughly the same logic, and reaches a similar conclusion:

(Teacher) defendants...contend that the temporary restraining order and the preliminary injunction...were invalid. With respect to the temporary restraining order defendants allege that there was no proper showing that such relief was justified. We have, however, examined the affidavit submitted in support of that order and find that it establishes that a strike by defendants was threatened and that if such a strike occurred, irreparable harm would result. Under the terms of the Taylor Law the mere threat of a strike is sufficient to warrant the grant of the temporary restraining order (see Civil Service Law, 211). Nor was the alleged lack of factual allegations relating to the extent and irreparability of the harm fatal to the application. By its very nature a strike by public employees constitutes an "irreparable injury" to the public order and welfare (Buffalo Board of Education v. Pisa, 839 N.Y.S. 2d 938 (1976)).

A California Appeals court, when faced with a request to void an injunction because it had been issued on the basis that a "strike by school teachers is per se illegal without the proper showing of irreparable injury to justify equitable relief," rejected the argument out of hand, citing other cases which had held that the question of legality was decisive. (Los Angeles Unified School District v. United Teachers, Los Angeles, 24 Cal. App. 3d 231 (1972)).

Nonetheless, the idea set forth in Holland did gain some adherents. In the period after 1967 there were two lines of cases which indicated that mere illegality would not justify issuance of an injunction. The first line of development was stimulated directly by Holland. The case served as precedent for new legal doctrine in Rhode Island, New Hampshire, Wisconsin, and Idaho. The second line of case law development was stimulated by the statutes incorporating the "clear and present danger" doctrine as a standard for enjoining otherwise legal teacher strikes. It is useful to trace these two developments separately.

The Holland-Type Decisions. In 1973 the Rhode Island Supreme Court, after affirming its earlier holdings that teachers did not have the right to strike in the absence of legislative authorization, and that the courts can enjoin strikes, observed that it did not follow that "every time there is a concerted work stoppage by public employees, it shall be subject to an automatic restraining order"

School Committee of Westerly v. Westerly Teachers Association 299 A. 2d 441 (1973). The court took note of the state Rules of Civil Procedure which specified that

no temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts by affidavit or verified complaint that irreparable harm will result before notice can be served and a hearing held (Westerly, 1973:445).

The court acknowledged that the plaintiffs had filed a general affidavit averring that the schools wouldn't be opening as scheduled, and that irreparable harm would ensue. But, said the court

...the mere failure of a public school system to begin its school year on the appointed day cannot be classified as a catastrophic event. We are...aware that there has been no public furor when schools are closed because of inclement weather, or on the day a presidential candidate comes to town, or when the basketball team wins the championship. The law requires that the schools be in session for 180 days a year...There is a flexibility in the calendaring of the school year that not only permits the makeup of days which might have been missed for one reason or another but may also negate the necessity of the immediate injunction which could conceivably subject some individuals to the court's plenary power of contempt (Westerly, 1973:445).

The court found the evidence insufficient to warrant a temporary restraining order under the rule requiring a finding of irreparable harm, and the TRO was quashed. However the effect was simply to render TROs more difficult. In two subsequent cases the Rhode Island Supreme Court reviewed preliminary injunctions which rested upon lower court findings of irreparable harm; in both instances the court declined to review the fact-finding below, even though the court noted that in one case several experts had testified that the strike had not and would not produce irreparable harm. Appleton (1980) surmises that the court may have been less interested in the matter of irreparable harm than in the effect an injunction might have on the bargaining process. Thus, while it appears that the irreparable harm question must be argued in anti-strike injunction cases in Rhode Island, it is not clear how the lower courts handle the problem. Data on that point would require study of trial court proceedings.

In 1974 the New Hampshire Supreme Court took up the Holland banner in Timberlane Regional School District v. Timberlane Regional Education Association (317 A. 2d 555). Reviewing (and upholding) a lower court's refusal to issue an injunction against striking teachers, the court noted that

The injunction is an extraordinary remedy which is only granted under circumstances where a plaintiff has no

adequate remedy at law and is likely to suffer irreparable harm, unless the conduct of the defendant is enjoined. The availability of injunctive relief is a matter within the sound discretion of the court, exercised on a consideration of all the circumstances of each case and controlled by established principles of equity (Timberlane, 1974:558).

Citing Holland and Westerly, the court opined

Accordingly, it is our view that in deciding to withhold an injunction the trial court may properly consider among other factors whether recognized methods of settlement have failed, whether negotiations have been conducted in good faith, and whether the public health, safety and welfare will be substantially harmed if the strike is allowed to continue (Timberlane, 1974:559).

(Of particular interest here is the court's apparent equation of the terms "irreparable harm" and "whether the public health, safety and welfare will be substantially harmed".) As Appleton (1980) notes, the Timberlane case adds little clarity as to the factual basis for finding irreparable harm. However the case brought to three the number of states whose appellate courts stressed the need to consider harm before enjoining teacher strikes.

In 1975 the Wisconsin Supreme Court held that illegality alone did not warrant injunctive relief; it also was necessary to find irreparable harm (Joint School District No. 1 v. Wisconsin Rapids Education Association, 234 N.W. 2d 289). In the case before it, the court found that the lower court had properly considered the irreparable harm standard, and had not abused its discretion in finding facts sufficient to warrant relief:

In ordering the temporary injunction, the trial court concluded that irreparable harm was shown by the following factors: (1) the illegal nature of the strike; (2) inability of the board to operate the school system and thereby meet its statutory duties and responsibilities to the taxpayers in the school district; (3) inability of the students to obtain the benefits of a tax-supported educational process; (4) possible loss of state aids; (5) inability of parents to comply with statutory responsibility to educate their children; and (6) cancellation of athletic events and other school activities (Wisconsin Rapids, 1975:299).

(The teachers' association did not dispute the lower court's findings of fact, but contested the conclusion that the facts amounted to a situation involving irreparable harm.) The Supreme Court sustained the lower court ruling. However, as Appleton suggests, it is not apparent that the facts below were not similar to those that would accompany any teacher strike, and so the court may have done little more than equate the existence of a strike with the existence of irreparable harm.

One further feature of the Wisconsin case warrants notice. Like Timberlane, it appears to establish some sort of equivalence between the concept of irreparable harm and the concept of harm to the public health; safety and welfare:

We conclude in this case that immediate and serious harm to public health and safety was not apparent and that an injunction should issue only after a showing of irreparable harm dependent upon the facts and circumstances as shown at the hearing (emphasis added) (Wisconsin Rapids, 1975: 301).

In 1977 the Idaho Supreme Court embraced the Holland principle in School District No. 351 Oneida City v. Oneida Educational Association (567 2d-830). The court dissolved an injunction which the trial court had issued without a hearing. "Mere illegality of an act," said the court, "does not require the automatic issuance of an injunction". Citing Holland, Westerly, and Timberlane, the Supreme Court noted that the lower court had refused to hear evidence relating to traditional equity defenses. The opinion indicated that the court was particularly interested in defenses concerning the plaintiff's alleged failure to adhere to mandated bargaining procedures; while the court made no specific reference to irreparable harm, it did indicate that fact-finding on such matters would be in order before relief could be granted.

Summarizing, in the years following Holland appellate courts in Rhode Island, New Hampshire, Wisconsin, and Idaho embraced the notion that traditional equitable principles--including the irreparable harm standard--ought to be applied in situations where plaintiffs sought to enjoin illegal teacher strikes. However in none of these states is it possible to discern (from reported appellate cases) clarity regarding the question of what constitutes irreparable harm. That matter is left to the lower courts.

The "Clear and Present Danger" Decisions. As noted previously, six states had, by 1978, adopted statutes which attempted to limit the use of injunctions. Alaska, Hawaii, Oregon, Pennsylvania, Vermont, and Wisconsin all adopted "limited right-to-strike" statutes which provided that certain teacher strikes could not be enjoined unless there was a court finding that they presented a danger or threat to the public health, safety, or welfare. (The exact wording varied from state to state.) The development of case law in these states would, presumably, case light upon the meaning of the terms, and their difference, if any, from the traditional "irreparable harm" phraseology. However the courts cannot make laws until they are presented with cases. As of mid-1979, there had been no appellate cases applying the injunction provisions in four of the right-to-strike states (Alaska, Oregon, Vermont, Wisconsin). One case reached the appellate courts in Hawaii, but the strike was deemed to have occurred in violation of the statutory prohibition, and hence was enjoined on that ground rather than on the statute's

"public health or safety" language, (Hawaii Public Employment Relations Board v. Hawaii State Teachers Association 511 P. 2d 1080 (1973)).

Pennsylvania's statute, unlike the others, has been the subject of repeated judicial scrutiny. Appleton (1980) and Graber (1980b) have provided detailed analyses; here we simply summarize. The language of the Pennsylvania statute, it will be recalled, specified that an otherwise legal strike could not be enjoined "unless or until such a strike creates a clear and present danger or threat to the health, safety or welfare of the public." As Graber points out, the origins of this phraseology are somewhat obscure. In practice however, it appears to be the functional equivalent of the irreparable harm standard.

In view of the large number of teacher strikes that occurred following passage of Pennsylvania's Act 195 in 1970, it is hardly surprising the injunction actions accompanying these strikes soon found their way to the dockets of the state's appellate courts. The first and most significant of these was Armstrong Education Association v. Armstrong School District (291 A. 2d 120, Penna. Commonwealth Court, 1972). When Armstrong teachers struck, the district promptly sought injunctive relief. In subsequent hearings district witnesses offered a long list of consequences of the strike:

- possible loss of state aid if missed school days could not be made up by June 30;
- cancellation of extracurricular activities and varsity sports;
- potential interference with teacher workshops;
- problems with obtaining bus drivers;
- interruption of routine office procedures; and
- harassment of school board members.

On the first day of the strike the trial court declined to issue an injunction, asserting that it would be premature. However two weeks later an injunction was issued, as the court found a clear and present danger or threat to the health, safety, or welfare of the public. On appeal the Commonwealth Court reversed the lower court and dissolved the injunction. The appellate court reasoned that the strike's effects upon the school program were "inherent in the very nature of any strike by school teachers", and that the legislature could not have intended that such effects would constitute grounds for injunctive relief. As to the harassment of school board members, there were other avenues of relief available. The court's most significant language concerned loss of state aid:

The danger that the District will lose state subsidies because of a strike could be proper grounds for enjoining the strike if such danger were "clear and present"...If the strike lasted so long...that any continuation would make it unlikely that enough days would be available to make up the 180 required, the teachers could be properly enjoined from continuing it. At the time of the last hearing however, the strike had lasted only 12 days, and the District had 20 days available in June plus 19 holidays dates which could be used to make up time lost...If a strike is to be enjoined on the basis that insufficient make-up time actually will exist, the strike must at the very least have reached the point where its continuation would make it either clearly impossible or extremely difficult for the District to make up enough instructional days to meet the subsidy requirement within the time available. This strike was far from that point when the Court below enjoined it (Armstrong, 1972:125).

Thus the court found a convenient mechanism--the calendar--for ascertaining whether or not there was a clear and present danger or threat to the health, safety or welfare of the public in Pennsylvania. Other consequences of strikes might be inconvenient, but they were not, at least in the Armstrong setting, sufficient to warrant injunctive relief. Appleton (1980) notes an interesting anomaly incident to the Armstrong opinion: the crucial determinant of enjoynability--loss of state aid--is compensable, i.e. measurable and reparable. In that sense the clear and present danger test, as applied in Armstrong, seems inconsistent with the face meaning of "irreparable" harm.

The importance of the 180-day yardstick subsequently was reiterated in the Bellefonte case (304 A.2d 922, Pa. Cmwlth. Ct., 1973) and the Bristol case, (322 A. 2d 767, Pa. Cmwlth. Ct., 1974), where review of lower court injunctions seems to have turned on the question of whether the injunctions were issued before or after the expiration of the calendar date at which 180 days still could be scheduled.

Although a dissent in the Bristol case accuses them of having done so, Pennsylvania's appellate courts have not quite established the 180-day rule as the test for enjoynability. An injunction issued in a Philadelphia strike rested, in part, on the threat of increased gang activity, expenditures for security measures, and the threat of financial damage to an already debt-ridden district. (Philadelphia Federation of Teachers v. Ross, 301 A. 2d 405, Pa. Cmwlth. Ct., 1973). Moreover in the Bristol case the court appeared to go out of its way to note that the inconveniences inevitably associated with a strike could cumulate to such an extent that an injunction could be warranted.

Excerpts from two dissents in the Bristol case provide apposite transitions to the second main portion of our report, concerning actions in the trial courts:

...Nothing written here is intended to be critical of the court below since its role is a most difficult one. The words of the applicable statute and the reported pronouncements of the appellate courts, on the one side, and the exigencies of the situation that confronts him, on the other side, make his moment of decision a most unenviable one. Being the parent of a child enrolled in a school district that...experienced the ordeal of a school strike, I am well cognizant of the many community pressures, added to the assertions of teachers and school board, that center on the chancellor. (Mencer dissent, Bristol:773).

As I view these disputes between school districts, teachers, labor unions and taxpayers, no one really represents the interests of the students, who are the beneficiaries or victims of the disputes. In addition to other rights they may have, students have a constitutional right to a thorough and efficient system of public education... (Kramer dissent, Bristol:774).

Summary: Irreparable Harm in the Law Books, 1979

At the beginning of the 1978-79 school year--the focal period of this study--school boards in a majority of states were on solid legal ground in seeking injunctive relief against teacher strikes. In most states teacher strikes were unlawful, either by virtue of statutory declaration or judicial interpretations of established doctrines such as "sovereignty." Moreover in most jurisdictions injunctive relief could be obtained simply on a factual showing that a strike was imminent or in progress; there was no necessity to prove that the strike was creating irreparable harm, although pro forma declarations to that effect were needed in many jurisdictions.

Against this general background of confidence in the ready availability of injunctive relief there were three principal sources of legal uncertainty. First, there were the six "right to strike" states, where it would be necessary to prove some sort of danger or threat to the public before an otherwise legal strike could be enjoined. Second, in a handful of states--Michigan, New Hampshire, Rhode Island, Wisconsin, and probably Idaho--the case law had established that mere illegality might not suffice as a basis for securing injunctive relief. Traditional equitable standards, including the need to show irreparable harm, might be invoked by the courts. But in view of the meager volume of cases, it was not at all clear what these traditional standards entailed. Third, in some states neither the legislatures nor the courts had directly addressed the question of the availability of injunctive relief. If the courts in these states adhered to the mainline pattern--illegal strikes are enjoined without a showing of irreparable harm--there would be no problem in obtaining court relief. Still, there always was the possibility that the courts in such states might spring a surprise. As will become apparent later, attorneys for school boards invest substantial energies in attempting to head off surprises of this sort, and teacher association attorneys do their best to encourage the courts

to deviate from the main pattern. The irreparable harm standard, as we shall see, provides one of the vehicles for waging battle.

TEACHER STRIKES: 1978-79

The research reported here was conducted during the 1978-79 school year. At the inception of the study, based on past years' experience with teacher strikes, we estimated that roughly 1% of the nation's 15,000+ school districts would have strikes (see Colton, 1978). That is, we anticipated somewhere between 100 and 200 strikes. Further, we anticipated that a majority of the strikes would occur during the first month of the school year, and that a majority of strikes would occur in the four states of Michigan, Ohio, Illinois, and Pennsylvania. As things turned out, experience was well within the predicted range. There were 158 strikes, including 90 in the "big four" states. More than half the strikes occurred before October. Twenty-three states were affected. Some of the strikes hit the nation's largest cities--Cleveland, St. Louis, Washington D.C., Wilmington, Indianapolis, Louisville, New Orleans, Seattle, and Portland. Some strikes were particularly long and bitter, e.g. Levittown, N.Y. and Bridgeport, Connecticut.

A major research task was to locate and monitor teacher strikes which occurred during 1978-79. We needed to identify all strike sites so that we could conduct a mailed survey of affected districts, and we needed to locate sites where field studies could be conducted. As it turned out, the task of monitoring strikes was extraordinarily difficult. There is no central national agency which has a reliable system for quickly identifying strike sites. Information gathered by state and national professional associations, and by state and national government agencies, contains serious discrepancies. Some are traceable to differing definitions of what constitutes a strike. Some are traceable to gaps in information sources. The basis for our own calculation that there were 158 strikes is set forth in a technical appendix (Graber, 1980d).

Survey Summary

The survey instrument was designed to obtain descriptive information concerning each district's view of, and experience with, injunction proceedings. Questionnaires were completed by 129 districts, or 82% of the districts which experienced strikes. Among the respondents, 91 districts (71 percent) reported that they considered seeking injunctive relief, 58 (45 percent) took the step of authorizing court action, and 51 (40 percent) actually filed a petition with a court.

Respondents reflected a high degree of confidence that the court would issue an injunctive order if requested (83 percent) and that the court order would be enforced (71 percent). Despite this favorable assessment of court action, 60 percent of the districts did not go to court. Those who decided against court action were much less sure that teachers would comply with the orders of the court. They

were also more likely to believe that the dispute would be settled before the court could effectively intervene and that court action would delay resolution of the impasse.

In the 51 districts which filed a petition with the court, 22 ex parte proceedings were held (defendants were given no opportunity to present their case); in addition, 40 show cause hearings were held, allowing a full airing of the positions of both sides. Judges granted 85 percent of requests heard at ex parte proceedings and 81 percent of injunctions requested at show cause hearings; in the remainder of the cases, the judge denied the request for an injunction. In 28 instances in which injunctions were granted, court orders restrained picketing; compliance was secured in 14 (50 percent).

In 31 instances, judges ordered teachers back to work; however, compliance was secured in only 11 instances (36 percent). In two of every three instances, teachers defied court orders that they return to work. Among the 20 cases of non-compliance with back-to-work orders, boards authorized contempt proceedings in 18 and filed contempt motions with the court in 16 cases. In 11 cases (69 percent of contempt motions filed), the judge found the teachers in contempt; in nine cases (56 percent) teachers were fined and in 5 cases (28 percent) teachers were jailed. In two additional instances, the court found teachers in contempt on its own motion; teachers were fined in both instances and jailed in one.

One of the reasons why boards say they hesitate to go to court is that the judge will become involved in the case in ways they have not requested. In our group of strikes, the judge directed parties to engage in additional negotiation in 25 cases and set up alternate or neutral meeting sites in 11. Also, in two instances, the judge ordered the board to fire teachers who had been found in contempt, a move which the board resisted. In an additional strike, the judge ordered reinstatement of the previous contract while negotiation continued, again entering what the board felt was its jurisdiction.

Nevertheless, districts which went to court generally reflect positively on their experience. Nearly half felt the court was either "indispensable" or "of substantial assistance" in the resolution of the dispute. Seventeen reflected that the court had been "of some assistance." Five reported the court of "no assistance" and 3 indicated the court had "complicated negotiations and made resolution difficult."

Respondents were queried as to whether they would recommend court action to the board in some future strike. Of those who went to court, 41 districts (80 percent) would "definitely" or "probably" do so again. Given that in some 80 percent of cases, districts received injunctions, such satisfaction with court action is not surprising. Similarly, 41 districts (58 percent of those who did not go to court) would not recommend doing so next time. What is surprising is that 30 districts (42.4 percent of those who did not go to court, have had second thoughts and would "definitely" or "probably" recommend court action in a future strike. Additional survey findings are presented in Graber (1980d).

Case Summaries

Technical appendices present detailed accounts based on field studies conducted at several strike sites during 1978-79 (Colton, 1980a, 1980b, 1980c; Graber, 1980a, 1980b, 1980c). Here we merely summarize the main outlines of these reports, giving particular attention to the place of the irreparable harm standard in each strike. The first two strikes summarized here gave practically no attention to the irreparable harm standard. In the next two (Daly City and Seattle) plaintiffs at least took the trouble to file affidavits, but the injunction proceedings did little more than acknowledge the allegations of harm. The final two cases, Warren (Michigan) and Butler (Pennsylvania) were the settings for the most highly developed treatment of the irreparable harm standard.

St. Louis, Missouri. The St. Louis Board of Education exhibited near-classic use of the labor injunction. Teachers voted to strike on a Sunday. The next day—a school holiday—board attorneys quickly sought and obtained an ex parte order restraining the strike; the petition on which the order was based alleged, among other things, that failure to enjoin the strike would result in irreparable harm. But the nature of the harm was scarcely specified; data supporting the petition merely demonstrated that a strike was imminent.

The teachers paid the order little attention. Heavy picketing forced closure of the schools. Nine days later the school board, evidently persuaded that court action would not end the strike, withdrew its petition from the court. Weeks later a parents' suit forced the board back into court as an unenthusiastic co-plaintiff. Another injunction was issued, again without any showing of harm. Teachers defied the new order, and settlement was reached before contempt proceedings could begin.

Collinsville, Illinois. In Collinsville the school board was split in its views about the desirability of going to court. A union member and a teacher on the board voted against a motion to seek injunctive relief. Nonetheless papers were filed. Although an ex parte order was not issued, a hearing was quickly scheduled. The board, through its petition and through brief testimony from district officials, alleged that the strike was irreparably harming the district, in that it was unable to perform its duty of operating schools. The teachers' attorney, after perfunctory cross examination, announced that the board had produced "not one scintilla of evidence" of irreparable harm. But he made no effort to prove that the strike was not harmful. The court found harm anyway, and enjoined the strike. Teachers defied the court's order, and contempt motions were filed. However settlement was reached before contempt hearings began, and the motions subsequently were withdrawn.

Daly City, California. Teachers struck at the beginning of the school year in Daly City. Salary increases and a new contract were tied up in disputes about the disposition of "bail-out" money provided by the state in the wake of Proposition 13, and by disagreements over funds which the teachers maintained were available in district

reserve accounts. Substitute teachers were employed by the district, and the schools were kept open with limited programs in operation. Picketing was intense. After a week the district sought an injunction against picketing. The petition for relief asserted that a showing of irreparable harm was not necessary under California law, but nonetheless included allegations and supporting declarations that the picketing was creating irreparable harm. A temporary restraining order limited picketing. Subsequently a hearing was held, and a temporary injunction issued, following submission of more detailed affidavits concerning harm. However these affidavits appear to have served procedural needs, and included little hard evidence of harm. The teachers' attorney did not contest the district's declarations about harm. Board sources indicated that the judge in the case, unhappy with the Board's negotiating posture, directed further negotiations with the teachers. However progress toward settlement was slow, and teachers defied provisions of the court's injunction. A settlement finally was reached two weeks after the injunction was issued.

Seattle. Seattle was one of ten Washington districts hit by teacher strikes at the beginning of the 1978-79 school year. Neither statutory nor case law provided unambiguous direction concerning irreparable harm and injunctive relief. The statutes neither authorized nor prohibited teacher strikes. The leading case, which involved municipal dock workers, clearly permitted injunctive relief, but it was not clear whether the relief was based on common law prohibitions against public employee strikes, or on the damage caused by such strikes. Teachers, anticipating that the board would seek injunctive relief, prepared to challenge the board's irreparable harm claims by preparing affidavits based on their experience in a two-week strike in 1976. The strike, the teachers claimed, had not resulted in irreparable harm.

The Board delayed filing its request for relief, thus weakening the teachers' defense. The board filed its own affidavits showing harm. In addition, of course, the board's petition claimed that it need not show irreparable harm, for strikes were per se harmful. By the time a hearing was held on the Board's request for an injunction, the strike was three weeks old. A group of parents had sought standing in the case, and while their request was denied, their affidavits concerning the harm caused by the strike were adopted by the Board.

The court's decision was based on the affidavits filed by the board and the teachers, legal briefs, and oral argument by the attorneys. No one testified. The court held that harm need not be shown under Washington law. The teachers' claims of unfair labor practices by the board belonged elsewhere, and were not germane to injunction request. The strike was illegal and hence enjoined. However, the court noted, it seemed obvious that the strike was harmful, particularly with respect to handicapped children. Ironically, the court's observations about handicapped children appear to have been based on information drawn from one of the teacher's affidavits, rather than the board's.

Seattle teachers voted to comply with the court's order.

Warren, Michigan. A three-week teacher strike delayed the opening of the 1978-79 school year for the 29,500 students of the Warren Consolidated School District. Teacher strikes are illegal in Michigan, but the famous Holland decision of 1967 established the precedent that illegal strikes should not be enjoined unless there was an adequate showing of irreparable harm.

A week after the strike began the school board sought injunctive relief. The all-day hearing which ensued provided (along with the strike in Butler, Pennsylvania) this study's best example of the use of the irreparable harm standard in a teacher strike injunction proceeding.

In the Warren case Board attorneys carefully prepared court documents and testimony arguing what a teacher source called "a normal litany of harm." Board witnesses testified that the Board was harmed in that it was unable to carry out its constitutional and statutory duty to provide education; that there was a threat to the capacity to provide 180 days of instruction and that the strike was incurring increased operating expenses and other financial harm. But the chief focus of plaintiffs' arguments as to irreparable harm was on the harm the strike was causing to students. Students were being deprived of educational opportunity; they were being given the example of illegal behavior by teachers; the strike would have adverse effects on attitudes to learning; a variety of programs (for drop-outs, special education, extra-curricular activities) were being threatened; and the intensive scheduling of make-up days necessitated by a continuation of the strike would be adverse to effective learning. The Board did not argue harm to the community or the public although the judge later concluded that harm was being incurred by those segments of the population.

In cross-examination, teacher attorney Eli Finkel challenged some of the Board testimony. He secured admission that the district was still two weeks away from the date on which attendance could be counted for state aid purposes, inferring thereby that harm had not yet begun to occur. In addition, he established that the district was still a month away from the time when the 180 days of instruction could no longer be scheduled (if holidays and the month of June were used for make-up days.)

Teacher sources indicated that they felt the Board's inability to furnish evidence of harm by citing educational studies and authorities was the weakest aspect of the case. (They referred to statements made by plaintiffs as "conclusory allegations," opinions which were not substantiated by evidence.) Again and again, WEA Attorney Finkel asked for citation of professional studies and authorities to back up statements being made by school personnel. But they could cite none, although they indicated that, given time in the library, they would be able to find some.

The teachers' case that harm would not occur as a result of a teacher strike had a scholarly base but it was risky. The witness for teachers cited studies and authorities indicating that schooling had little measurable impact on student success or failure in life. An absence because of a teacher strike should therefore not affect pupils adversely. This is a two-edged argument, likely to undercut the position of teachers in some future argument over the importance of their contribution to the lives and learning outcomes of children. Teacher sources admitted they were uncomfortable in using that approach but used it nevertheless.

Teachers also used the example of several learning programs and variant class schedules in other countries to establish that learning could occur even if the five-day-a-week schedule were not followed. And they cited a study made during an eight-week Pennsylvania strike in which there were no differences in scholastic achievement between those who had been in school and those who had been out during the entire strike. This was perhaps their most persuasive refutation of harm, but it received little attention.

Judge Cashen was then left with a battle of the experts. Learned men had testified on both sides; they were far apart in their assessment of the consequences of the strike and on the existence of harm. Indeed, Judge Cashen noted, "Their discord in agreement is unbelievable" (Transcript, Warren, 1978:116). The judge did not note that the case of the teachers had been substantiated by scholarly evidence while that of the Board had not. That quality of evidence was apparently not decisive for him. For him, there had been harm to the teacher-student interaction process as exemplified by a student with a sign saying, "Fire my teacher." That erosion of relationship seemed to epitomize the existence of harm for him. In addition, he found that there was harm to the Board, to teachers and to the community. The public was being deprived of services for which they were paying. To secure those services, the judge issued the injunction.

In summary, the precedent of Holland that an injunction not be issued in a teacher strike absent a finding of violence, breach of the peace or irreparable harm was observed in the court action in this strike in the denial of an ex parte temporary restraining order and in the provision for a show cause hearing. Further, the consideration of the case in that hearing was focused on the issue of irreparable harm. In face of the disagreement of the experts, the judge relied on court testimony but also on his independent judgment in finding the existence of harm. He agreed with the Board that the learning process was being harmed; in addition, he also found there was harm to the Board, to teachers and to the community. So finding, he issued the requested injunctive relief.

Butler, Pennsylvania. Butler Area School District teacher representatives began their negotiations for the 1977-78 contract early in 1977. Agreement proved to be impossible, and the impasse procedures required by Pennsylvania's Act 195 were invoked. But the 1977-78 school year began without settlement of the contractual issues, and on January 9, 1978, a teacher strike began. The schools

closed. A week later school board attorneys petitioned the court for injunctive relief, contending that the strike posed a clear and present danger or threat to the public health, safety, or welfare. The strike, the complaint claimed, threatened the district's capacity to schedule 180 days of instruction by June 30, denied students their education, threatened state and federal funding, created hardship for non-striking employees, prevented continuity in educational programs (particularly in special education), interfered with the plans of graduating seniors, and infringed on students' constitutional rights to a free education.

A three-day hearing occurred on January 19, 20, and 23. Board witnesses offered testimony which reiterated and expanded upon the points made in the initial complaint. Counsel for the teachers rigorously cross-examined board witnesses, demanding strict proof of each allegation of harm. For example there were requests to specify the exact numbers of students who were deprived of counseling services, and the exact number of inquiries concerning the availability of counseling services. Empirical studies supporting plaintiff's claims were solicited by the teachers' attorney. But the studies were not forthcoming, and most of the "strict proof" demanded by the teachers was met by the personal observations and opinions of school district witnesses. In part the teachers' demands for proof were attributable to a desire to stretch out the proceedings as long as possible; in part they were a reflection of bona fide doubts that a clear and present danger existed. With respect to the calendar, teacher attorneys explored the possibility of "elongating the school day", such that the requisite number of instructional hours might be scheduled in fewer than the normal number of school days.

On January 26 Judge Keister issued his Opinion and Order. The judge found a long list of harms associated with the strike, including the prospect that the 180-day school year could not be completed. The court thereupon enjoined the strike. At the same time he ordered both parties to resume negotiations, and he further ordered that the contract which had expired the previous June be reinstated, except as otherwise agreed upon by the plaintiffs and defendants. The teachers then voted to return to work. Four months later the board and teachers agreed upon the terms of a contract.

In most respects the Butler proceedings was fairly routine for Pennsylvania. However Judge Keister, in his opinion, made the strike an extraordinary one. Recalling his "fond and vivid memories of Fannie Tebay, (my) first grade teacher at Institute Hill School", and noting that "to the child the teachers are a pillar of knowledge, wisdom, and strength," Judge Keister found an irreconcilable conflict between the strike provisions of the Public Employment Relations Act, and the constitutional rights of children. "The portion of PERA legalizing strikes by public school teachers," said the Judge, "is unconstitutional" (Opinion, Butler, 1978). That declaration prompted a furor, and the court's action promptly was appealed to the Pennsylvania Supreme Court, which later ruled that the judge's Opinion was "improvident...and...of no effect." The appeals were dismissed.

THE LAW IN ACTION

"The life of the law has not been logic," said Holmes; "it has been experience." The law set forth in statute-books and in reported cases provides a poor guide to the events one observes as plaintiffs, defendants, and trial court judges cope with the forces and emotions unleashed by a teacher strike. On the surface, matters such as irreparable harm are calmly argued and disposed of, but beneath the surface lie a host of tactical, strategic and political considerations which have as much--and perhaps more--influence than do the lawbooks on the courts' treatment of the irreparable harm standard.

In order to identify and analyze these underlying phenomena, the major portion of this research project was devoted to the task of gathering field data in settings where strikes and injunction proceedings occurred during 1978 and 1979. Field studies were conducted in Missouri, Illinois, Michigan, Pennsylvania, New York, Washington, California, Louisiana, and Vermont. In these studies we examined courthouse files (which included petitions, answers, exhibits, briefs, orders, and motions), observed courtroom proceedings where feasible, obtained transcripts of courtroom proceedings where possible, reviewed newspaper accounts of teacher strikes and, most important, conducted extensive interviews. The principal interviewees were the following:

- 12 attorneys representing school management
- 11 attorneys representing teacher organizations
- 3 school board members
- 4 superintendents or assistant superintendents
- 6 teacher organization officials (local and national)
- 2 judges
- 1 expert witness
- 3 state education agency officials
- 5 spokespersons for third parties (e.g., parents, mediators)

In most cases interviews were transcribed, and of course anonymity was assured. The interviews themselves were unstructured, and ranged over a host of questions involving the legal aspects of strikes, but special attention always was focused on the use of the irreparable harm standard.

Data gathered in several of the field settings were summarized in the preceding section of this report, and are presented much more fully in several appendices (Colton, 1980a, 1980b, 1980c; Graber, 1980a, 1980b, 1980c).

In the following pages field data are presented thematically, rather than site-by-site. The overwhelming impression gained from the work in the field was that plaintiffs (school board members, superintendents, and management attorneys), defendants (teacher organization leaders and teacher attorneys), and judges viewed the irreparable harm

standard in fundamentally different ways. Their views of the issues at stake, their views of the positions of the parties, and their views of the role of the courts had little in common. No doubt this is an inherent feature of forums which are adversarial by design. Indeed, one of our initial reasons for examining courtroom treatment of the irreparable harm standard was our supposition that each party would have an interest in elucidating the meaning of the standard. Nonetheless it was disconcerting to experience the great gulf which reflected the differing roles occupied by plaintiffs, defendants, and judges. Perhaps the reader who pores through the following data will share our discomfort. Regrettably, words on paper cannot convey the depth of feeling and the emotion that repeatedly was communicated in interviews.

Before proceeding to the data, several caveats are in order. First, we encountered tremendous variations in sophistication of analysis of the irreparable harm standard. These variations were evident both within and among states. In essence, some individuals had thought about the matter a great deal; others had not. In these pages we present data gathered in large part from the most thoughtful and lucid of our interviewees. Some of our sources are quoted extensively; some are not quoted at all. In many cases, as well, our desire to avoid redundancy narrowed the range of sources utilized. Second, except where public documents are utilized, sources are anonymous. Readers are hereby warned that they risk error if they assume that a "Pennsylvania source" necessarily was associated with the Butler case, or that a "Michigan" source necessarily was involved in the Warren strike; our interviewees were not restricted to the field study sites, and many of the sites we studied are not reported in the appendices.

Plaintiffs' Views of Irreparable Harm

Plaintiffs exhibited a broad range of views about the nature and significance of the irreparable harm standard in injunction proceedings. In Hazelwood, Collinsville, and St. Louis, for example, plaintiffs' complaints for injunctive relief routinely alleged that irreparable harm would ensue if an injunction was not granted. But affidavits supporting the allegation were not prepared, and virtually no attention was given to the problems of proving, through testimony or exhibits, that irreparable harm was imminent or present. In short, the irreparable harm standard in these situations was no more than a hollow legalism, routinely incanted but of no practical significance.

In other districts, e.g., Daly City and Seattle, the irreparable harm standard received somewhat more attention. School board attorneys outwardly maintained that the mere existence of an illegal strike warranted injunctive relief. However there was concern that the courts might exercise discretion by refusing to issue an injunction. One potential basis for such rejection would be (as in the Holland case)

the absence of evidence concerning irreparable harm. Hence plaintiffs prepared themselves for a worst-case contingency. In their approaches to the courts these districts maintained that they need not show that a strike was irreparably harmful. But they also asserted that if the court disagreed with them then they were prepared to show that strikes were harmful. To that end, extensive affidavits were prepared, describing a multitude of harms associated with strikes. However the preparation stopped there. Little was done to marshal hard evidence or to prepare witnesses for examination or cross-examination concerning irreparable harm. The possibility that the court might require careful attention to the matter was so remote that planning for such a contingency just did not take place.

In other settings, notably Michigan and Pennsylvania, the irreparable harm standard was taken far more seriously. In the strikes we studied plaintiffs assumed that the irreparable harm standard was significant to the courts. Testimony was prepared carefully, and an approach to the courts was delayed until such time as the strike had endured long enough to develop the impression that real harm might be occurring or might be imminent. Put differently, plaintiffs in these districts believed that it was not sufficient merely to point out that a strike was illegal. There must be more. Irreparable harm was an essential part of the required additional showing.

Through our interviews with board sources, e.g., board members, superintendents and their associates, and attorneys for school management, and through our examination of court files and trial transcripts, we were able to discern several substantive themes set forth by plaintiffs who considered the matter of irreparable harm. One theme was that harm occurred in many guises, and embraced far more than students' cognitive learning. Second, evidence in support of allegations of harm was derived mainly from the personal experience and professional opinion of educators, rather than from harder sources such as research studies. Third, teachers' counter-arguments were seen as self-serving. And finally, major strategic and tactical problems were involved in situations where it is necessary to plead irreparable harm as a prerequisite to injunctive relief.

1. Irreparable Harm Occurs in Many Guises. The trial transcript in a Pennsylvania case exhibited the multitude of types of harm which, plaintiffs alleged, were associated with a teacher strike. Among them were the following:

the school calendar was disrupted

continuation of the strike would make it impossible to schedule the mandatory 180 days of instruction

state aid would be lost if 180 days could not be completed (the daily loss was calculated at \$45,417)

federal funds would be forfeited (\$3008 per day lost)

wages lost by non-professional personnel affected by the strike would result in loss of local wage taxes

unemployment benefits might have to be paid to laid-off non-professional employees

programs for handicapped children were not in operation

college and vocational counseling for senior students was interrupted

students anticipating enrollment in summer programs would be unable to enroll if the school year was extended

students would not be adequately prepared for college entrance examinations

continuity of instruction was broken

students would be handicapped in seeking summer employment

extracurricular activities were curtailed

nutritionally balanced meals were not available to students

adult education programs were inoperative

the strike was working a hardship on families, by requiring employment of baby-sitters, or by having a family member stay at home rather than go to work, and disrupting summer vacation plans. (Transcript, Butler, 1978).

Plaintiffs' affidavits prepared in connection with the Seattle and San Diego cases contain similar recitations of harms. A Superintendent's affidavit in Seattle said:

This strike action or work stoppage is causing and unless enjoined will continue to cause great harm to the District. This great harm includes the following:

(a) The delay and substantial disruption of the educational programs of the District's 55,200 students, 112 schools and 25 programs.

(b) The likelihood of having to cancel many worthwhile school events including athletic events, dances and other student activities.

(c) ~~The loss of support for financial propositions for~~ school funding caused by a strike-induced frustration of voters and parents. The District obtains for 1978-79 about 27% of its funds through the special excess levy system. Loss of these funds would entail material cuts in the educational programs and services of the District.

(d) The continued inability to effectively open schools because of strike action would extend the school year into the latter half of June or later which would result in:

(i) the disruption and altering of summer school and vacation plans of hundreds of District students and parents;

(ii) the placing of Seattle students in a less competitive position for summer employment opportunities;

(iii) the postponement of graduation for high school seniors, some of whom need and plan to enroll in summer school courses in order to meet college enrollment requirements;

(iv) the disruption of summer plans of hundreds of noncertificated employees of the District who will have to work into the summer during "make-up" school days;

(v) ~~disruption of maintenance schedules caused by fewer~~ days of vacant facilities during the summer to perform major maintenance and other work;

(vi) unanticipated day care costs and inconvenience for many parents of school age children;

(vii) disruption of City of Seattle Parks and Recreation Department schedules because of change in students' school attendance calendar, and disruption of other programs which are coordinated between the City of Seattle and the District (including the inability to restart the S.P.I.C.E. program (Seattle's Program Involving the City's Elderly) which uses District facilities) (Affidavit of David Moberly, Seattle, 1978).

An affidavit of the Board President said:

The Board has received hundreds of complaints, statements of concerns, and pleas from citizens, parents and students to take legal action against the strike or use some other method to open schools for the reason that students are being harmed by the continued closure of school and by the example of the students' teachers and other District employees violating State law and promise not to strike in the Collective Bargaining Contracts between the District and the three Seattle Teachers Association organizations.

"I have had many years experience working in support of special excess levy propositions for the Seattle School District and am aware that the concern, frustration, and anger created by the closure of District schools because of the present strike may jeopardize the chances for success of future school levies or other financial ballot propositions (Affidavit of Patt Sutton, Seattle, 1978).

An Associate Superintendent, voicing a theme that the court subsequently echoed, said:

The strike is causing and unless ended will continue to cause great harm to the District and its constituents. This harm includes the following:

...Disruption of special education classes and services. Special education students more than others need continuity in their highly structured programs. Their programs are being disrupted by staff absences. Loss of the continuity of developmental and speech therapy, psychological services, resource room and self-contained classroom programs may cause these students to regress in performance. For some of these students, particularly the severely handicapped, less than full staff means that no program at all can be provided (Affidavit of Harold Reasby, Seattle, 1978).

In San Diego the district's Controller attempted to project the financial consequences of a strike:

The financial impact of a teachers' strike...against the district could be significant. Loss of Average Daily Attendance in the final month of school would reduce the subsequent year's revenue by the following amounts:

- 1) Elementary schools (K-8)—\$6.04 per absent student per day.
- 2) Secondary schools (9-12)—\$.71 per absent student per day.

The reduction would be in State funding with no provision for local tax increases to recover this loss (Affidavit of A. Ronald Oakes, San Diego, 1977).

Declarations such as these were common in all strike sites where plaintiffs felt it necessary to submit affidavits about irreparable harm. In essence, there appear to be four main categories of harm which schools attribute to strikes. First, there is the threat of loss of state subsidy, either through reduced attendance (if the schools are in operation) or through a shortened school year (if lost days cannot be made up). Second, the instructional program is disrupted or shortened, with accompanying loss of learning. Third, boards frequently contend that teachers, through their illegal strikes, are setting a poor example for children. Finally, strikes present a

Variety of community disruptions, including inconvenience to parents who cannot send their children to school and hence must make other child care arrangements.

2. The Evidence of Irreparable Harm is Largely Personal: In a few settings plaintiffs found it necessary to go beyond the allegations made in affidavits. Direct testimony on harm had to be presented in court. A Superintendent told us how the testimony proceeded:

The attorney for the teachers asked me questions about making up lost time should we not be able to get 180 days in for the school year. And he argued that we could do something by extending the day each day for twenty minutes or fifteen minutes. And while I was on the stand I contended that it may be possible to do this to get the aggregate number of hours for the school year. But it's impractical. If we're to add twenty minutes or a half hour to a school day in the secondary schools, thereby adding perhaps five minutes to each class, I dare say there would be no lesson plans that could specifically be organized around providing the additional five minutes of instruction and consequently I saw little or no benefit. And then I questioned what this might mean, say, for the kindergarten child or first grade child. Beyond what point does learning really slow down? The learning is going to be quite dramatically shortened at that certain point.

Q: Did you have any specific evidence at that point that you argued in court about the validity of adding extra time to a learning period?

A: No. You know, it's just the observation of two decades in education as a classroom teacher. I recognized the impracticality of it and this was not challenged. I saw it only as a device to provide the aggregate number of hours rather than the days. We do know in the psychology of learning that there are distinct advantages to spreading out programs over a greater period of time and I'll cite an example. Rather than have one day a week for students to learn typing and give them an eight hour session you're much better off spreading an hour and a half or so over six days to provide the same. There'll be greater learning taking place.... I recall moving into discussions on the problems of the younger children and their perceptions. And there's no question in my mind that older students can understand strike issues and the fact that teachers may separate themselves from it. But I pointed out that primary age children do not, They do not understand. It's a form of rejection, in the same sense perhaps as a father and mother being divorced. They don't perceive things from our point of view at all, I suppose, as adults. And that's natural. I did argue that the children do suffer from this and it effects their outlook on what's taking place in their relationship with the teacher. They do not understand strikes.

I don't know how many hours their attorney cross-examined me. If I tell you everything I know on the subject in five minutes, he'd stretch out my time on the witness stand to five hours. I project one hour for every minute of knowledge I have. So, he wanted evidence of this. And the fact that primary age children, I think somebody ought to do some research on it-- their perceptions of what's taking place. But he wanted to know if I had anything to substantiate this and I said to him, "Yes, I can locate it if I can be released from here"....I knew I could get him by now, I'd learned this. Otherwise he, if I couldn't cite the periodical issue and page he'd really put me down. This released me, he backed off. He really thought I could come in with it. I did have some information. The thought wasn't entirely new with me on this but it was not a study that had been conducted. But I'm convinced that children do have a problem in their relationships with the teachers. They don't understand in the primary grades why it's happening....

I think the tests that we have for achievement are not so discrete that they can identify (the effects of) eight weeks. Most of the tests deal with bigger spans of time but you're talking about achievement. I was talking about attitudinal things which I think are far more significant--the attitudes of students. I doubt that in eight weeks, unless there's something that's highly skilled, say typing...~~If we're discussing the matters that occur~~ in the normal course of events in an English class which may include not only appreciations but certain knowledge, certain skills, certain attitudes, appreciations, these are not going to show on the typical examination. As I said I'm much more concerned with the attitudes. And it showed up in a sort of a rebellion on the part of students in our district. Letters to the editor. You know, if the teachers can strike, why can't we? (Interview, district administrator).

A district administrator in another state described the matter in similar terms:

When preparing to argue irreparable harm, you prepare a wide range of arguments. You never know what will strike the judge...We simply thought of as many kinds of evidence as we could, and hoped that something would strike fire.

Q: How do you prepare to argue irreparable harm in court?

A: What we did is that when we knew we were going to court, the attorney and I each separately made a list of things we wanted to include that would show irreparable harm. Then we got together and shared our lists....Much of our argument was circumstantial. We were asked on cross-examination what studies we could cite. But we didn't have that information ready. However I could have gone to the library and found some. I said if the court would declare a recess and let me to to the library, I could

come back with some. There is a group of studies on the spacing of learning. If we would have had to teach on Saturdays and vacations, we wouldn't have had that kind of spacing. And one learns better if there is time in between. There are also some studies that indicate that if you want to teach a child something, he learns better if you give him an example of what you are trying to teach. You know, it's a case of "monkey see, monkey do." I could go to the library and find those things.

Q: If you were going to court again, would you prepare differently?

A: Yes. We might find some of the studies that help us make our point. The expert for the teachers cited one such study. We didn't have that kind of evidence--ours was more circumstantial. But we could point to harm, especially with special education pupils. You know, the average pupil may not be affected as much. But the special education child needs the ongoing care and learning on a steady basis. And the school year was interrupted, or rather delayed, for all our students. There was harm occurring. And in the end the judge agreed with us....(Interview, district administrator).

A school management attorney noted his dependence on professional opinion as the source of evidence of irreparable harm:

Q: When you got to court and began raising the question of clear and present danger, what kinds of evidence did you offer to demonstrate that there was a clear and present danger?

A: The evidentiary part of these hearings often is difficult. A lot of what you're asking the administrator to testify about, (and that's basically who you have--the administrators) a lot of what you ask them to testify about is nothing more than their opinion. And that involves how the strike will effect certain groups of children, either actually or psychologically or emotionally. In this state we often get into the argument that a continuation of the teacher strike will have devastating effects upon the mentally retarded and emotionally disturbed children; that they don't understand what's going on and, in addition, that their programs are so set that by missing days and days and days it will completely devastate whatever program's been set up. On the other hand, you have administrators testifying about what effect this will have on the average child or what effect this will have on those who want to go to college and it's kind of a speculative situation because they're speculating on whether or not colleges will admit these students without them having fully completed the high school year. On the other hand, you can offer evidence as to the fact that the basic issue in this whole thing is whether or not 180 days can be fit into the school calendar and so you can offer testimony indicating that so many days have gone by, there are only so many days left between

whatever period you're in court and that magic date of June 30th, and you fit this into a calendar-sort of exhibit and show the court, or attempt to show the court, how many days are left and how much time you have to fit it in. Then you get into really what are peripheral issues and it goes to this Armstrong County case, the idea of, if you can collect a number of things and throw all these effects into one big ball, that cumulative effect may in itself present a clear and present danger. So then we throw in all these various things such as...

Q: Keep filling up the cup hoping it will run over?

A: That's right. The cafeteria workers won't get paid, the bus drivers won't get paid. That has a serious and detrimental effect on the community. Working mothers have to stay home with their children during the teachers' strike. And this has a detrimental effect on them. The children, it's to the children's detriment because now they have to go to school in the summer when it's hot. You know you get into just a whole accumulative effect of the thing.

Q: Another argument that's sometimes made is, with less than 180 days you'd lose that much of a subsidy. One one-eightieth of the state aid.

A: That's right. Although it's a speculative argument too because no one has ever, to my knowledge lost any money over a teachers' strike.

Q: On that question of evidence....as a solicitor, one of the questions that's of interest to us as social scientists is what kind of evidence there is. As an attorney is your life made more difficult by the absence of hard data on how strikes effect kids? Or are the data there and available to you and just not necessary?

A: I would say that that data would be extremely helpful. In most cases it's not available, except that it is available in reference to retarded or emotionally disturbed children in the form of experts' opinions that a break in the continuity of a program for a retarded or emotionally disturbed child has a tremendously adverse effect on this child or on the class as a whole. And that these children, even missing school for a day, it may set them back two days by missing one day. And this is the kind, this is about the only area where we had any evidence if you will, and that evidence would be in the form of opinions by experts as to the break in continuity of education and this sort of thing. As to regular, and I say regular, normal, every-day school children, what effect it has on them is basically speculation. When we're talking about emotionally or socially and so forth.

Q: So your strategy is to get someone qualified as an expert and then rely on their opinion testimony?

A: Yes.

Q: OK.

A: In our district we had a Miss X testify who'd qualify as an expert in this area. Making reference to references, reference books and manuals, where possible. There's not a whole lot on it but there's some in that area.

Q: Why, if courts will enjoin on the basis of threat to 180 days, is it necessary to go through all this other rigamarole with all the other sorts of harm that may ensue in the absence of an injunction?

A: We're never certain that the 180 day argument will hold up and we want to cover all our bases, to be very frank with you.

Q: Oh, OK.

A: It's the same old thing. You just want to be sure that you've got everything there, and enough to get the injunction. So you throw all the rigamarole in (Interview, management attorney).

Dependence upon personal knowledge, rather than upon "hard" social science-type data was virtually universal among plaintiffs. For many of them, the obviousness of the harm wrought by a strike was so apparent that proof was not even needed. For example in one setting a-board member, still distraught months after a strike ended, spoke with great emotion as follows:

Some of the strikers felt a responsibility to their students. And that's the whole thing. How can you, as a teacher, say "it's OK for me to break the law" and then when a kid does something that violated the code say, "you're going to be expelled from school." How do you teach citizenship? How do you teach responsibility to those young, fertile minds, if you don't live up to the letter of the law yourself? If the state says, "you can't do this, you're breaking the law," and you say "I don't believe that, I'm above the law," and then you go into the classroom and you tell the kids, "there are my rules and if you don't abide by them I'm going to fail you. I'm going to throw you out. I'm going to see that you're suspended from school." If you go out there on the street and you slash somebody else's tires, but a kid comes into class and the kid throws an eraser at somebody, you march him down there and you have him expelled from school, or you give him a three-day or a ten-day suspension, where's your sense of values? Are you going by one set of rules and the

kids have to go by another? Don't do as I do but do as I tell you? That's wrong (Interview, board member).

For this person "proof," in an evidentiary sense, was hardly necessary. In another case a board attorney evinced the same view:

I've seen a number of school strikes, and there is irreparable harm done. We're suffering now because of the harm done by the strike. I don't think there's any question about it...The whole attitude is terrible (Interview, management attorney).

Also militating against the need for hard data was the law itself, particularly in states where the law asserts that illegal strikes are, by definition, irreparably harmful. One attorney put it this way:

We weren't all that concerned with irreparable harm. There are some cases in this state which suggest that when a public employee participates in an illegal strike, that is per se irreparable harm to the public. When governmental functions are impaired to any degree, that is irreparable harm.

Q: You felt the court's action would turn on the showing that there was a strike and that it was illegal?

A: Very simple case from our point of view. All we had to show was the union's involvement, which we did through documents (Interview, management attorney).

3. The Teachers' Arguments are Not Credible. A further reinforcement of plaintiffs' certitude resulted from the view, widely held, that defendants' challenges to plaintiffs' allegations of harm were self-serving. That is, plaintiffs believed that teachers' disclaimers about harm were not credible. The logic of the situation was so complex that none of our sources set it forth in crisp terms, but the fragments of the argument can be pieced together. First, plaintiffs observed that it did not make any sense for teachers to be asserting that the absence of teachers from their classrooms did not cause harm. As one attorney said, "The irreparable harm point is really not a very good one to be made by the defense, in my opinion" (Interview, board attorney). This attorney believed that challenges to plaintiffs' allegations of harm were simply devices to delay courtroom proceedings. More significant was the plaintiffs' view that teachers' invariable assertion that "the days can be made up" was prompted not by a desire to make up instructional days, but rather by a desire to make up pay days. One attorney put it this way:

The teachers never lose a dollar in Pennsylvania. The teachers know that when they go out they can stay out as long as they want and they'll still most likely get paid for 180 days of school, which is their full salary (Interview, board attorney).

Another attorney pushed the analysis even further. He said that Pennsylvania teachers did not object to being ordered back to work when the 180-day rule was threatened; an order entered at that time provided a face-saving device for teachers to return to work, and hence to preserve their full annual salary. It was this latter observation, coupled with some apparent anomalies in plaintiffs' comments to us, which prompted us to look for the strategic and tactical dilemmas inherent in board efforts to enjoin strikes.

4. Dilemmas of Application. When this study first was conceived, we anticipated that teachers, not school boards, would be most troubled by the irreparable harm standard. How could teachers argue that strikes were not harmful? In the next section of this report we will describe our findings on that matter. First however, we must report several unexpected practical dilemmas facing school boards.

One dilemma occurs when schools are operating in the face of a strike. There are a number of reasons for school boards to try to keep schools open during a strike. First, of course, the tactic puts pressure on the teachers' groups. If there is division within the ranks of teachers, as there usually is, the division is exacerbated by the daily event in which some teachers teach, and others do not. Further, the tactic requires the investment of enormous resources (by the teachers) in picketing; picketing, in turn, can be fairly routinely restrained where it interferes with ongoing school programs. Most significantly, continuation of schooling means that striking teachers lose pay for each day they are out--while their working colleagues are paid. Moreover, those who are working may be paid premium wages (as we observed in the Everett strike, where newspapers advertised substitutes' positions paying \$105 per day). In an era of teacher surplus, substitutes often are available in large numbers.

Assuming a school system is operating, the board is obliged to advertise that fact, i.e., to persuade parents and children that it is OK to come to school, that classes are staffed, and that regular services are being provided. Further, it is necessary to make these claims even if the reality is somewhat less reassuring. One reason for the need is to counter teacher claims that inadequate schooling is being offered. Another, and perhaps particularly significant one, is that state aid usually is computed on the basis of attendance, and schools which are operating at low levels of attendance are losing state aid.

The dilemma arises when the district goes to court claiming that injunctive relief is required. It has publicly claimed that everything is fine. Can it then claim in court that irreparable harm is being inflicted on the students? The matter is of little consequence in places where mere illegality suffices to secure an injunction, but what is a district to do in states where a showing.

of irreparable harm is required?

Our best—but inadequate—evidence on the way out of this dilemma was apparent in a strike in Vermont. There the statutes require that injunctive relief be predicated on a finding of a threat to a sound program of education. The district, confronted by a strike, devised a delicate strategy for dealing with the dilemma. Schools would be kept open, staffed with non-striking teachers and substitutes. (Clearly there was a risk of violence here, but probably the risk was less in this placid and pastoral setting than it would have been in industrial communities.) Injunction proceedings were commenced at once. The prime witness for the Board was the leader of the teachers' association. The witness was asked whether the makeshift arrangements which were being used to keep the schools open constituted a "sound program of education." The only plausible answer was "No." The strike promptly was enjoined. Next time, no doubt, teachers will work harder to assure that the schools are completely shut down, but in this instance the Board's strategy appears to have successfully side-stopped the main issue. The irreparable harm standard worked to the Board's advantage.

A second dilemma occurs when boards seek to apply economic pressures to teachers by letting a strike drag on. Unless a board tries to run schools during a strike (with the inevitable risk of violence and ugliness), the only strategy is to reduce the length of the school year by offering less than 180 days of instruction, with a commensurate reduction in the number of days of pay. A Pennsylvania school board attorney voiced the dilemma this way:

I think that a board has a duty, when it's approaching the 180 day figure, to do something. And I advise them of that. But there's always some feeling on those boards: "Let them sit. Who cares? Let them lose money." And if they go past the 180, they will lose money--the teachers.

Q: Alright. Here and there we've picked up clues to the effect that injunctive relief sometimes is surreptitiously welcomed by the teachers. It does get them off the hook. Is that phenomenon operating here?

A: Absolutely. As a matter of fact you find that sometimes you're representing your client--the school board--and you're espousing a position which really may be popular with the teachers and unpopular with your client. And that is to get the teachers back to work...There are a lot of school board members who feel, "If they're out on strike, let them stay out for a while and let them lose some money, as I would if I were working in the mill or anywhere else." So it's a reversal of roles (Interview, management attorney).

The problem then, is whether the board's failure to seek injunctive

relief is the cause of irreparable harm, or whether the teachers are the source of the difficulty. Board sources in Pennsylvania expressed real hostility to state-imposed requirements that schools be run for 180 days, for the requirement effectively prevented boards from exerting pressures on teachers' pocketbooks. Yet the 180-day rule is the key to the availability of injunctive relief.

A closely related dilemma results from patterns of state aid reimbursement. In some states a district's entire state subsidy is contingent upon the district completing the mandated number of school days. However in these states there occasionally are "emergency" bills passed by legislatures, which accommodate reductions in the school year attributable to weather and other natural calamities. Does a strike constitute such an emergency? In addition it appears that in many cases a school district "makes money" if it reduces the length of its school year. This is particularly true in settings where state aid is reduced on a pro rata basis, i.e.; one day's loss of aid for each lost day of school. But local revenues are unaffected, and so the local revenues need by spread over a fewer number of days. For a district with a shaky financial posture, a reduced school year offers real possibilities. But again, to admit such a possibility is to nullify the effectiveness of the 180-day rule on which findings of irreparable harm apparently rest.

The existence of such dilemmas does nothing to ease the lot of school boards faced by teacher strikes and by the need to plead irreparable harm in court. And teachers are not unaware of these difficulties.

Defendants' Views of Irreparable Harm

Among teachers, their leaders, and their attorneys we found a number of major themes concerning irreparable harm and teacher strikes. One was that neither (a) personal experience nor (b) research evidence supported the proposition that strikes create irreparable harm. A second theme was that plaintiffs' presentations of evidence concerning irreparable harm are not compelling. Third, defendants felt that irreparable harm should be viewed in relative terms: the harm associated with continuation of a strike is outweighed by the harm associated with terminating a strike before settlement of the dispute that precipitated it. Fourth, despite all this, judges routinely claim to find irreparable harm and use the finding as justification for issuing an injunction. Fifth, even though teacher defendants regularly lose the irreparable harm argument in court, it is useful to make the argument. Finally, the irreparable harm argument contains certain built-in pitfalls which need to be acknowledged and which warrant certain tactical planning. Below we present evidence reflecting each of these themes.

1a. Personal experience does not support the proposition that

teacher strikes create irreparable harm. Evidence on this point appears in a group of affidavits prepared by Seattle teachers in connection with the 1978 strike in that district. (We do not argue that the evidence is good evidence; it simply is, the best that we found.) The affidavits were prepared by teachers who had been involved in a two-week strike in the district in 1976. The teachers' observations included the following:

My students miss school for up to a week at a time for their field studies and are very capable of making up lost lessons. In the 1976 strike when school opening was delayed nine days, the 180 day school year was made up and no student suffered any loss of class time or educational quality. I am sure that there may be inconvenience for some students, however, there will be no serious harm to the educational program (Affidavit, science teacher).

In my opinion the strike in 1976 did not cause any harm other than the inconvenience of re-arranging somewhat the schedule for the academic year. I was particularly concerned about the effect a strike might have on some of my students since many of them are seniors and are understandably concerned about graduation. In the fall of 1976 when there was a strike this concern was particularly acute since the program to which I had been assigned was in the process of re-organization. Despite the delay in school opening that year, more students graduated from the Training Program in June, 1977, than ever graduated before from that program (Affidavit, social studies teacher).

The major loss to students of a shortened school semester would be an overall decrease in the amount of counselor time per student. However it is interesting to consider just exactly what the loss in time amounts to on an individual student basis. If the counselor-student ratio is 1/400 (which was the suggested ratio for 1977-78 and which the Superintendent has announced as the basis for hiring counseling staff this year), a counselor has 1.05 minutes a day for each student. In a ninety-day semester, that amounts to 94.5 minutes per semester. In an 85-day semester, the per student counselor time would be 89.3 minutes, or a loss of 5.2 minutes (Affidavit, counselor).

At the end of the 1976-77 school year I recall no difference in my group Spring Concerts from any other year when there had not been a strike (Affidavit, music teacher).

In 1976, teachers were on strike for approximately two weeks. Lost time occasioned by this delay in the opening of the school was made up during an extended school year during the much longer calendar year. In my judgment, and from my observations, that strike caused no irreparable harm to the mathematics program or to the educational programs in general, or the students (Affidavit, math teacher).

Additional evidence about teachers' views of the irreparability of strike effects is apparent in the transcript of an injunction proceeding connected with a 1977 strike in Aliquippa, Pennsylvania. A teacher in the district was placed on the stand by defense counsel; a portion of the direct examination follows:

Q: Do you believe that the students could be re-oriented and the school teachers, yourself as one...could recap sufficiently and summarize and review the material that the teachers left off with, so the students will be able to bridge this time that they have missed school as a result of the work stoppage?

A: I believe we can. Those of us that have been in teaching continuously know that teaching involves re-orienting, teaching, re-teaching; learning, re-learning, viewing, reviewing; it is a constant on-going process. In my particular case, I would find it not too difficult to resume, because I do teach the youngsters who are high achievers academically--they showed the ability the first day of school after the summer recess; and I think, in many cases, a lot of the teachers would find some problems, which they can overcome. It would depend on the ingenuity; the resourcefulness of the teachers as to how quickly they could cause the students to resume the learning in the same fashion they had been prior to the work stoppage. I think most of the teachers have been thinking about that during this stoppage in their own minds. I am sure they have gone over--I have talked with many of them in the elementary level as well as my department and the high school level, what they would do to get the students re-oriented, back in the education process.

Q: Have they discussed or asked you how they would bridge this period when the students were off during the work stoppage?

A: Yes...they would...say "Jim, what do you think we ought to do when we go back?" because I am experienced in the elementary level, and I have advised them... [] n asking for opinions and ideas, I find them to be optimistic about being able to do the job required of them whenever they go back.

Q: You are telling this Court that at least these teachers you have come into contact with certainly have considered the problem of bridging this period of time when the students were not in school?

A: Yes. About sixty per cent of these teachers engaged in

the same experience during 1968-69 when we had two strikes and they had interruptions--I think one was nineteen days, one was twenty-one days or so, and they were able to resume their classes without too much interruption, with some degree of continuity and satisfaction in the outcome of the results they were able to attain.

Q: You certainly can tell us what you did in those two strikes that you just talked about, and what you are going to do when you return to the classroom this time?

A: Well, as I said earlier, we review, we diagnose, and we find out that students don't really forget that much, as some people would lead you to think.

Q: Tell us specifically what you did when you returned to class after the strike in 1968-1969?

A: I tried two different things in one field because I had students of a bright calibre. I left off at a specific page, and when I went back, I started the next page. They did well. They went to college, medical school, dental school, some in the ministry, some teaching on our staff today--they showed no loss. That was the ones I just resumed from the page I had left off. In other cases, I decided I would pre-test and found out that there was some need for remedial work, which we were able to facilitate....

Q: You will return to the classroom and attempt to determine what the students need in order to bridge this period of time that they have been idle?

A: Basically, the prime responsibility would be merely to refresh certain concepts in their mind so they can score more on the tests or as close to what they would have done on the day we had the work stoppage; and because the youngsters are of the calibre, I am sure they can meet that standard (Transcript, School District of the Borough of Aliquippa vs. Pennsylvania State Education Association et al., Court of Common Pleas, Beaver County, No.1949, 1977: 243-247)

1b. Research evidence does not support the proposition that teacher strikes cause irreparable harm. Teachers are not known as ardent consumers of pedagogical research findings. However litigation focused on the irreparable harm standard has prompted teachers to search for evidence that may be germane. (The search is impelled not merely by the desire to locate data supportive of the teachers' position, but also by the need to locate research data which might be used to undermine their position. Thus, the dynamics of the litigation situation probably resulted in a fairly thorough search for relevant research.) We interviewed a person who has served as an expert witness for teachers in situations where

the Holland case is significant:

Now as far as the key testimony on the irreparable harm, there are three areas that one can raise, it seems to me, with respect to actual evidence. One of them is the Jencks and Coleman stuff which in essence argues that schooling cannot be shown to have dramatic effect on kids.... But that's a very narrow study. There have been a lot of complaints about the study but it's a rather impressive thing and there's not very much in the literature other than a study put out by the Federal Reserve Bank, I think in Philadelphia, that indicates that school does have some effect but that's an internal comparison of the effects of programs, it's not an effect of schooling in terms of the variables that Jencks tried to identify. That's one way you can go. Another way you can go is to look at the Prince Edward County experience in Virginia when the schools were closed on a racial basis for a long time. And there is no evidence to indicate that the kids were seriously harmed educationally. There are a lot of unique problems in that one. Then, there's the case that you've got in front of you in which a strike appeared during the middle of the year and they were lucky enough to have a neat little control group kind of study to indicate that achievement didn't decline. Those kids who were out of school full-time as compared with those who were in school part-time as compared with those who were in school all the time. There didn't seem to be any big differences....

... I read some stuff in the New York Times about school closings in Ohio due to weather and millage. And so I sat down and wrote a letter to every single school superintendent in Ohio whose name was mentioned in the article, there were about 14 of them, asking whether as a result of all this, they had any evidence of any kind to indicate the effect on the kids. And I got absolutely nothing back. I got two letters back and in both those cases they said they didn't know of anything. Nor were there any studies going on. I thought maybe somebody down in Ohio had picked this as an opportunity to find out, with that kind of stuff going on and nobody had. So we came up dry again. There was just absolutely no evidence that we could find at all to support the theory that there is irreparable harm (Interview, expert witness for teachers).

Other sources agreed. A teachers' organization attorney indicated that the quest for research evidence was continuing:

There are a few studies going on apparently where they're taking pilot groups and control groups of kids who have been involved in certain teacher strikes and they're gonna follow the control group and the other group. They're going to follow these kids, in other words, take them in the fourth or fifth

grade or something and follow them for a few years and then at various points, check out tests and things like that and find out, is there any evidence of effects of the strike? I think there's a great deal of skepticism whether they can possibly find out. Will there be any relationship? If some kid in one point in his career has education held off for two or three weeks, can one possibly show long-run harm? So many things affect a child's maturation and development over the period that the effect is doubtful. Imagine that some kid, in third grade, missed four weeks of school. Frankly, if it was never even made up, I would question whether, by the time they were seniors in high school, it would show. But in almost literally every case the time's all made up anyway. How they can ever believe that, that somehow there is going to be a great detriment to that kid is pretty hard to believe. But I think this thing we want to do is, run some tests and try to find out. Maybe people will look at it a little differently at that point (Interview, teacher organization attorney).

2. Plaintiffs' presentations of evidence concerning irreparable harm are not compelling. A teacher organization attorney commented on the common allegation that strikes threaten a district with loss of state aid:

One of the big allegations as to irreparable injury...in these suits is that if the teachers are not in their schools and the children are not there, that the school district will lose a lot of state aid. The basis for state aid for each district is the number of pupils that you have in attendance. There's a couple of times during the year that they make these counts. And they say "Now this is irreparable injury because we just won't get this money. And there's just no way we're going to be able to make it up." Now...there's really not much we can bring in on facts on that because it's more or less a question of law. You're either going to lose the money or you're not going to lose the money. The fact remains that no school district has ever lost a penny as a result of a teachers' strike because of that count. What normally happens is the legislature simply passes a separate act that says the school district shall not lose any money as a result. There's a general feeling: why should it affect these kids and the school district and why should taxpayers lose money as a result of something over which they had absolutely no control? And it is really a counting procedure anyway; for many purposes it really wouldn't make a lot of difference whether they used the second Friday, the third Friday, fourth Friday, sixth Friday, tenth Friday, any Friday--they just had to pick some day. And the mere fact that it's just a fortuitous circumstance that the teachers have to be on strike on a particular Friday is no reason that anybody should be penalized you know. The taxpayers and the district and such would probably have to come up with the extra money or something. I don't know anybody in the state who has ever lost any money, where the State Department simply said, "You're simply not going to get

this money." Now there have been a couple of instances where in essence the school districts say, "Well, we just don't want to make the time up, so we'll just take the loss of state aid" (Interview, teacher organization attorney).

Trial transcripts indicated that this theme is extensively developed at injunction proceedings in Pennsylvania (see Butler, 1978; Aliphippa, 1977). Even if the matter does not surface in courtroom proceedings, teachers believe that a strike does not threaten state aid or loss of instructional days--unless the loss is instigated by board refusal to schedule make-up days.

Q: To what extent do you think there is irreparable harm in a teachers' strike? It was hardly touched on in this case. Hardly argued in court.

A: I think there isn't any, and I'll tell you why. There could be, I suppose, if you went long enough. But what is so sacred about a day that a teacher is out on strike and yet snow days, holidays, vacation days, and above all summer vacations are somehow less sacred? Is there something that pupils can only learn on days other than summer vacation, snow days, and holidays that somehow magically they can assimilate on days that people would otherwise be in school and they go on strike?

...And they did arrange to make up the time. So therefore it only means that we're talking about inconvenience. Inconvenience to the students. As far as the harm being irreparable, we kept hearing on fairly good authority that the Board was going to ask for a waiver of the required days. So it looks like the irreparability or the quality of irreparability is suspect immediately if that is true (Interview, teacher organization spokesperson).

Other allegations of irreparable harm fare no better, in the eyes of teachers. An attorney spoke somewhat contemptuously of a typical Board complaint seeking injunctive relief:

Q: What about the arguments of school boards? Have there been changes in the quality of board arguments over time?

A: I would say, in my opinion, very, very little. I have a Board complaint right here. They have a list a mile long. Here is your typical complaint, your allegation of irreparable injury.... It's so speculative. It's conjecture, speculation. And we can get people that'll come in and say, "Well, my opinion is different, see." So OK, that was their first one, right up front. "D) Serious disruption, impairment and demoralization of a vital function of the government: namely the operation of a public school charged with the education of students within its district." Now there, they're already

slipping off into just conclusory type things. What do you mean "serious disruption"? That just begs the question. What is a serious disruption? What is impairment? Demoralization? And how are you going to prove that? You are going to say, I'm demoralized? A teacher can say "I'm demoralized. I don't have a contract." So I don't know. But there again. Very, very weak I think. Extremely weak for anybody really looking at the thing (Interview, teacher organization attorney).

The attorney's point is amply demonstrated in trial transcripts showing testimony in which board witnesses are cross-examined. The following episode, for example, appears in the transcript of the Butler case:

Q: You stated yesterday that the seniors might experience some disadvantage because of the fact that they are not now in school because of the work stoppage, and they are about to take this (ACT or SAT) examination on the 28th--

A: Yes.

Q: --of January? Can you tell us what disadvantage you are thinking about or referring to?

A: Yes, the disadvantage would be related to the interruption, the fact that the student is not currently attending classes, conditioned both attitude and behavior to respond to certain items that would be found on the instrument.

Q: That jogs my memory now. You mentioned the phrase, "attitudinal changes"?

A: Yes.

Q: Now, do you have some major, some empirical data that you could share with this Court that would show that the mere interruption of the education from January 9th to this date would create such a disadvantage to these seniors?

A: I could not cite for you certain pieces of research, no.

Q: Upon what, then, sir, do you base your statement to this Court?

A: My experience in working with learners in the classroom.

Q: All right. Let's explore that for a moment. What period of time can you tell this Court, or what example can you tell this Court where there had been a break in education for nine or ten days prior to an examination such as the SAT or the ACT which had caused some disadvantage to the person or persons to be tested?

A: I would correlate this with a teacher-made test, and if the learner had been absent for a period of time, even due to personal illness or Christmas vacation.

Q: So, I'm looking at similar tests so we can compare apples with apples--

A: Yes, yes.

Q: --and not SAT to a history examine to a senior high school student. What examples would you have for us?

A: In my opinion, the responsibilities and pressures placed upon a youngster preparing for such an examination, and thinking in terms of the value and future commitment of that student, this pressure in itself for the SAT would increase the anxiety level. Now, if--

Q: Upon what do you base that; what example? My question has been examples, sir.

A: My children taking such examinations; my own personal experience in taking such examinations.

Q: So, that's one for you, and how many for the children now?

A: Pardon?

Q: How many children do you have?

A: Six.

Q: And they have all taken these examinations?

A: I believe my youngest daughter, the ACT, not the PSAT or SAT.

Q: So, you're speaking now of two personal experiences on these examinations?

A: Not just two personal experiences. The students within our schools; the comments made to me.

Q: Wait...let's take it, if we can, by the numbers here. You talked about personal experience. You talked about yourself. All right?

A: Yes.

Q: Did you take the examination after being off for ten days because of a work stoppage, as a student?

A: No, sir.

Q: So that doesn't count. How about your daughter, did she take the examination coming off of a work stoppage?

A: No, sir.

Q: All right. Now, what other examples do you have?

A: I do not have other examples.

Q: So the Court is clear and I'm clear—I don't mean to confuse you, sir. I apologize if I have been.

A: You're not.

Q: I just wanted to know what your basis was, or is, for the statement that there would be some attitudinal problems with the children—

A: Yes.

Q: —taking these examinations (Transcript, Butler, January 20, 1978: 19-22).

3. Irreparable harm is relative. Frequently defendants spoke of harm in relative terms, rather than in absolutes. For them the question was one of weighing the harm arising from the strike against the harm associated with ending the strike. Our sources divided the latter into two broad categories: harm which the strike had been designed to combat, and harm which would be caused by a return to work without a contract. A teacher organization officer spoke of the first type with considerable emotion:

As late as this past week I had a man say to me how upset his wife was to have had their four children at home. And I said, "Well, really, I'm so sorry for your poor wife." Her baby-sitters were withheld from her for a while. He was still very upset that his wife had those kids—it just got on her nerves. Education—it just has to be more than baby-sitting. We had issues. Our school system was being destroyed. We know how many substitute teachers are walking through these classes. Class after class which has had six, seven, eight different subs in a year or a semester...Anybody can get a job anywhere else without having to put up with the types of problems that we have in an urban situation...A person could get the same salary somewhere else (but most of the time they could get more) and they don't have to worry about some of the other things we have problems with. Now the Board knows that. The Superintendent knows it. But they weren't even asking what would make it attractive to get people to come in and stay in the system and become professionals. They asked for no improvement in conditions for professional teachers or for the profession itself. We saw what was happening to our

profession. We know that we were all hurting...We have gotten farther and farther behind.

....

The harm that might come from the strike is nothing compared to the damage and harm that was being perpetrated on our people and our children every day in this system. For years...And there was no intent to change it....Any price that we pay for this short interruption, for what I perceive to be the opportunity for a realistic getting at something that can save our system and place it in a position where we can aim at quality education for children. I don't see what we did as being destructive at all (Interview, teacher organization officer).

Affidavits prepared by teachers in Seattle frequently compared the harm caused by a strike with the harm caused by other events.

With the help of his instructor, a student who has been ill or absent for some other reason for an extended period, has in many cases completed the course at the top of his/her class....The situation involving a student that has been home ill for an extended period is much more difficult to handle than a situation where the entire class missed material or instruction for an extended period. Yet each day the teacher is faced with returning students who have been home ill. When the entire class must complete the program in a slightly reduced amount of time, the instructor simply has to provide additional material which combines the information from two units into one (Affidavit, industrial education teacher).

In past years I have seen so-called innovative programs come and go, some of which used less class time and more home study time. Most notably, for a number of years, a rotating schedule was adopted, which in effect reduced the student's class time by thirty hours per class, out of a yearly total of one hundred eighty. As far as I could tell through testing, observation, etc., the students were able to accomplish the goals as set for each subject (Affidavit, science teacher).

I have taught in Seattle when two days were lost due to snow closure of schools and when three days of instruction were lost in my building due to an unexpected special testing program. In both cases the days were not made up, however the students did not suffer any severe loss in their education. Teachers are trained and experienced in making adjustments in their instructional plans to accommodate...a wide variety of interruptions such as assemblies, fire drills, group tests, field trips by other teachers, band practices, and absences due to illness or family vacations (Affidavit, mathematics teacher).

Of greater significance than the strike on the quality of education is...the new textbook adoptions that didn't show up for the opening of school (Affidavit, experienced teacher).

Other teachers assessed harm by comparing the effects of continuing to strike until settlement was reached, and returning to class without a settlement.

It is my opinion that starting school with the unsettled disposition of the staff would result in an inferior program as compared to starting school after having resolved the issues so that one's full resources can be directed toward providing a quality, integrated educational program (Affidavit, special education teacher).

From a counseling viewpoint...it appears more likely that opening school in an unsettled atmosphere would be more detrimental than a delay in opening or a shortened school year. Forcing teachers to go back to school before there is resolution and mutual agreement means that the school staff would be working under more than the usual opening-of-school stress. When people are under stress, it is reflected in increases in interpersonal conflicts...and inability to see others' views. It may also lead to apathetic task performance. If we increase stress and anxiety on school staff, we in turn decrease their ability to be responsive to student needs, interests, and tensions (Affidavit, special education teacher).

To start school without a contract and face a possible walk-out sometime during the school year would...be much more disruptive to the educational process than merely delaying the start of school until everything is settled (Affidavit, home economics teacher).

If teachers are forced to start the school year without having settled the paramount issues of salary, fringe benefits, and evaluation procedures, they will be angry and frustrated. This cannot help but have an impact on the quality of their teaching.... The irreparable harm caused to the educational process by forcing the teachers to teach prior to the conclusion of bargaining will far exceed any harm which would result from delay in the opening of school (Affidavit, teacher organization official).

The sum and substance of all of this is that teacher defendants assert that neither personal experience nor research indicates that irreparable harm flows from teacher strikes, that plaintiffs have failed to demonstrate the existence of irreparable harm, and that any harm identified is outweighed by the harms that would stem from a premature termination of the strike.

Yet teachers do not expect that these arguments will prevail in

court, or at least they do not feel that board requests for injunctive relief will be dismissed by the courts for failure to prove irreparable harm.

4. The courts will find enough irreparable harm to justify granting injunctive relief. A teacher organization attorney lamented the futility of it all:

No matter how skillful our lawyers have been in cross-examination--showing that the specific harm that's been portrayed to us by their witnesses really is not as harmful upon close scrutiny by lawyers from our side--this seems to be not impressive at all to the judge listening to the case. Almost as if it's a formality that he's just taking all this down for dress as opposed to any substance. No matter what we could say in counter-distinction, they will grant the injunction.

We have experts coming in from the state capital who are trained in as much detail, if not more, than the school district has access to, in terms of budgetary questions such as loss of subsidy to the school district when the district is closed due to a work stoppage. Our witnesses come on to say that the school district will save money the longer the strike continues. Nobody rebuts our experts' testimony. You would think that point would be brought home clearly enough to the court for the court to take a grasp of it and say, "This is true." But it falls on deaf ears time and time again (Interview, teacher organization attorney).

Another attorney described the situation this way:

Q: OK. Let me ask you another question. One of the first things you have to do is refute the school board's case. The school board is saying there is irreparable harm and you can show either that there is no harm or that it is not irreparable. Do you have to make an affirmative case for your side or is it sufficient merely to refute the school board's argument?

A: I think in the normal situation, here is, the school board has the obligation to make a showing of irreparable damage. They bring the lawsuit and then they have the burden of proof. Which means they get to go first, they have to bring on their witnesses. Then we make arguments refuting that. So that I'd say the obligation is not to us to make a showing that there is no irreparable harm, but for them to make a showing that there is irreparable harm.

Q: And then you tear into that.

A: And then we tear into that. They have what's known as the burden of proof. And I'd say that's what the law is. Now again,

judges being human beings, this is very fluid and some judges dislike strikes by public employees so much and they realize that the strike is illegal and such that they in essence almost switch the burden without saying so. There's no doubt about it, it's discretionary with the judge. Once he'd held a hearing, even though they might disagree with it, the appellate courts are not going to generally overturn that ruling. And so we have gotten the short shrift a few times where we come in, they put on some really very meagre case that to me by any real logical standards was insufficient. The judge just simply says, "Well I find that these kids are being hurt because now two football games have not been played." Boom. That's it (Interview, teacher organization attorney).

A teacher organization officer put the matter most succinctly:

Q: Was there harm, here in this case?

A: No. We always contend that there isn't. One of the main things we point to, we usually end up making up every day. They claim they're losing money; they won't lose money because they're going to get the school year in anyway. And we don't think there's even been a showing of irreparable harm which would justify an injunction. But the judge always issues it anyway (Interview, teacher organization official).

5. The irreparable harm argument is a useful one to make. In view of the near-universal (and generally confirmed) expectation that the courts will find irreparable harm even though the teachers think that it isn't there, one must ask why the teachers continue to litigate the issue. Our interviewees made a number of observations about the reasons for pursuing an outwardly futile quest.

The manifest function of arguing the irreparable harm standard, is, of course, that of persuading the judge to deny the board's request for injunctive relief. The argument rarely is persuasive, but there are just enough exceptions to nourish hope. In the initial Illinois case (Redding), for example, injunctive relief was withheld at the trial court level because the court did not find irreparable harm. (On appeal the lower court opinion was reversed.) In Holland the lower court granted injunctive relief, but on appeal the Michigan Supreme Court indicated that the irreparable harm standard should have been applied. In the several states (e.g., Washington) where the ground rules for granting injunctive relief are unclear, occasional victories encourage defense attorneys to continue their challenges to the doctrine that strikes are enjoined simply because they are illegal.

However the very low proportion of decisions which turn on the irreparable harm standard, and the persistence of argument in the face of experience, suggests that the argument may serve some latent functions. It does. One such function is simply to delay the date of

issuance of an injunction, in order to maximize the time available for reaching a settlement. One teacher attorney put the matter quite straightforwardly:

One of the strategies that we employ is to delay the ultimate occurrence, which would be the injunctive relief order being entered, which terminates our strike. Our leverage is still there while they're still out on strike. And therefore if we can make the employer put on the best case possible and elongate the proceedings we have a chance to keep the strike alive (Interview, teacher organization attorney).

A second latent function is that of encouraging the judge to enter the teacher-board dispute as a mediator. An attorney described the process this way:

Rarely does a judge ever argue or ever rule "I find no irreparable damage." What he simply does is hold off giving the injunction. And he gets the parties and says, "Well now, let's see here. Before we continue this I want to see the counsel back in my chambers." ...What they aim to do is (if they don't really think irreparable damage is there at that time) they go so far as to say that "I want to talk to the parties back in my chambers." And they get the bargaining going. They get them to argue, to get them negotiating around the clock. And they wear everybody down and get an agreement....I guess I'm a fairly strong believer in court-ordered bargaining, in that I think it does make both the parties tend to get much more reasonable. There's just no doubt about it (Interview, teacher organization attorney).

A third latent function served by teachers' challenges to irreparable harm is that the argument offers possibilities for gaining public support. One teacher attorney made the following observation:

It's important. We want the public to know our side of the story. We know the public usually doesn't care, but we do influence a certain segment. Some of those segments or people that you might influence may come out of the woods and help. So it's important (Interview, teacher organization attorney).

A final latent function was mentioned by an attorney with one of the national teachers' organizations. While we did not detect evidence of the phenomenon in any of the settings we studied, the argument is highly plausible. In essence, our source conceded that irreparable harm might be found vis-a-vis a few students, and that the teachers dealing with those students might then be enjoined, with other teachers allowed to continue their strike. Arguing the irreparable harm standard might, he suggested, avoid blanket injunctions affecting all strikers (Interview, teacher organization attorney).

6. The irreparable harm argument contains built-in pitfalls. Several of our sources were acutely aware that there were certain limitations to the effort to counter board claims about the irreparable harm wrought by teacher strikes. Part of the problem is that the evidence showing the lack of school effects does not promote the teachers' interests. An expert witness noted the situation in these terms:

We've used the Jencks and Coleman stuff. Not without some trepidation. But we've used it in the sense that if you can't demonstrate that the school has a major effect on kids, then you can't demonstrate that there is irreparable harm because school's not in session.... Now usually the comment I get either from the opposing attorney or from the judge is "Does that mean that we've got a bunch of ineffective teachers out there?" So you have to try and cover that (Interview, expert witness for teachers).

The teachers' main defense to the argument, of course, is that the students' education is delayed, not denied. Nonetheless, there is sensitivity. As one attorney noted, claiming that there is no irreparable harm "makes the clients a little uneasy."

A number of teachers and teacher attorneys expressed particular concern about the effects of strikes on handicapped children. Strike organizers in one city had planned to leave two special education schools in operation:

As far as the special education, the handicapped children, well those two schools we did not ask the faculty to leave. But the Board closed them down anyway....If they had continued with those schools open, we had already determined there would be no pickets placed at those schools. All the others, yes, but not those (Interview, strike organizer).

A teacher organization attorney also had concluded that it might be better to keep special education schools open:

Here's another area where we modified our stand a lot and that is in this area of special education. This is a very, very interesting area of irreparable damage. Today of course you have both federal and state mandatory special education acts. You've got all these categories: the physically impaired and mentally impaired and the educable handicapped and all these various categories, going from people who have very, very mild disabilities to the ones who are extremely severe. We got into a strike here, probably five or six years ago, where we knew that was going to be one of the school board's big, big issues. They had this huge special education program. You start to get into the physically handicapped, where it might not be a good idea for some kid not to get the

physical therapy for four or five weeks in a row. And indeed a lot of those kids have special programs that go through the summer so we don't let up on that type of thing. What we did in that one after a couple of weeks, we suggested to our people, "We think you should go back." And indeed they did.

Q: Special Education only?

A: That's right. So they went back, because you at least start to get a lot closer to where there might be some harm. At least I think it's certainly a little more arguable where you've got a kid who's physically handicapped. It may be that for that kid, four weeks later, their physical disability might start coming back. So more and more, we're advising these people, "Look, this Special Education program is such a small part of this you know, such a small part of this..."

Q: And it shows a gesture of good will and good faith.

A: Yeh. It's been well received by the judges where we've done it. (Interview, teacher organization attorney.)

Another teacher organization attorney, however, was not at all convinced that selective school openings were desirable. From the point of view of managing a strike, he felt that maintaining services to handicapped youngsters would be "chaotic" (Interview, teacher organization attorney). Evidently the strategic problems here will take some time and experience to work out.

The View from the Bench

Judges find injunction proceedings immensely frustrating. A judge in Washington bitterly assailed the legal system's failure to provide clear direction:

Judges get burned in the press and by the public all the time on these public issues...because there is a misunderstanding by the parties and also by the people that write about these things or report on them, and sometimes misunderstandings about the lawyers. This is not a question addressed to my moral judgment, or to my philosophy of labor relations, or to my philosophy about whether there should be a strike or whether there shouldn't be strikes, or my philosophy about whether there should be a right to strike for public employees and in particular school teachers. What's presented to me here is a legal question, based on facts, that I must attempt to resolve by applying the facts as they have been presented to me, to the law as I understand it...I'm not responsible for that law.

....

[0] Obviously this is an area that cries out for legislation. And at least so far as the Court is concerned, it cries out for legislation because it would make our job easier if we knew what the public policy of the State was as applied to teachers' strikes. We have Case Law and other things...that talk about public employees' right to strike,...but the square issue of whether school teachers should have the right to strike has not been squarely met in this State, as far as I know at least, by either the legislature or...by the Appellate Courts. Everyone—teachers, administrators, students, parents, taxpayers, as well as Courts—would have an easier job with these things if their rights and duties were spelled out (Oral Opinion, Central Kitsap School District No. 401 v. Central Kitsap Education Association, Washington, Kitsap County No. 78-2-00607-0 (1978)).

But while Judge Bryan lamented legislative silence, Pennsylvania's Judge Brominski found that legislative action was equally frustrating. Commenting on the power which the legislature had vested in the courts Brominski observed:

The authority vested in the court is unprecedented. Historically the court terminated by injunction illegal strikes only or illegal incidents attendant to otherwise legal strikes. Termination of legal strikes resulted at the bargaining table whereas under Act 195 the court is directed to terminate an otherwise legal strike if it presents a clear and present danger to the public interest. Thus the court is called upon to digest the economic, professional and managerial complexities of an educational system, assume problems unresolved by mediation and/or fact-finding commissions, and decide what is in the best interests of the public or presents a clear and present danger thereto.

A review of some of the cases litigated in Pennsylvania reflects some of the reasons advanced to enjoin strikes as creating a clear and present danger:

1. It might reduce its state per diem reimbursement to the school district if the 180 day school year is not completed by a given date.
2. The expense for custodial and maintenance staffs would continue even if the schools were closed.
3. The calendar year is 180 days and must be completed before a given date.
4. If the school year were extended beyond the regular time, it would affect the repairs to the buildings ordinarily anticipated to be done during the summer.

5. Since the school district provides transportation for private and parochial school students, such service would be terminated.

6. The failure to complete the school term as scheduled might affect the school district summer school program.

7. If the members of the teachers' association fail to man the classes, the school district could not provide an adequate educational program for the students.

8. There would not be sufficient supervisory personnel to maintain adequate discipline in the classes.

9. If the school year were extended beyond the regular school year, it would affect those students seeking summer jobs.

10. The presentation of the college entrance examinations would be affected.

11. The night school classes would be affected.

12. State police drivers' school would be affected.

13. The adult classes would be affected.

14. The extra-curricular activities such as playing football, marching in bands, and participating in other such activities would be affected.

15. The cooperative work program shared by students and teachers would be affected.

16. The in-service days would be affected.

17. The schools could not be kept open.

18. Thousands of students would be out of school.

19. Promotion to subsequent grades would be postponed.

20. The P.T.A. would be disrupted.

21. The parents' working schedules would be affected because their children would not be in school.

22. Vacation schedules for both parents and students would be affected if school was not completed as originally scheduled.

Do any of these reasons or combination thereof present a danger to the public interest?

We should first recognize that each must have been seriously considered by the Legislature as awesome consequences of a teachers' strike. After all, there were some 42 to 47 teachers' strikes in the 10 years immediately preceding Act 195. Were not their consequences equally as devastating as those allowed by Act 195? Yet, the legislature has not enumerated or defined these or any other specific reason as one creating a clear and present danger to the public interest. A fortiori, the definition section (301) of the act does not define any of the terms used in the strike section (1003) such as health, safety, welfare, etc. So that a judicial quandry exists in this absence of legislative guidelines. This, then, lending itself to ad hoc determinations. It can reasonably be assumed that the legislature did not consider any of these items, per se, or combination thereof, as affecting the public interest, otherwise they would have so stated. Under any other interpretation, the teachers' limited right to strike would be no right at all.

The fundamental question then is left to the courts: When does an otherwise legal teachers' strike become a clear and present danger to the public interest?

The resolution of this question lends itself to less than uniformity of judicial determination (Brominski, 1973): 682-683.

A few years later another Pennsylvanian judge would reach beyond the legislatively-induced problems by defining the issue in constitutional terms:

Inasmuch as education is the constitutionally declared right of the child, and the Courts have repeatedly held that education is for the welfare of the child as well as the general welfare, it is difficult...for this Court to reconcile such a basic principle with a statutory right of a teacher to disrupt and interfere with the mandated educational program.

Next to the parent the school teacher has the greatest influence on the child. This was my experience and I believe that this would be the conclusion of most citizens. I possess fond and vivid memories of Fannie Tebay, the first grade teacher at Institute Hill School, as well as all the other splendid teachers of the Butler School System to whom I was exposed. To the child the teacher is a pillar of knowledge, wisdom, and strength. The parent and the teacher are the example to the developing and impressionable child.

...In the preparation of a child to enter a society that is hopefully orderly and democratic a strike of teachers in the public school system can have a negative and bad effect on the child. The message to the child is clear: When elected representatives and government employees fail to negotiate a contract it is proper

to close down the system. Undeniably it is this kind of example that downgrades the profession and helps to promote disorder by young people inside and outside the classroom. The strike disrupts and interferes with the formal education of the student. It also encourages bad citizenship.

The legislatively declared policy of PERA is to resolve disputes...As a practical matter under PERA school strikes have multiplied, with Pennsylvania having the worst record of school stoppages in the nation. The school child is the victim of this approach to the solution of labor disputes between the teachers and the School Board. The circumlocutory language of PERA cannot change the fact that a public school strike is contrary to the best interest and welfare of the every child affected.

...The strike provisions of PERA relating to public school teachers cannot be reconciled with the Public School Code and the Constitution of Pennsylvania. The portion of PERA legalizing strikes by public school teachers is unconstitutional...Courts should face the issue squarely and declare PERA unconstitutional insofar as it legalizes strikes by public school teachers (Opinion, Butler, 1978).

The Pennsylvania Supreme Court considered Judge Kiestler's Opinion-- and vacated it.

Following the hearing, in the Warren case, the judge commented on the evidence he had heard about irreparable harm:

The basic problem we have [is] whether or not irreparable harm exists under Holland. I enjoyed listening to the experts.

Almost every day of the week I hear experts in one field or another. I am always delighted to hear them because a man spends a lifetime acquiring an expertise and he comes into court and fortunately we are in a position where we can share listening to it.

[The teachers' expert and the board's expert] are talking about the same thing. Here are two fellows who have been called and they can't agree. Their discord in agreement is unbelievable. We are talking about the education of kids. You look at it from this point of view, that you can't just talk about Christmas vacations being delayed or going to be curtailed. You can't talk about whether or not summer vacations are going to be affected if you push the 180 days through every day but Sundays or legal holidays.

I don't (sic) look at it from the point of view of young kids walking up and down the street carrying a picket sign. That's the most devastating thing you can imagine. Can you imagine a kid walking up and down the street with a sign saying, "fire my

teacher?" That's a terrible thing.

Youngsters, just by virtue of just common sense and by experience, we all have, usually has a great fondness for a classroom teacher. Always had and let's hope that they always do have, and when a situation comes about that somehow a youngster is alienated from the class room teacher even if it is for a brief period of time, that's a devastating event. I think we all acknowledge that's some of the fall out of this type of labor dispute, but that's there and it has to be acknowledged.

The fact that the financial aspects of the school district is in jeopardy and it is, I can't take the position this strike is going to end tomorrow or the next day or the next.

I am not at liberty as Doctor Cofl to speculate in the future irreparable harm, when it will commence or if it will commence. We are not in a position to do that, because my memory is immediate and I pick up this knowledge -- I picked up this knowledge somewhere today, but there are 30,000 kids out there and 1400 teachers, let alone the administrators, clerks, cafeteria people, whatever they all are.

This situation affects their every movement of thinking. Right now each and everyone of them let alone the untold parents that are affected by this work stoppage, these are the things I have to think about. I can't just say to myself, well, you know, irreparable harm will commence in this area or certain days will commence in this area or another date and whatever the case may be. It doesn't work like that.

The substance of all the facts overwhelmingly demonstrates to this Court that irreparable harm does exist. It exists to the School Board. It exists to the teachers. It exists to the kids. It exists to the community in which that school district exists. Everybody suffers each and every passing moment that this work stoppage continues.

...the purpose of the Public Employment Relations Act was to preserve to the public the benefits of those services for which they pay, and to me that is the overriding consideration in this whole picture. Teachers, public employees just don't fill the same shoes as the people in the private sector. They forfeit, by virtue of this statute, certain rights and privileges and that's what the teachers in the Warren District have done. They have forfeited their strike right, their right to strike by withholding services when irreparable harm exists. That's not pleasant, but it is a fact, it is a fact, and the obligation of this Court is to see that the public receives service, receive the service that they are entitled to receive by virtue of the statute.

I say this because I am going to issue that injunction... (Transcript, Warren, 1978: 115-118).

In the end, it was an experienced labor attorney who most succinctly (and not unsympathetically) characterized the position and the actions of judges involved in teacher strike injunction cases:

Q: Judging from the cases you've handled, what is the basis of the judge's decision? How often does he really and honestly decide to issue on the basis of irreparable harm or to what extent is he influenced by other factors? And if so, what are those factors?

A: Well, you know, I think it's very difficult to tell sometimes what factors really are influencing the judge. Everybody likes to think that somehow, the law and judges work in a very scientific manner. But the fact of the matter is they don't, particularly when you get into this area, where they have a great deal of discretion whether or not to issue an injunction. It can depend on his values. The judge may just have a philosophical bent that he doesn't like unions, he doesn't like strikes, he clearly doesn't like illegal strikes. And frankly, what is the political makeup of his constituents? You get down into an area where you've got a very heavy labor population, you've got a lot of people used to being on strikes. You've got elected judges. You're going to be elected by these people. The judge may not want to be perceived to be anti-labor. And he's going to quite often be a little more leery about finding irreparable damage in issuing the injunction. It gets right down to such things sometimes as how busy is the judge? Is he right in the middle of a great big jury trial? Or at this particular point when this thing's coming up, maybe his schedule isn't quite as bad and he feels, "Well, I've got a little more time to cajole the parties and try to get an agreement." There's all of these factors that come in here. And quite often you never really know what is motivating him either to grant an injunction or not grant an injunction. You just never know. But it gets right down to that judge's personal feelings, experiences. And he's always got the law (Interview, teacher organization attorney).

A management attorney expressed a similar view:

You've got to remember that if the trial court decided in its discretion not to give us the temporary injunction on the basis of the irreparable harm standard, it would not have been because of the failure of proof, but because it just didn't want to (Interview, management attorney).

These comments are apt summaries of the judicial views expressed in the preceding quotations.

Summary: The Law in Action

Plaintiffs', defendants', and judges' views of the irreparable harm standard are so divergent that it requires effort to recall that, in principle at least, all three groups are talking about the same thing. The past, present, and projected experience of each party is so unique that there is virtually no common denominator. For school managers, the overriding objective is to get children back in school; injunctions are seen as instrumentalities toward that end, and claims about irreparable harm become necessary in order to activate the instrument. If the instrument can be activated without the claims, the task is eased. If the claims are necessary, they will be presented. But in the end the claims are driven less by the direct evidence of harm than by the goal of obtaining a favorable court ruling. Arguments of harm are arrayed cafeteria-style, in hopes that the judge will find something persuasive.

For defendants, the principal objective is to provide the conditions whereby the dispute underlying the strike can be settled. To attain that end, injunctive relief must normally be delayed as long as possible, if not altogether avoided. Irreparable harm arguments, and challenges to the plaintiffs' proofs of harm, provide a convenient device for protracting litigation and, occasionally, for avoiding an unfavorable court ruling.

Judges are caught. Sworn to uphold the law and to protect the public interest, both action and inaction have uncertain consequences for both the law and the public interest. Rulings based on the irreparable harm (or similar) standards inevitably incorporate the judge's personal biases, for the objective meaning of the standard simply is not clear. Faced with such a dilemma, it is hardly surprising that judges are inclined to push settlement efforts, to postpone legal proceedings, to lean on both parties, and occasionally to lash out in anger at those deemed responsible for their predicament.

SUMMARY AND DISCUSSION

In this report we have described the "law in books" and the "law in action" pertaining to use of the irreparable harm standard in injunction proceedings which are aimed at halting teacher strikes. The report summarizes a much larger body of findings which are presented in a series of technical appendices. (The appendices, in turn, are highly distilled summaries of masses of data on teacher strikes collected during the period from July 1978 through December 1978). Let us now summarize the summary.

The use of labor injunctions was considered by two-thirds of the school boards which experienced teacher strikes in 1978-79. More than half of this group took the additional step of filing a petition for injunctive relief. Our focus was upon the ensuing legal events, particularly with reference to the irreparable harm standard. Those

events were shaped in part by the statutory and case law which prevailed in the setting where injunctive relief was sought, and in part by the objectives and perceptions of the plaintiffs, defendants, and judges involved in the injunction proceedings. In most states the statute-books provide little explicit direction to the courts concerning the standards to be employed in injunction proceedings which grow out of teacher strikes. However, there are two small groups of states which have provided some legislative direction. Statutes in Nevada, Iowa, Florida, and Maine indicate that the courts need not utilize the irreparable harm standard as a prerequisite to issuing injunctive relief. However in Alaska, Hawaii, Oregon, Pennsylvania, Vermont, and Wisconsin the statutes appear to direct the courts to withhold issuing injunctive relief in legal strikes until such time as the court finds a clear and present danger or threat to the public health, safety, or welfare. (The details of phraseology vary among these states, but in each case the language appears to be akin to the irreparable harm concept.) Thus a few state legislatures have rejected the irreparable harm standard, others have embraced it, and most have said nothing.

In the courts, which must act on injunction requests whether or not there is statutory guidance, two distinct traditions are apparent in appellate opinions. The oldest and still dominant position holds that strikes are (a) enjoined simply because they are illegal, or (b) enjoined because they are illegal and therefore harmful. In both (a) and (b) plaintiffs need do no more than demonstrate that a strike is current or imminent, and to make the traditional assertions that failure to enjoin the strike will result in irreparable harm. The validity of these assertions is not contested and supporting statements, if presented, are not strictly scrutinized. The second tradition, whose origins lie in the 1968 Holland case, contends that illegal strikes are not enjoined without a showing that failure to enjoin will result in irreparable injury. State courts in New Hampshire, Rhode Island, Idaho, and Wisconsin have moved toward adoption of the Holland rule. These states, plus those with limited right-to-strike laws, provide the settings in which irreparable harm (and its "clear and present danger" analog) is most likely to be litigated.

Our studies in two of these states--Michigan and Pennsylvania--yielded substantial evidence concerning the law in action. Plaintiffs, cognizant of the irreparable harm standard (Michigan) and the clear and present danger doctrine (Pennsylvania) typically delay seeking injunctive relief until a strike has been under way for some time. Such delay is believed to permit harm to "ripen" to the point where it may be construed as irreparable harm, rather than mere temporary inconvenience. Petitions for injunctive relief, and testimony in support of those petitions, describe a wide variety of arenas where irreparable harm is alleged to be occurring. Plaintiffs affirm that the district's financial posture, the continuity of students' educational programs, the particular needs of special education students, the burdens on graduating seniors, and disruption

in the community collectively constitute irreparable harm.

Defendants respond by challenging the evidence. They say that neither state aid nor instructional days will be lost, as the strike days will be re-scheduled. There is no empirical evidence that student learning is adversely affected by strikes, and in any case, the professional staff is accustomed to all sorts of disruptions and can make necessary adjustments to overcome them. Finally, it is alleged that an injunction will make things worse, not better, if teachers must teach without a contract, and if the conditions which precipitated the strike are not rectified.

Judges, faced with such conflicting evidence and testimony, have expressed considerable frustration. Some, such as Judge Kiester in Pennsylvania, seek firmer standards of decision: Kiester sought to have strikes declared unconstitutional, and hence enjoined on that ground. Other Pennsylvania judges, and Michigan judges, have grasped at another justiciable standard: the school calendar. The criterion for awarding injunctive relief (and hence the definition of irreparable harm) becomes that of determining whether the strike has gone so long that it threatens completion of the mandated number of school days. Hence the courts' discretion is grounded not on complex matters of pedagogical outcomes or community harm, but on a much simpler criterion.

A Field in Transition

In the past two decades teacher bargaining, teacher strikes, and anti-strike injunctions have become commonplace in the field of public education. The events have produced enormous stress, and there are continuing efforts to find policies by which to manage teacher-board conflict in ways which are less disruptive and harmful. Policies and strategies are evolving rapidly. Even in the brief period we studied, dramatic changes took place. Connecticut, evidently stunned by the bitter Bridgeport strike at the beginning of the school year, amended its statutes to provide for binding arbitration. At the beginning of the 1979-80 school year a teacher strike in Vermont forced the courts in that state to confront some of the anomalies in its laws. Oregon amended its statute to indicate that the financial and economic consequences normally incident to a strike do not constitute grounds for injunctive relief (Bureau of National Affairs, 1979). The possibility of damage suits against teacher organizations is being explored (Interview, teacher source). Several cases in Pennsylvania were testing the meaning and operation of the 180-day rule, which evidently is working in favor of teachers, not school boards. The courts themselves, it appeared, were displaying a hardened attitude toward teacher strikes. Jailing of striking teachers, and the levying of massive fines, seemed to be on the increase. Finally, management strategists were expressing less inclination to resort to the courts for relief; the desire to impose economic pressures on teachers, and to avoid the

possibility of judicial interference in negotiations, warranted efforts to stay out of court (Interviews, board sources). Clearly the function of the labor injunction and of the irreparable harm standard have not stabilized. Our conclusions and observations should be viewed in that light.

Irreparable Harm: Issues and Problems

Our examination of the use of the irreparable harm standard has brought us to a number of observations and perceptions. In view of the changing state of the phenomena we have studied, it is not surprising to find that the observations and perceptions are not neatly connected and cannot be logically arranged. Indeed, to present the observations in a systematic way would imply the existence of phenomenological regularities which do not exist. What follows then, is simply a list of concluding observations.

1. Contrary to our initial hopes, the use of the irreparable harm standard has not stimulated the collection or application of empirical data concerning the effects of strikes. As nearly as we can ascertain, there have been only four systematic efforts to identify such effects, and all have been inconclusive (Brison, 1978; Lytle and Yanoff, 1973; Hashway, 1977; Kehoe, 1977). One possible explanation for the absence of pertinent research findings is that strikes--or at least the strikes thus far encountered in the U.S.--simply do not produce irreparable harm. Another explanation is that interest and/or resources for conducting the necessary studies do not exist. A third is that the tools of social inquiry have been misdirected, or are not appropriate for the examination of strike consequences. In any event, despite nearly 2000 teacher strikes in the past two decades, evidence about their effects is virtually non-existent. The social science evidence which might inform judicial decisionmaking on harm simply does not exist.

2. The irreparable harm standard and its analogs are, at present, judicially unmanageable. Use of the standard virtually forces courts to rely on either (a) their personal views and experiences about education and teachers and community disruption, or (b) arbitrary standards such as the 180-day rule, or (c) legalisms such as "the public interest," "right to an education," and "sovereignty." But reliance on these decisional bases does little to enhance the credibility or legitimacy of the judicial function. The credibility of the courts undoubtedly affects compliance with court orders. In view of the apparent arbitrariness of decisions to enjoin strikes, it is not surprising that teachers defy court orders more often than they comply with them.

3. Use of the irreparable harm standard drives both plaintiffs and defendants into positions where they have to argue in ways which may run against their own best interest. As we anticipated at the outset of this study, teachers are uncomfortable in arguing that

the evidence on school effects does not support the notion that a strike is harmful. The teachers' interest, after all, requires public and professional conviction that teaching does make a difference, and that the difference is important. However, contrary to our initial expectations, the teachers' discomfort is not nearly as important as anticipated. Teachers are willing to acknowledge that strikes are inconvenient and may even cause harm. But the evidence to date permits teachers to say that the harm is not irreparable. Thus teachers can admit to board allegations of harm, but challenge them on the basis of board claims that there is irreparable harm. Further, the teachers have discovered that they can argue in relative terms: strikes are no more harmful than other disruptions, and in any event the harm associated with a court-ordered return to work may exceed the harm associated with continuing a strike until settlement.

An unexpected finding was the extent to which the irreparable harm standard occasionally forces plaintiffs to argue in ways which are against their own interest. For example, when boards are trying to operate schools during a strike, they have to tell the public that things are alright, but the court has to be persuaded that harm is occurring or is imminent. Another problem was apparent in Pennsylvania, where boards are finding that invoking the 180-day rule precludes a strike strategy which reaches into teachers' pocket-books. That is, the only way to affect teachers financially is to refuse to schedule make-up days. Yet, to obtain injunctive relief, it is necessary to argue that the relief is needed in order to secure a full school year. As boards increasingly turn to strike management strategies which focus on financially penalizing teachers, the 180-day standard for defining harm may become a burden for boards.

4. Teachers frequently can turn the irreparable harm standard to their own use. By forcing boards to produce evidence of harm teacher attorneys can protract injunction proceedings, providing extra days for negotiating teams to arrive at settlements. Moreover, hearing proceedings which focus attention on the frailty of board allegations of harm serve to build morale among strikers, and may serve to reduce public support for the board's position. Most significantly, perhaps, is the fact judges may be persuaded to take informal notice of the irreparable harm argument, and such notice may encourage the court to take an active role in seeking settlement of the underlying dispute. That is, even if the harm standard is not formally applied, it may be informally applied, may serve to delay judicial issuance of injunctive relief and may simultaneously encourage judicial efforts to promote settlement.

5. In view of the above, it is not at all clear that school districts and managers are well-served by legislative and judicial efforts to force boards to seek injunctive relief (as required by the Taylor Law in New York State). Nor is it apparent that statutes which permit courts to waive the irreparable harm standard always are

useful to plaintiffs. The purpose and effect of such statutes is to make injunctive relief quickly and easily available. But the perceived unfairness of such a process may encourage teacher defiance of court orders. The teacher spokespersons with whom we spoke invariably indicated that they did not relish strikes, and that instant injunctions tended to polarize things rather than prompt settlements and the resumption of schooling.

Additional Inquiries

The strategies and tactics of teacher-board struggles are changing. School boards have developed increasingly sophisticated approaches to strike management. Today injunctions often are not the first or most important remedy considered. Increasing attention is being given to teacher dismissals. Many boards now are trying to keep schools open during strikes, thereby financially penalizing striking teachers. In addition penalties such as those provided in the Taylor Law are being sought, i.e., loss of dues' deduction privileges, fines against the striking organizations, and administratively-imposed fines against individual striking teachers. Teachers, of course, are responding with strike funds, with efforts to increase the powers and responsibilities of state employment relations boards, and with efforts to require binding arbitration as an additional impasse resolution mechanism. In the years ahead it will be useful to compare the different effects of alternative impasse prevention and impasse resolution strategies, and to reconsider the role of the injunction in the growing array of strike-related tools.

Particularly troublesome, to us, is the 180-day rule. Thus far teachers have undercut board charges of irreparable harm by pointing out that missed school days will be rescheduled. Most often, they are. But teachers, rather than students, may be the prime beneficiaries of the rule in many circumstances, for while it assures teachers their full pay, it disrupts--even if it does not irreparably harm--the lives of students who are innocent bystanders in most strikes. If boards feel that teachers ought to lose pay-days when they strike, perhaps they should adopt the New York policy, whereby teachers forfeit pay for strike days even if the days are rescheduled. The 180-day rule soon may collapse anyway, as education moves from time-based to learning-based modes of organization. It would be ironic indeed if irreparable harm litigation gets tied to a rule which itself is hollow. The 180-day rule warrants systematic analysis by students of public policy. (For a further discussion of alternative impasse procedures, see Douglas, 1979 and Jackson, 1979).

Finally, we come to the most obvious conclusion. Strikes have different effects on different people. Handicapped children are not affected in the same way as the non-handicapped. Older and younger children are differently affected. Some forms of learning

are more immediately and intensively affected than others. Homes where both parents work are affected in ways different from those where there is a parent in the house. If school systems close, the effects are different than they are if schools remain open with makeshift staffs. There are no clear lines which sort effects into "inconvenient," "harmful," and "irreparably harmful" categories. The effects will vary from person to person, school to school, district to district, and strike to strike. To date neither the personal knowledge of educators nor the systematic knowledge of researchers permits easy identification of the moment or place where irreparable harm is imminent. For the time being then, the irreparable harm standard offers a very weak foundation for building public policies dealing with teacher strikes. It is a standard without objectively-ascertainable substance.

REFERENCES

- Aboud, Antone and Aboud, Grace S. "The Right to Strike in Public Employment." New York State School of Industrial and Labor Relations, Key Issues Series, #15. Ithaca, New York: Cornell University, 1974.
- Advisory Commission on Intergovernmental Relations, Labor-Management Policies for State and Local Government. Washington, D.C.: Government Printing Office, 1969.
- Appleton, Susan Frellich. "Appellate Review of Proceedings to Enjoin Teachers' Strikes: The Irreparable Harm Standard and Some Thoughts on the Perceived Benefits of Education." Center for the Study of Law in Education, Graduate Institute of Education, Washington University, St. Louis, Missouri, unpublished, 1980.
- Berman, Harold J. and William R. Greiner. The Nature and Functions of Law. Mineola, New York: The Foundation Press, 1972.
- Bickel, Alexander. The Supreme Court and the Idea of Progress. New York: Harper, 1970.
- Brison, David W. "The Effects of Ontario Teachers' Strikes on Students." Ontario: Ministry of Education, 1978.
- Brominski, Bernard C. "From the Perspective of the Local Judge." 2 Journal of Law and Education (1973): 677-688.
- Bureau of National Affairs. Government Employee Relations Report RF 184, Washington, D.C., November 26, 1979.
- Burton, Jr., J. and Krider, C. "The Role and Consequences of Strikes by Public Employees." 79 Yale Law Journal (1970).
- Clevenger, Martha. "Teacher Strikes, 1960-68." Center for the Study of Law in Education, Graduate Institute of Education, Washington University, St. Louis, Missouri, unpublished, 1980.
- Cole, Stephen. "The Unionization of Teachers: Determinants of Rank and File Support." Sociology of Education XLI (Winter 1968): 66-87.
- Colton, David L. "The Influence of an Anti-Strike Injunction." Educational Administration Quarterly XIII (Winter 1977): 47-70.
- Colton, David L. "Collective Bargaining Laws and Teacher Strikes." Journal of Collective Negotiations in the Public Sector VII (1978): 201-212.
- Colton, David L. "A Teacher Strike in Collinsville, Illinois." Center for the Study of Law in Education, Graduate Institute of Education, Washington University, St. Louis, Missouri, unpublished, 1980a.

Colton, David L. "Two Missouri Strikes: Hazelwood and St. Louis." Center for the Study of Law in Education, Graduate Institute of Education, Washington University, St. Louis, Missouri, unpublished, 1980b.

Colton, David L. "State of Washington: Four Courts." Center for the Study of Law in Education, Graduate Institute of Education, Washington University, St. Louis, Missouri, unpublished, 1980c.

Colton, David L. "Statutory Provisions for Injunctive Relief in Teacher Strikes." Center for the Study of Law in Education, Graduate Institute of Education, Washington University, St. Louis, Missouri, unpublished, 1980d.

Corwin, Ronald G. "Professional Persons in Public Organizations." Educational Administration Quarterly I (1965): 1-22.

Douglas, Joel M. "Injunctive Relief in Public Sector Work Stoppages: Alternative Approaches." Labor Law Journal (July 1979): 406-415.

Education Commission of the States. Cuebook: State Education Collective Bargaining Law. Denver: Education Commission of the States, 1978.

Frankfurter, Felix and Greene, Nathan. The Labor Injunction. New York: McMillan, 1930.

Graber, Edith E. "Michigan: The Warren Consolidated Schools Strike." Center for the Study of Law in Education, Graduate Institute of Education, Washington University, St. Louis, Missouri, unpublished, 1980a.

Graber, Edith E. "Pennsylvania: The Butler Area School District Strike." Center for the Study of Law in Education, Graduate Institute of Education, Washington University, St. Louis, Missouri, unpublished, 1980b.

Graber, Edith E. "California: The Daly City Strike." Center for the Study of Law in Education, Graduate Institute of Education, Washington University, St. Louis, Missouri, unpublished, 1980c.

Graber, Edith E. "Survey of 1978-1979 Teacher Strikes." Center for the Study of Law in Education, Graduate Institute of Education, Washington University, St. Louis, Missouri, unpublished, 1980d.

Hashway, Robert. "Long range effects of teacher strikes on student attitudes." Educational Research Quarterly 2 (Spring 1977): 12-21.

Jackson, James J. "Public Employer Countermeasures to Union Concerted Activity." Journal of Law and Education VIII (January 1979): 73-98.

Kehoe, John T. "The effect of time spent in class and achievement." Division of Research, Bureau of Information Systems, Pennsylvania Department of Education, 1977. (Mimeographed)

Kheel, Theodore W. "Strikes and Public Employment." Michigan Law Review 67 (1969): 931-942.

Lieberman, Myron. Education as a Profession. Englewood Cliffs: Prentice-Hall, 1956.

Lytle, James H. and Yanoff, Jay M. "The effects (if any) of a teacher strike on student achievement." Phi Delta Kappan 55 (December, 1973): 268.

McDonnell, Lorraine and Pascal, Anthony. "Organized Teachers in American Schools." Santa Monica: Rand, R-2407-NIE, 1979.

Midwest Center for Public Sector Labor Relations. "Labor Legislation in the Public Sector." School of Public and Environmental Affairs, Indiana University, Bloomington, 1979.

Myers, Donald A. Teacher Power—Professionalization and Collective Bargaining. Lexington: D.C. Heath, 1973.

Phi Delta Kappa. A Decade of Gallup Polls of Attitudes Toward Education, 1969-1978. Bloomington: Phi Delta Kappa, 1978.

Pound, Roscoe. "Law in books and law in action." American Law Review 44 (1910): 12-36.

Rosenthal, Alan. Pedagogues and Power. Syracuse: Syracuse University Press, 1969.

Smith, Russell A., Edwards, Harry T., and Clark, Jr., R. Theodore. Labor Relations Law in the Public Sector. Bobbs-Merrill Co., 1974.

Weintraub, A.R. and Thornton, R.J. "Why teachers strike." Journal of Collective Negotiations 5 (1976): 193-206.

Wellington, Harry H. and Winter, Ralph K. The Unions and the Cities. Washington, D.C.: The Brookings Institution, 1971.

Zagoria, Sam, ed. Public Workers and Public Unions. New York: The American Assembly, Prentice-Hall, 1972.

Ziskind, David. One Thousand Strikes of Government Employees. New York: Columbia University Press, 1940.

Cases

Aliquippa School District v. Education Association, 97 LRRM 3128, Pa. Cmwlth. Ct., 1977.

Anderson Federation of Teachers v. School City of Anderson, 72 LRRM 2466, Ind. Sup. Ct. (1969).

Armstrong Education Association v. Armstrong School District, 291 A.2d 120, Pa. Cmwlth. Ct., 1971.

Bellefonte Area Education Association v. Board of Education, 304 A.2d 922, Pa. Cmwlth. Ct., 1973.

Board of Education v. Redding, 59 LRRM 2406; Il. Sup. Ct., 1965.

Bristol Township Education Association v. School District, 322 A.2d 767, Pa. Cmwlth., Ct., 1974.

Buffalo Board of Education v. Pisa, 389 N.Y.S. 2d 938 (1976).

Butler Area School District v. Pennsylvania State Education Association, et al., Ct. of Common Pleas, Butler County, Pa., No. 78-002 (1978).

Central Kitsap School District v. Central Kitsap Education Association, Superior Court, Kitsap County, Washington, No. 78-2-00607-2 (1978).

City of Manchester v. Manchester Teachers Guild, 131 A.2d 59, Sup. Ct. of N.H., 1957.

City of Pawtucket v. Pawtucket Teachers' Alliance, 141 A.2d 624, Sup. Ct. of R.I., 1958.

Hawaii Public Employment Relations Board v. Hawaii State Teachers Association, 511 P.2d 1080, Hawaii Supreme Ct., (1973).

Joint School District No. 1 v. Wisconsin Rapids Education Ass'n., 234 N.W.2d 289, Wis. Sup. Ct., 1975.

Los Angeles Unified School District v. United Teachers, Los Angeles, 24 Cal. App. 3d 142 (1972).

Norwalk Teachers' Association v. Board of Education of City of Norwalk, 83 A.2d 482, Sup. Ct. of Errors of Ct., 1951.

Philadelphia Federation of Teachers v. Ross, 301 A.2d 405, Pa. Cmwlth. Ct., 1973.

San Diego Unified School District v. San Diego Teachers Association, Superior Court, County of San Diego, California, No. 399394 (1977).

School Committee of Westerly v. Westerly Teachers Association, 299 A.2d 441, Sup. Ct. of R.I., 1973.

School District for the City of Holland v. Holland Education Association, 157 N.W.2d 206, Mich. Sup. Ct., (1968).

School District No. 351 Oneida City v. Oneida Education Association, 567 P.2d 830, Supreme Court of Idaho, 1977.

Seattle School District No. 1 v. Seattle Teachers Association,
Superior Court, King County, Washington, No. 851172 (1978).

State of Delaware v. Delaware State Educational Association, Del.
Ch., 326 A.2d 868 (1974).

Timberlane Regional School District v. Timberlane Regional Education
Association, 317 A.2d 555, Sup. Ct. of N.H., 1974.

Appellate Review of Proceedings to Enjoin Teachers' Strikes:
The Irreparable Harm Standard and
Some Thoughts of the Perceived Benefits of Education

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CONTENTS

I. IRREPARABLE HARM: ASCERTAINING THE STANDARD..... 1

II. STRIKES IN THE PUBLIC SECTOR: A BRIEF OVERVIEW 4

III. ENJOINING TEACHERS' STRIKES 6

 A. An Introductory and Intuitive Appraisal 6

 B. Appellate Court Review of Litigation to Enjoin
 Teachers' Strikes 6

 1. Illegality as a Sufficient Condition 6

 2. Illegality as Conclusive Evidence of Harm 8

 3. Harm Presumed from Factual Generalizations 8

 4. Judicial Assessment of Irreparable Harm 9

 (a) Illegal Strikes 9

 (b) States Recognizing a Right to Strike 12

 5. Analysis: The Pennsylvania Model 15

IV. BEYOND ENJOINING TEACHERS' STRIKES; EDUCATIONAL HARM
AND BENEFIT 17

 A. The Importance of Education 17

 B. Particular Educational Goals and Gains 18

 C. Lost School Time, the Disruption Standard, and
 Irreparable Harm 19

 D. When Schooling Misfires 21

V. CONCLUSION 22

FOOTNOTES 24

Teachers' strikes, occurring now in well-publicized flurries,¹ present a host of practical problems for those individuals associated directly or indirectly with the affected school districts. Such strikes not only occasion obvious and immediate interruptions in work for the teachers themselves and in schooling for their pupils but also entail a number of secondary consequences that frequently include the loss of day care for the school-age children of working parents, unavailability of free lunch programs, jeopardy of state financial assistance to local education programs, college admissions difficulties for high school seniors, and general community discontent.²

Teachers' strikes often prompt judicial proceedings for injunctive relief, typically initiated by the teachers' employer, the local board of education or its equivalent.³ In other contexts a court asked to grant an injunction, an equitable remedy, ordinarily requires the party seeking such relief to establish the inadequacy of a remedy at law and the threat of irreparable injury absent the requested judicial action.⁴ The issue posed is one of fact calling for case-by-case appraisals of the likely consequences of both the injunction sought and continuation of the conduct challenged.⁵ The irreparable harm standard generally controls regardless of the activity to be enjoined or the complexity of the factual questions a rigorous application of that test would generate.⁶

In many proceedings to enjoin teachers' strikes, however, such careful inquiry regarding harm evaporates or at best receives judicial lip service.⁷ Instead, mechanical deference to statutory labels of illegality and unexamined presumptions of the requisite existence and quality of the resulting injury often replace an exacting consideration of the facts.⁸

This paper undertakes a study of teachers' strikes and the irreparable harm standard; its purpose is both to explore judicial application of that standard in proceedings to enjoin such strikes and to venture an analysis of the patterns that emerge, based in part upon judicial and statutory treatment of schooling outside the narrow context of strike injunctions. Part I of this paper offers as background a short but more detailed consideration of the equity standards controlling injunction proceedings generally. Part II, again to provide background, briefly examines the law, both legislative and decisional, governing strikes by teachers and other public employees. Appellate court opinions reviewing the issuance or non-issuance of injunctions against teachers' strikes form the nucleus of Part III while Part IV assesses those opinions in light of commonly held legal views of educational benefit and harm surfacing in a variety of statutes and judicial statements. In particular, Part IV attempts to provide a broader theoretical basis for analyzing the irreparable harm standard and to suggest the special considerations that may guide courts asked to enjoin teachers' strikes.

I. IRREPARABLE HARM: ASCERTAINING THE STANDARD

An injunction is an equitable remedy of considerable clout.¹⁰

Sometimes issued after only a truncated judicial proceeding,¹¹ an injunctive order, which directs the defendant to act or to refrain from acting, can intrude significantly on defendant's freedom;¹² it operates in personam and disobedience of even an improperly issued injunction may evoke enforcement by contempt of court.¹³ Given the power and potential abuse of this form of relief, an injunction is available only under limited circumstances: where necessary to prevent the imminent occurrence of irreparable harm.¹⁴

Although irreparable harm or its equivalent¹⁵ is a pervasive standard in injunction litigation regardless of jurisdiction, a definitive and universal formulation of that test defies precise identification.¹⁶ Stringently applied, irreparable harm requires plaintiff to establish the threat of an immediate¹⁷ and either noncompensable¹⁸ or incalculable¹⁹ injury outweighing the risk of comparable losses to the party to be enjoined.²⁰ In its blandest articulation the standard amounts to no more than the general prerequisite for any type of equitable relief: the inadequacy of a remedy at law.²¹ And in some cases irreparable harm receives no mention at all,²² although it nonetheless apparently serves as a silent criterion of uncertain force.²³

The difficulty in reaching a definitive understanding of the irreparable harm test is exacerbated by the fact that its immediate context, proceedings for injunctive relief, come in assorted varieties. A plaintiff seeking to halt a particular activity may, before asking for a final and permanent injunction,²⁴ request a temporary restraining order²⁵ or a preliminary injunction,²⁶ short-term equitable remedies designed to preserve the status quo until the court can conduct a full review of the merits of the case.²⁷

Assessments of irreparable harm assume particular significance in this latter context of preliminary relief, often ex parte proceedings unaccompanied by either the procedural safeguards of a full hearing or a determinative resolution of claims required for a final remedy,²⁸ because there the judicial task is simply one of freezing the present position of the parties.²⁹ The irreparable harm test functions there not as an unequivocal forecast of ultimate success or failure³⁰ - for an irremediable change in the status quo may be precisely the outcome of a decision on the merits - but rather as a vehicle for ensuring that until such decision nothing is done that cannot be undone. The standard, therefore, is not one of injury or loss simpliciter but interim detriment that is irreversible and noncompensable.³¹

Where considerations of irreparable harm surface in the context of permanent injunctive relief, recitations of the test are similar³² although its function changes slightly. Here an injunction issues to prevent injury to plaintiff's interests which a court has determined, on the merits, deserve protection that cannot be guaranteed by the prospect of subsequent money damages, or other corrective action.³³ "Irreparable harm" in this context not only describes the quality and degree of injury but also establishes that the injury is one that infringes a legal right of the complainant.³⁴

Where the conduct that is the subject of an injunction proceeding already carries a legislative label of illegality,³⁵ the

irreparable harm standard might appear looser³⁶ but should operate in a no less exacting manner.³⁷ Illegality, though an informative variable in the evaluation and weighing of competing interests necessary for the final resolution of a case, is not always an accurate litmus for irreparable harm, particularly at the preliminary-injunction stage.³⁸ While the illegality of defendant's conduct may signal the existence of the requisite harm to a legally protected interest of the complainant,³⁹ such illegality does not necessarily mean that harm is irreparable.⁴⁰ Because in some cases the extent of injury caused by illegal conduct is measurable and money damages or other corrective relief⁴¹ available to make the complainant whole, illegality cannot alone serve as a proxy for the traditional equitable requirements.⁴² Professor Leubsdorf provides a useful illustration of this point: although illegal "job discrimination compromises the social interest in human dignity, ...that injury may be small if the discharged employee immediately wins another job with greater prestige and pay."⁴³ Denial of a preliminary injunction in such a case subjects the complainant to no risk of irremediable loss -- notwithstanding the illegality of the conduct he seeks to halt.

Although this logic may apply with equal force in some proceedings for final injunctive relief,⁴⁴ it is most compelling where preliminary relief is sought.⁴⁵ Yet, although almost all of the teachers' strike cases analyzed below⁴⁶ concern grants or denials of preliminary relief,⁴⁷ those cases diverge significantly in their treatment of a family of characteristics commonly labelled "illegality."⁴⁸ Some courts find illegality itself a sufficient basis for enjoining a teachers' strike while others undertake a more searching inquiry into the strike's effects.⁴⁹ Because of these differing approaches, it is important to clarify at the outset the contours of the traditional irreparable harm test and the reasons why illegality and irreparable harm are not necessarily one and the same.

The pair of features not invariably characteristic of illegality that emerge as the core requirements of irreparable harm from the welter of expressions and applications of that test, then, are incalculability and noncompensability. These critical variables, consistent with the limiting purpose of the irreparable harm standard, appear repeatedly in case law⁵⁰ as well as in statutory formulations of the criteria for injunctive relief.⁵¹ A demonstration of incalculable or noncompensable injury, moreover, is typically required before the issuance of an injunction even where the subject of the lawsuit makes such showings extraordinarily difficult and complex. For example, where a court confronts an activity alleged to constitute an environmental nuisance, use of the irreparable harm test may well require considerations of projected long-term environmental damage and the probabilities of health hazards which will become manifest, if ever, only during subsequent decades.⁵²

Yet even in these cases no short cut exists, for factual complexity, like illegality, provides no ready basis for presuming the required irreparable harm⁵³ or avoiding the traditional rigors of the test. Any departures from the norm significantly undercut the

characteristically limited availability of injunctive relief⁵⁴ — a consequence which, desirable or not, at least deserves evaluation.⁵⁵

II. STRIKES IN THE PUBLIC SECTOR: A BRIEF OVERVIEW

Work stoppages by public school teachers constitute only one species of strikes by governmental employees.⁵⁶ As in the broader context of public sector strikes generally, analysis of irreparable harm in proceedings to enjoin teachers' strikes occurs in most courts in the shadow of significant statutory overlay. The legislation applicable in such litigation is of two sorts: statutes classifying as illegal some or all public sector strikes and those regulating the procedure for the issuance of injunctions in labor disputes.

New York's Taylor Law⁵⁷ provides an instructive example of the former. Under that statute, "[n]o public employee or employee organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage, or condone a strike."⁵⁸ Further, that law requires the appropriate chief legal officer to apply to the supreme court for an injunction against such activities and for punitive measures against violations of any injunctions so issued.⁵⁹ Other state legislatures have essayed more discriminating classifications. In Alaska, for example, public employees fall into three different categories, essential, semi-essential, and non-essential, depending upon the work performed;⁶⁰ in turn, the extent of an employee's statutory right to strike rests on his taxonomy.⁶¹ Still another approach is typified by Vermont legislation reflecting, at least verbally, in its limited authorization of public school teachers' strikes, the same kinds of considerations that a court asked to enjoin such a strike might review under the irreparable harm standard.⁶²

A variety of reasons underlies such limitations on work stoppages in the public sector: first, the power of public employee unions are arguably not constrained by the ordinary forces of the market which operate in the private sector,⁶³ and second, strikes by public employees, unlike those undertaken by their private counterparts, can in the course of the ensuing collective bargaining process generate substantial political repercussions.⁶⁴ Related and equally significant justifications include the perceived indispensability of services performed by public employees (and the concomitant harm resulting from the interruption of such services)⁶⁵ as well as the affront to governmental authority epitomized in a public sector strike.⁶⁶

Whether sound or questionable, legislation embodying such reasoning does not necessarily curtail public sector strikes in fact,⁶⁷ but it does constitute a significant variable in many judicial analyses of the availability of injunctive relief against such strikes.⁶⁸

A very different kind of statute affecting public sector strikes are those state enactments modeled on the federal Norris-LaGuardia Act⁶⁹ and designed to circumscribe judicial power to intervene in labor disputes generally.⁷⁰ Such "anti-injunction" statutes, although now limited in force and reach by subsequent amendment⁷¹ as well as by

decisional gloss,⁷² have served as an important transition from an era of "government by injunction"⁷³ to the New Deal regularization of the collective bargaining process through an elaborate statutory framework⁷⁴ which, inter alia, reduced substantially the opportunities for judicial involvement in labor disputes.⁷⁵

The important feature of such legislation is the recognition that judicial intervention in labor disputes markedly affects the collective bargaining process - with a decided advantage for management.⁷⁶ A preliminary injunction issued against a strike may "irreparably harm" the employees' ability to press their demands by neutralizing the only real bargaining leverage they have. As Felix Frankfurter and Nathan Greene pointed out in their seminal analysis⁷⁷ that ultimately spawned the Norris-LaGuardia Act,⁷⁸ the ordinary tests for injunctive relief provide only a partial understanding of the labor injunction:

In labor cases, however, complicating factors enter. The injunction cannot preserve the so-called status quo; the situation does not remain in equilibrium awaiting judgment upon full knowledge. The suspension of activities affects only the strikers; the employer resumes his efforts to defeat the strike, and resumes them free from the interdicted interferences. Moreover, the suspension of strike activities, even temporarily, may defeat the strike for practical purposes and foredoom its resumption, even if the injunction is later lifted. Choice is not between irreparable damage to one side and compensable damage to the other. The law's conundrum is which side should bear the risk of unavoidable irreparable damage. Improvident denial of the injunction may be irreparable to the complainant; improvident issue of the injunction may be irreparable to the defendant. For this situation the ordinary mechanics of the provisional injunction proceedings are plainly inadequate. Judicial error is too costly to either side of a labor dispute to permit perfunctory determination of the crucial issues....⁷⁹

Significantly, however, many courts have construed such restrictive legislation to address only strikes against private employers;⁸⁰ thus, since late in the 1950's, as public employees began to bargain collectively and then to strike as a part of that process,⁸¹ injunction suits have proceeded unfettered by such jurisdictional limitations.⁸² Coupled with the restrictive statutes described above governing strikes by public employees and often requiring applications for injunctive relief,⁸³ this phenomenon should have produced a rich and extensive body of judicial assessments of precisely what, if any, irreparable harm flows from such strikes - including strikes by public school teachers.

As the following part of this paper demonstrates, such analyses emerge as the exception rather than the rule.

III. ENJOINING TEACHERS STRIKES

A. An Introductory and Intuitive Appraisal

Teachers' strikes, like other public sector strikes, evoke a number of intuitive analyses. Although schooling is obviously important - as reflected in the virtually universal attendance requirements in the United States⁸⁴ - a missed day of public school as the result of a teachers' strike is, equally obviously, less imminently threatening to the public weal than a day without fire or police protection occasioned by a strike.⁸⁵ Indeed, school days are often cancelled for a variety more and less compelling reasons: snow, contagion, lack of heating, teachers' meetings, or a school sports activity.⁸⁶ Still more individual students may miss required school time for reasons ranging from visits to prospective college campuses to disciplinary suspensions. The assortment of annual school vacations, usually Christmas, spring, and the long summer break, not to mention the weekly free Saturday and Sunday, further attest to the fact that a day without schooling by itself bodes no certain or immediate disaster for the student or the general public.⁸⁷

Teachers' strikes, however, frequently persist for more than a single day.⁸⁸ Still, even when confronted with a teachers' strike of moderate length, common sense dictates, at least at first blush, that the harm, if any, caused is of a qualitatively different sort than that occasioned by a work stoppage by other groups in the public sector such as police, fire, or public hospital employees.⁸⁹ As one analysis has observed, "[l]ost school days can be recaptured [at other] times of the year...."⁹⁰ One might conclude, therefore, that whatever harm a teachers' strike engenders, that harm is not per se irreparable.⁹¹

At some point, however, even in an analysis confined to a strike's impact on the time the legislature has allocated to be spent inside the schoolhouse, the possibility of "recapturing" by rescheduling missed school days becomes onerous and impracticable.⁹² Whether or not a teacher's strike reaches this point after one week or, say, five rests on variables peculiar to each school district and pupil. These variables, including inter alia, formulae for computing state aid,⁹³ the particular educational program in question, and the school's possible role as "babysitter" for working parents, all seem, therefore, among the legitimate considerations in a proceeding brought to enjoin a teachers' strike. In other words, given the conventional prerequisites for injunctive relief,⁹⁴ the broad questions become whether, when, and why a teachers' strike causes or threatens irreparable harm.

Appellate court treatment of such questions provides the focus of the following section.⁹⁵

B. Appellate Court Review of Litigation to Enjoin Teachers' Strikes

1. Illegality as a Sufficient Condition. Initially, appellate court treatment of injunctions issued to halt teachers' strikes appear divisible into several general categories. In the first fall those opinions

affirming the granting of injunctive relief on the sole ground that such a strike is illegal, either by virtue of a statutory label or general considerations of public policy. These courts hold illegality or contravention of public policy a sufficient condition for an injunction; as a result, the factual context of any particular teachers' strike plays a negligible role in the judicial analysis.

Representative cases surface in a number of jurisdictions. Restrictive Florida legislation⁹⁶ prohibiting strikes by public employees has spawned appellate opinions approving injunctions against teachers' strikes on the basis on such statutes alone.⁹⁷ These courts cite as controlling the legislative intent to prevent such strikes⁹⁸ coupled with the conclusion that permitting governmental employees so to challenge the authority of government invites anarchy.⁹⁹ In Florida the only threat that need be established as the factual basis for the issuance of injunctive relief is the bare threat of a public employee strike itself.¹⁰⁰

California case law evinces a similar approach, albeit one anchored to public policy concerns rather than to statutory bars. Disregarding arguments that the issuance of an injunction requires a showing of irreparable harm, one district court of appeals has upheld the injunctions granted below on the theory that public employees lack the right to strike in the absence of legislative authorization.¹⁰¹ Precedent in the state had stressed the policy rule against public employee strikes,¹⁰² although occasional and casual references to facts suggesting "harm" have appeared as dicta.¹⁰³

Judicial pronouncements in Connecticut follow this pattern. In 1951, the Connecticut Supreme Court, asked by a teachers' union for a declaratory judgment regarding its right to strike, stated that public sector strikes directly contravene public policy, thus entitling the government to injunctive relief against such activities.¹⁰⁴ The court's opinion did not mention any need to establish irreparable harm.¹⁰⁵

More recent case law in that state holds this rule controlling "under proper circumstances,"¹⁰⁶ and legislation now prohibits certified professional employees from striking and authorizes enforcement of this prohibition in superior court.¹⁰⁷

Similarly, in Indiana prior to the enactment of a statute barring strikes by governmental employees,¹⁰⁸ the supreme court upheld a temporary restraining order against striking teachers¹⁰⁹ because public strikes "lead to anarchy"¹¹⁰ and are "unthinkable and intolerable."¹¹¹ This case, Anderson Federation of Teachers v. School City of Anderson¹¹² is particularly significant because the vigorous dissenting opinion¹¹³ clarifies the manner in which the majority allowed considerations of public policy to replace the traditional injury into irreparable harm. Rejecting the conclusion that Indiana has ever espoused a public policy barring public sector strikes¹¹⁴ and quoting judicial insistence from Michigan that injunctions against teachers' strikes issue only upon a showing of "violence, irreparable injury, or breach of the peace,"¹¹⁵ the Anderson dissent points out the "completely peaceful and minimally disruptive"¹¹⁶ nature of the strike in question. The dissent therefore

elucidates the conceptual and empirical distinctions between illegality and irreparable harm; the two notions arguably embody very different standards that, as applied, might yield frequently different outcomes in proceedings for injunctive relief.¹¹⁷

2. Illegality as Conclusive Evidence of Harm. An analytically kindred group of cases is comprised of those in which the irreparable harm standard figures nominally but illegality remains the controlling variable. In these cases, illegality or contravention of public policy provides the basis for a judicial presumption of harm. Unlike the previous group of cases discussed, however, these courts do mention the traditional criteria for injunctive relief.¹¹⁸

Thus, for example, an appellate court in New York reviewing injunctions issued under that state's restrictive Taylor Law¹¹⁹ has observed that "[b]y its very nature a strike by public employees constitutes an irreparable injury to the public order and welfare, and therefore the lack of factual allegations in the affidavit alleging irreparable harm is not fatal to the court's granting of the injunction."¹²⁰ Although other opinions from New York appear to require a slightly more rigorous application of the irreparable harm test,¹²¹ nonspecific references to a record below¹²² and the ordinary deference accorded to trial court findings¹²³ leave uncertain the precise extent to which the traditional formulation of the irreparable harm test operates here as a constraint on the issuance of injunctive relief. A fair reading of these opinions against the background of the Taylor Law,¹²⁴ however, indicates that the irreparable harm standard plays a diluted role at best with illegality serving as the determinative factor.

Kentucky law reflects the same approach. Emphasizing the violation of "settled public policy"¹²⁵ embodied in any public employee strike and an injured party's right to protection from the consequences of such illegal activities,¹²⁶ the Court of Appeals of Kentucky has upheld permanent injunctive relief issued against striking teachers.¹²⁷ Despite such emphasis, the court nonetheless acknowledged the irreparable harm limitation by finding in the record below "ample proof of irreparable impairment of the school system."¹²⁸ Because of both failure to review that proof in any but a generalized fashion and ambiguous references to the school system as a whole -- rather than particular groups of constituents who might suffer harm¹²⁹ --, the case leaves unanswered questions concerning the factual components of the proof cited and the role played by illegality in the trial court's determination.

3. Harm Presumed from Factual Generalizations. Here the categories of judicial analysis began to blur. For example, while appellate opinions in Illinois tend to articulate with somewhat greater precision than those reviewed above the injurious impact of a teachers' strike, generalizations assuming harm rather than factual scrutiny of the strike in question predominate.¹³⁰ Although these courts adopt a more exacting use of the irreparable harm standard where a court has taken procedural shortcuts,¹³¹ the general rule that can be extracted is that careful case-by-case assessment of the effects of a teachers' strike is unnecessary given the presumed public interest in unimpeded

governmental functions, including education.¹³² Though the irreparable harm test thus emerges as only a nominal requirement, the Illinois courts' collective treatment of the issue does recognize it as a factual question and suggests a range of possible victims whose injuries might deserve consideration in a less relaxed application of that test.¹³³ In this respect, the analysis, though still clouded by presumptions, moves beyond that undertaken in New York and Kentucky.

Cases from Delaware and New Jersey differ slightly in language but still fit comfortably within this category. In both states the appellate courts invoke an irreparable harm test that demands no more than the ordinary requirements of equitable relief generally, the inadequacy of money damages.¹³⁵ Then, without identifying the particular injuries perceived to be caused or threatened by the teachers' strike in question,¹³⁶ these courts endorse the issuance of injunctive relief stressing, again, illegality and generalizations of public harm.¹³⁷ These cases contain no persuasive explanation, moreover, why such presumed harm is irreparable rather than remediable;¹³⁸ thus the standard applied bears only a superficial resemblance to the standard articulated.

4. Judicial Assessment of Irreparable Harm.

(a) Illegal Strikes. In notable contrast to those courts approving injunctive relief on the basis of illegality or unexamined presumption, some appellate opinions have attempted to determine what kind of injury, if any, results from a teachers' strike. The oft-cited pathbreaker dominating this category is the Supreme Court of Michigan's 1968 opinion in School District of the City of Holland v. Holland Education Association.¹³⁹ There, in reviewing the issuance below of a temporary injunction restraining striking teachers from withholding their services, the court held that no-strike legislation for public employees did not compel courts to enjoin all public sector work stoppages;¹⁴⁰ instead, public policy and constitutional constraints require such injunctive relief to rest upon "a showing of violence, irreparable injury, or breach of the peace."¹⁴¹ The record before the Michigan Supreme Court indicated only that, as a result of the strike, "the district's schools would not open, staffed by teachers on the date scheduled for such opening."¹⁴² Given the lack of proof to support the relief ordered below, the court dissolved the temporary injunction and remanded the case for further proceedings.¹⁴³

Holland is significant but only in a negative sense. It does not by itself offer any distinct view of the sorts of facts the court would have found acceptable to support the temporary injunction.¹⁴⁴ The case does, however, deflate the dominance of both legislative labels and the assumed public interest in the school year's adherence to a particular schedule. Holland therefore invites the kind of factual analysis the irreparable harm test has produced in other contexts. In addition, the opinion suggests that irreparable injury may have some clearly demonstrable components or functional equivalents - "violence" and "breach of the peace" - without disclosing whether or how a plaintiff might establish the requisite harm in a case where a teachers' strike has created neither violence nor breach of the peace.

In Timberlane Regional School District v. Timberlane Regional Education Association,¹⁴⁵ the New Hampshire Supreme Court relied upon

Holland to affirm the trial court's refusal to enjoin a strike by two-thirds of the district's teachers. Despite the illegality of such strikes¹⁴⁶ the precedent upholding the injunctions issued on the basis of that illegality alone,¹⁴⁷ the Timberlane court reasoned that irreparable harm must be found for a court to issue the extraordinary remedy of an injunction.¹⁴⁸ Factors to be considered in such cases include "whether recognized methods of settlement have failed, whether negotiations have been conducted in good faith, and whether the public health, safety and welfare will be substantially harmed if the strike is allowed to continue."¹⁴⁹ What variables does the phrase "public health, safety and welfare" embrace? Does the court have in mind intrusions other than the "violence" and "breach of peace" mentioned in Holland?¹⁵⁰ Because the outcome is the denial of injunctive relief, this formulation remains vague, adding little content to the "negative significance" of Holland.¹⁵¹

Idaho's adoption of the Holland principle provides no additional information regarding the contours of the irreparable harm test. Describing public school teachers' strikes as "illegal"¹⁵² -- notwithstanding the absence of a specific statutory prohibition¹⁵³ -- the Supreme Court of Idaho has reversed injunctions issued below, citing Holland with approval.¹⁵⁴ The only discernable reasoning concerns not the impact of the strike itself but rather the projected impact of the requested injunctive relief on the collective bargaining process.¹⁵⁵ The court's primary concern seems to lie less with the application or content of the irreparable harm test than with the protection of the bargaining process adherence to that test promises.

The law from Wisconsin infuses the generalization that teachers' strikes cause harm with some content, albeit content with minimal analysis. In its 1975 opinion in Joint School District No. 1 v. Wisconsin Rapids Education Association,¹⁵⁶ affirming in part contempt citations issued below against striking teachers who had violated a temporary injunction, the state supreme court rejected illegality as a sufficient condition for enjoining a teachers' strike and stressed the necessity of a showing of irreparable harm.¹⁵⁷ According to the court, while strikes by firefighters or police officers cause irreparable harm per se, teachers' strikes do not;¹⁵⁸ in the latter context, a successful prayer for injunctive relief requires a demonstration of irreparable harm.¹⁵⁹

Although such reasoning suggests that the effects of a teachers' strike defy ready generalization and appears to contemplate factual assessments undertaken on a case-by-case basis, the court sustained the temporary restraining order issued below to halt a four-day strike on the basis of consequences obtaining from any teachers' strike: the incapacity of the school board to meet its statutory obligation to operate the schools, the inability of students to obtain the benefits of a tax-supported education, the potential loss of state financial aid,¹⁶⁰ parental non-compliance with the statutory duty to educate their children, and the unavailability of extra-curricular activities.¹⁶¹

Despite the apparent specificity reflected in this list, the court's considerations at bottom rest upon generalizations attributable

to any school strike; if these are the only facts necessary to establish irreparable harm, a per se rule like that controlling in strikes by police officers and firefighters¹⁶² re-enters the appraisal through the back door. In other words, although the determination of harm acquires a focus in Wisconsin Rapids, that focus still lacks the precision that a careful factual probe should yield.¹⁶³ Given the brief duration of the strike at the time the temporary restraining order was issued,¹⁶⁴ the court's superficial treatment of the situation offers little more information than the fact found inadequate by the Holland court: the failure of the schools staffed with teachers to open on time.¹⁶⁵

Part of the difficulty may stem from the failure of Wisconsin Rapids to distinguish harm from irreparable harm, that is, to explain why the "findings" cited¹⁶⁶ constitute irremediable injury.¹⁶⁷ This distinction and thus the shortcomings of the Wisconsin Rapids analysis, surface clearly in the 1973 opinion of the Supreme Court of Rhode Island in School Committee of the Town of Westerly v. Westerly Teachers Association.¹⁶⁸

Like Holland,¹⁶⁹ Westerly is cited often for the proposition that the teachers' lack of a right to strike does not automatically require injunctive relief¹⁷⁰ - in this case, an ex parte temporary restraining order.¹⁷¹ Noting that Rhode Island law disallows such an order to issue "unless it clearly appears from specific facts by affidavit or verified complaint that irreparable harm will result before notice can be served and a hearing held,"¹⁷² the court quashed the restraining order because "the mere failure of a public school system to begin its school year on the appointed day cannot be classified as a catastrophic event."¹⁷³ The court then explained:

We are also aware that there has been no public furor when schools are closed because of inclement weather, or on the day a presidential candidate comes to town, or when the basketball team wins the championship. The law requires that the schools be in session for 180 days a year. There is a flexibility in the calendaring of the school year that not only permits the makeup of days which might have been missed for one reason or another but may also negate the necessity of the immediate injunction which could conceivably subject some individuals to the court's plenary power of contempt.¹⁷⁴

The "flexibility" invoked by the Westerly court suggests that, whatever the harm wrought by a teachers' strike - presumptively including all of the effects noted in Wisconsin Rapids - ,¹⁷⁵ such harm can be remedied provided the length and timing of the strike do not breach some outer limit beyond which rescheduling of missed school days would become impossible.¹⁷⁶

Three years later in Menard v. Woonsocket Teacher's Guild-AFT,¹⁷⁷ the same court reviewed a preliminary injunction issued to halt an eight-day teachers' strike.¹⁷⁸ Though emphasizing irreparable harm as "a critical factor"¹⁷⁹ and the inadequacy of illegality standing alone,¹⁸⁰ the only facts cited in support of the injunction were those "attending disruption of the school calendar, i.e., an interference with the students' learning process; the failure to provide free school lunches for needy children; and the disadvantage seniors might experience from an untimely entry into the job market caused by a late school closing."¹⁸¹ Deferring to the trial court, the Rhode Island Supreme Court upheld the injunction.¹⁸²

When the Rhode Island Supreme Court predicates irreparable harm upon "disruption of the school calendar,"¹⁸³ it repudiates the significance of the "flexibility" it had stressed in Westerly.¹⁸⁴ Nonetheless, the specific variables noted by the court to support its conclusion in Menard merit further examination. Even if a temporary "interference with the student's learning process"¹⁸⁵ results in a recoupable loss,¹⁸⁶ that is not so clearly true with respect to other factors cited: missed lunches and delayed employability. Once past, those occurrences, particularly the latter, arguably cannot be remedied through rescheduled school days.¹⁸⁷

Throughout the opinion, moreover, the court's primary concern seems to lie with the progress and the effectiveness of the bargaining process itself; apprehensive of the spectre of an indefinite strike absent judicial action,¹⁸⁸ the court in Menard suggests that, regardless of the actual duration of the strike at the time the injunction is sought, the status of the negotiations between employer and employee will influence an appraisal of irreparable harm.¹⁸⁹

In 1976 the Rhode Island Supreme Court had still another opportunity to consider such questions. In The School of the City of Pawtucket v. Pawtucket Teachers' Alliance,¹⁹⁰ while verbally adhering to the constraints of Westerly,¹⁹¹ the court upheld a preliminary injunction issued by the superior court which had found, approximately eight days after the strike began,¹⁹² irreparable harm to the district's students.¹⁹³ The appellate opinion reflects little of the evidence introduced to support the findings of irreparable harm although the court does remark that seven educators testified that "the strike had not and would not cause irreparable harm."¹⁹⁴ Given the ordinary deference to the trial court's findings,¹⁹⁵ the evidence of "hopelessly deadlocked"¹⁹⁶ negotiations, and the apparently negligible role played by the illegality of the strike,¹⁹⁷ the court affirmed the injunction. But, again, nothing in the opinion suggests any specific facts peculiar to this teachers' strike - or any specific facts at all. The court thereby gives the impression, albeit unarticulated, that the "automatic-injunction" rule rejected in Westerly¹⁹⁸ has been replaced by an automatic-injunction rule resting on a different premise: the existence of the strike itself rather than its illegality. If any single variable emerges as particularly important, it is not the immediate impact on the students or public per se but instead the state of the bargaining process and what that portends for an end to the strike without court intervention.¹⁹⁹

(b) States Recognizing a Right to Strike. In those states where the legislature has not labeled all teachers' strikes illegal, one would expect to find a more highly developed application of the irreparable harm test. Unable to invoke statutory prohibitions as presumptive indicia of irreparable harm, courts in such states should be unable to rely on the generalizations characteristic of many of the opinions discussed above. Appellate opinions from Pennsylvania provide useful examples.²⁰⁰ Pennsylvania law prohibits strikes by most public employees only during the pendency of statutorily regulated negotiation and mediation.²⁰¹ If negotiation and mediation fail to produce an agreement, such a strike is not prohibited unless or until a court finds it creates "a clear and present danger or threat to the health

safety or welfare of the public."²⁰² A court may enjoin a prohibited strike upon the request of the public employer;²⁰³ that request is obligatory when a prohibited strike occurs.²⁰⁴

Appellate courts in Pennsylvania have generally, although not consistently, adopted a narrow construction of the statutory criterion. Armstrong Education Association v. Armstrong School District,²⁰⁵ decided in 1972, contains telling language. Teachers, who struck on the first day of school after a long, unsuccessful attempt to reach agreement,²⁰⁶ appealed from an injunction issued by the Court of Common Pleas following the introduction of evidence showing a laundry list of problems caused by the strike: jeopardy of state subsidies in the event of a shortened school year,²⁰⁷ cancellation of extracurricular activities and varsity sports, difficulties in obtaining qualified school bus drivers and in other aspects of student transportation, interruption of the routine office procedures and work of the Superintendent of Public Affairs, harassment of school board members, and disorder at school board meetings.²⁰⁸ Although the trial judge denied the requested injunction after one hearing held immediately after the start of the strike, he granted it following a hearing conducted two weeks later,²⁰⁹ finding that the evidence established the requisite "clear and present danger or threat to the health, safety or welfare of the public."²¹⁰ Cited specifically by the trial court were strained community relations reflected in the harassment of the school board and the loss of 12 school days with the concomitant disruption of routine procedures and jeopardy of state aid.²¹¹

Conceding its limited scope of review²¹² and concluding that the "clear and present danger or threat" standard contemplates a real, actual and existing danger or threat other than those "inconveniences" that are "normally incident to a strike by public employees"²¹³ the Commonwealth Court set aside the injunction issued below. The court reasoned that in legalizing some public sector strikes, the legislature "indicated its willingness" to tolerate those "inevitable inconveniences" falling short of the clear and present danger threshold.²¹⁵ It then determined that, although "clear and present," the disruption and harassment did not constitute a "danger" or "threat,"²¹⁶ and that the loss of school subsidies, although a danger, was not yet "clear and present," because of the still remaining opportunities of meeting the state's 180 instructional days minimum.²¹⁷ The court rejected the other evidence as simply the normal consequences of a teachers' strike: "If we were to say that such inconveniences, which necessarily accompany any strike by school teachers from its very inception, are proper grounds for enjoining such a strike, we would in fact be nullifying the right to strike granted by the legislature...."²¹⁸

One may draw a number of different conclusions from the analysis in Armstrong. First, one might construe the rigorous factual assessment undertaken by the reviewing court as a byproduct of Pennsylvania's peculiar statutory scheme with its partial legitimacy of public employee strikes and its unique "clear and present danger" limitation.²¹⁹ Read in this manner, the Armstrong reasoning offers little contribution to a general study of the irreparable harm standard in injunction proceedings against teachers' strikes. Alternatively, the "clear and present danger" test may be viewed as a codification of the traditional irreparable harm

test. In this context, the legality of some public sector strikes in Pennsylvania is largely irrelevant since, as suggested above, illegality has never been an accurate proxy for irreparable harm, despite the tendency of some courts to treat the two as equivalent.²²⁰ Under such an interpretation of Armstrong, that opinion becomes - at least superficially - a useful prototype for the kind of case-by-case inquiry that ought to characterize all proceedings brought to enjoin teachers' strikes. In that sense, moreover, Armstrong presents a sharper picture of the importance of the flexibility of the school calendar than did Rhode Island's Westerly;²²¹ as a result of this inherent adaptability, the factor that emerges as determinative is the ease with which the school district can reschedule missed instructional days in order to remain eligible for state financial assistance.²²² That variable will obviously change with the passage of time, thereby attaching considerable significance to the length of the strike and its timing in the course of the school year. Finally, such an analysis suggests that disruption of the academic program or of the learning process as well as interference with extracurricular activities, standing alone, are of de minimus legal import.²²³

The following year in Philadelphia Federation of Teachers v. Ross,²²⁴ the same court affirmed an order enjoining a teachers' strike. In support of this result the court cited evidence it found to exceed the inevitable inconveniences incident to such a strike; the possibility of increased gang activity by students out of school,²²⁵ a substantial increase in costs of police protection for public property,²²⁶ jeopardy of state financial aid to a "debt-ridden school district,"²²⁷ the prospective loss of an unknown number of school days (after the loss of 15 such days as the result of an earlier phase of the same labor dispute several months before),²²⁸ the particularly pronounced impact of such lost instruction on the substantial number of those who are under-achievers,²²⁹ and special problems posed for high school seniors seeking to qualify for college entrance.²³⁰

Several aspects of Ross merit attention. First, the court suggests that the narrow scope of appellate review virtually compels its decision to affirm;²³¹ yet the same constraints did not inhibit reversal of a similar injunction in Armstrong.²³² Only the more specific facts,²³³ though not clearly unique to this particular strike,²³⁴ cited in Ross and the inference that Philadelphia has problems not shared by other districts²³⁵ explain the divergent outcomes. Yet in Ross, unlike Armstrong, as Judge Blatt (the author of the Armstrong opinion) points out in dissent in Ross, the fact that strike began on the day of the hearing on the requested injunction and had only continued for four days when that relief was granted²³⁶ suggests that, whatever the harm caused by the strike, it had not matured to the point of its counterpart in Armstrong, the product of a two-week strike.²³⁷

Second, Armstrong and Ross differ in their recitations of the statutory test. While Armstrong reads the law to contemplate either the requisite "danger" or "threat" as one that is "clear and present" and affects "the health, safety or welfare of the public,"²³⁸ the Ross majority interprets the statute to demand either a "clear and present danger" or, alternatively, a "threat to the health, safety or welfare of the public."²³⁹ By divorcing "threat" from the "clear and present" requirement, the Ross majority adopts a relaxed view of the certainty and imminence of harm in

situations like the one before it where the strike in question had barely begun.²⁴⁰ But the anomaly is obvious: why should the legislature have imposed more stringent judicial limitations with respect to a danger already extant than with respect to one merely impending?²⁴¹

In addition, both Armstrong and Ross articulate concerns that the statutory test not be reduced to meaninglessness. Thus Armstrong points out that the legislature must have been willing to tolerate the ordinary and inevitable effects of public sector strikes, for to conclude otherwise would rob the enactment of all meaning.²⁴² In Ross, however, the same concerns stress a different point and support a different result: some effects of some strikes must create the requisite "danger" or "threat;" otherwise, the statutory threshold would be senseless.²⁴³

Finally, one feature shared by Armstrong and Ross deserves notation: in both, the real bottom-line injury that would or does trigger injunctive relief is a monetary one - loss of state subsidies.²⁴⁴ This point emerges equally clearly from subsequent cases; for example, in Bellefonte Area Education Association v. Board of Education,²⁴⁵ the Commonwealth Court reversed a preliminary injunction issued below on the ground that the duration of the strike (13 instructional days) at the time of issuance did not sufficiently jeopardize the receipt of state funds.²⁴⁶ In so holding, the Commonwealth Court rejected the notion that the strike's interference with a state-sponsored "quality assessment program" justified the injunction, reasoning that it was the sort of ordinary consequence the legislature anticipated in allowing public sector strikes.²⁴⁷

This analysis received further elaboration in Bristol Township Education Association v. School District,²⁴⁸ a 1974 opinion of the Commonwealth Court affirming an injunction issued to halt a strike found to have consumed 26 instructional days at a time when only 23 of those lost days could be rescheduled.²⁴⁹ Judge Blatt, writing for the majority,²⁵⁰ determined that the finding below of a probable loss of state subsidies from failure to meet the 180 day minimum requirement justified the granting of the injunction.²⁵¹ The 16 other enumerated injurious consequences of the strike found by the chancellor - ranging from complete denial of an education program for some students and difficulties posed for working mothers of school-age children to lost wages for bus drivers and cafeteria workers and interruption of a community swim program,²⁵² - were acknowledged as only the basis for a potential cumulative "clear and present danger or threat to public health, safety or welfare;"²⁵³ in the absence of an extraordinarily prolonged strike or other aggravating circumstances, however, the legislature presumably had directed judicial tolerance of such "inconveniences."²⁵⁴ A dissenting judge wrote, inter alia, that the majority had equated a district's inability to offer 180 school days with the "clear and present danger or threat" required by statute, a per se rule for injunctive relief the legislature had not intended.²⁵⁵

5. Analysis: The Pennsylvania Model. Taken together, these appellate opinions from Pennsylvania suggest that case-by-case factual assessments of the kind contemplated by the traditional irreparable harm test,²⁵⁶ do

not defy judicial competence in proceedings to enjoin teachers' strikes; that is, such strikes create situations lending themselves to such judicial analysis.

Under the Pennsylvania approach, however, the single variable providing the apparent focus in each case for such individualized consideration is the status of the state's financial aid to the district.²⁵⁷ Yet, the traditional formulation of the irreparable harm test makes such a focus anomalous, if one assumes some rough functional equivalence between that test and Pennsylvania's statutory standard.²⁵⁸ Loss of state subsidies, standing alone, constitutes precisely the sort of injury that traditional equity principles would have found inappropriate for injunctive relief -- for such a loss is both calculable and compensable by money damages.²⁵⁹ Authority from California, moreover, imposing upon striking teachers liability in tort for the damage incurred on account of their work stoppage completes the analysis:²⁶⁰ a loss or threatened loss of state financial assistance by itself should not support an injunction against a teachers' strike, for money damages assessed against the wrongdoers arguably provide adequate compensation. Even without borrowing law from other jurisdictions, however, the point is particularly troublesome in Pennsylvania where the complex state subsidy formula could mean in some cases that the provision of fewer than 180 instructional days results in a net financial gain to the district.²⁶¹

Apart from possible loss of state subsidies and factors like those found in Ross, e.g., increased gang activity, presumably characteristic of only certain school districts,²⁶² however, the Pennsylvania cases also show that many of the consequences ensuing from a teachers' strike are quite generalizable and predictable; that is, they are effects that any teacher's strike would produce. These include the kinds of factors listed in Bristol and held not necessarily to compel injunctive relief: complete denial of an education program to some of the district's pupils; injurious effects on working mothers; permanent loss of some instructional days; lost wages of cafeteria workers and bus drivers; unavailability of special programs for the mentally retarded, brain-injured, and socially and emotionally disturbed students; problems for college-bound high-school seniors; unavailability of county services for students with hearing, vision, or speech disabilities; suspension of extracurricular programs; and suspension of community programs for driver education, swimming (including life-saving), adult education, citizenship training, high school instruction and enrichment, cooperative work experience, driver improvement (for retention of operating privileges by violators), itinerant teachers (federally funded), social work, and free lunches.²⁶³

Whether or not such effects should satisfy a court's reading of the traditional irreparable harm test or a probable equivalent like Pennsylvania's "clear and present danger or threat" standard,²⁶⁴ to the extent that the Pennsylvania courts are willing to classify these and related effects as the "inevitable inconveniences"²⁶⁵ accompanying

a teachers' strike, they confirm that generalization is not only possible in this context; it is also difficult to avoid.

The mere fact that the consequences of a teachers' strike are susceptible of generalization, however, does not reveal whether those consequences create irreparable harm, a clear and present danger, or simply an innocuous situation. In other words, predictable effects do not necessarily mean predictable harm. The easy leap that some state courts have made from the bare existence of a teachers' strike to irreparable harm²⁶⁶ rests on two assumptions: first, that such strikes entail certain predictable consequences and second, that such consequences generally cause legally cognizable harm. While the Pennsylvania cases seem ready to accept the first assumption,²⁶⁷ they expressly, and almost mechanically, reject the second.²⁶⁸

The next section of this paper attempts to analyze that second assumption as it emerges in case-law outside the strike context with a view towards gaining a better understanding of judicial perceptions of harm and benefit in the educational enterprise.

IV. BEYOND ENJOINING TEACHERS' STRIKES EDUCATIONAL HARM AND BENEFIT

The purpose of this section is twofold. It examines courts' concepts of educational harm and benefit in non-strike settings in order to assist in evaluating judicial assumptions that irreparable harm has occurred or may occur as the result of a teachers' strike; it also provides a framework for anticipating the lines of argument that courts may find persuasive when hearing cases concerning the propriety of enjoining teachers' strikes. Consistent with these theoretical goals, this analysis reaches beyond the narrow holdings of the cases and relies extensively upon broader bases, including some judicial dicta as well as reasoning by analogy.²⁶⁹

A. The Importance of Education

Courts presented with the opportunity to comment on the importance of education almost invariably begin with the United States Supreme Court's characterization in Brown v. Board of Education²⁷⁰ of education as an essential ingredient of a democratic society:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities.... It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.²⁷¹

In such enclaves to formal schooling²⁷² courts seem ready to presume the benefits of the process without close examination and evaluation of the specific aspects of any given school's program.²⁷³ Even in cases reaching arguably "anti-schooling" results, the general value of formal education is extolled.²⁷⁴

Confronted with challenges grounded in state or federal statutes or the constitutional guarantee of equal protection of the laws, courts have ordered school districts to provide full educational opportunities to bilingual,²⁷⁵ handicapped,²⁷⁶ "exceptional,"²⁷⁷ and retarded²⁷⁸ children.²⁷⁹ Implicit, and sometimes explicit,²⁸⁰ in such holdings is an assumption that schooling provides universal and unmatched rewards. The Supreme Court, moreover, in Mills v. Bradley,²⁸¹ has suggested that some of the benefits of public schooling transcend their immediate educational purpose: They can provide an acceptable remedy for the constitutional wrong of racial segregation.²⁸²

B. Particular Educational Goals and Gains

State legislation typically offers more detailed and comprehensive indicia of the purposes - and thus the presumed benefits - of schooling. Elementary schools in Pennsylvania, for example, must teach, inter alia, English, reading, writing, arithmetic, geography, and history.²⁸³ Legislative provisions for "quality control" of such course offerings in the form of certification requirements for teachers²⁸⁴ and strict limitations on home instruction as a substitute for compulsory school attendance,²⁸⁵ together with the recent advent of competency testing,²⁸⁶ all support the obvious inference that the supposed benefits of schooling include at least the mastery of subjects enumerated in such statutory lists.

Certain required courses, moreover, not only serve academic goals, but also attempt to fulfill the role, acknowledged in Brown,²⁸⁷ of "awakening...the child's cultural values."²⁸⁸ This statutorily imposed obligation for the schools to foster student "socialization"²⁸⁹ is embodied in the virtually universal requirement of civics training²⁹⁰ (often including specific emphasis on loyalty to state and national governments²⁹¹ and the "good, worthwhile, and best features and points of the social, economic, and cultural developments, the growth of American family life, high standards of living of the United States citizen, privileges enjoyed by such citizens, their heritage and its derivations of and in our principles of government"²⁹²) as well as courses in physiology and hygiene,²⁹³ alcohol and narcotics,²⁹⁴ humane treatment of birds and animals,²⁹⁵ and conservation of natural resources.²⁹⁶

In addition, some judicial opinions express the view that - apart from particular course offerings - attendance at school, in and of itself, facilitates student socialization.²⁹⁷ Accordingly, one justification for compulsory school attendance laws and the complementary limitations of home instruction²⁹⁸ is the recognized importance of "personal inter-communication among the students."²⁹⁹ Similarly,

teachers not only instruct their students but also serve as role models in this socialization process;³⁰⁰ thus, teachers typically must possess "good moral character"³⁰¹ in addition to academic certification³⁰² in order to be hired and to retain their jobs.³⁰³ The frequently touted functions of public education as a "melting pot,"³⁰⁴ "the great equalizer,"³⁰⁵ and a "marketplace of ideas"³⁰⁶ provide still additional reflections that the perceived benefits of schooling embrace more than narrow academic achievements.

C. Lost School Time, the Disruption Standard, and Irreparable Harm

When a teachers' strike causes schools to close, the perceived benefits discussed above become unavailable - at least temporarily - to the student population. An almost irresistible corollary of the Brown panegyric³⁰⁷ is that any loss of scheduled school time occasions judicially cognizable detriment.³⁰⁸ The critical question, however, is whether such a loss even presumptively constitutes the sort of irreparable harm contemplated by the traditional standard for injunctive relief.³⁰⁹

The Supreme Court's treatment of Goss v. Lopez,³¹⁰ a post-Brown student suspension case, provides a basis for a more probing analysis. Not only did the Court in Goss describe a student's suspension from school for ten days or less³¹¹ as an irreparable loss of educational benefits,³¹² but the Court also held that even a ten-day removal from school occasions a sufficiently substantial detriment to require pre-suspension procedural due process safeguards.³¹³ Generally, the Court has required procedural protections prior to deprivation of a liberty or property interest only when the loss is of such a nature that any subsequent proceedings could not provide adequate compensation - that is, only when the injury, once inflicted, is irreparable.³¹⁴

That the Supreme Court regards unwarranted time out of school as an irreparable injury is further supported by contrasting Goss with Ingraham v. Wright,³¹⁵ where the Court refused to mandate even minimal procedures for determination of guilt before the imposition of corporal punishment upon a student.³¹⁶ According to the Ingraham Court, which found civil and criminal proceedings subsequent to the punishment sufficient remedies for the child wrongfully punished,³¹⁷ the common-law practice of corporal punishment satisfies the requirements of the due process clause.³¹⁸ The Court distinguished Goss, stating that such post-deprivation proceedings would not have served the necessary deterrent or remedial function in suspension cases.³¹⁹ Arguably, then, the difference between Ingraham and Goss is that any wrongful physical injury is compensable by damages, while a monetary award will not make whole the child wrongfully suspended: the loss of educational benefits caused by absence from school is irreparable.³²⁰

As the strike cases themselves indicate, however, not all teachers' strikes result in a net loss of school time.³²¹ Often the missed school time is made up after the strike by scheduling weekend class sessions or an extension of the academic year.³²² During some teachers' strikes, moreover, schools do not close; non-striking teachers, substitute teachers, parents and community members may keep the school open

and require students to attend class regularly.³²³ Arguably, therefore, - no matter how lofty the judicial perceptions of schooling - in strikes where lost school time can be made up, or is never lost initially, the student may appear not to suffer a deprivation constituting the irreparable injury required for injunctive relief.

Loss of school time, however, is not the only situation in which a court may discern a deprivation of educational benefits. In Tinker v. Des Moines School District,³²⁴ the Supreme Court suggested that disruption in and of itself in the school setting may substantially impair a child's education.³²⁵ Had the Tinker student's wearing of an armband - an act of symbolic speech protesting the Vietnam War³²⁶ - "materially disrupted classwork or involved substantial disorder or invasion of the rights of others," the school could have prohibited the exercise of this first amendment right.³²⁷ Comparable logic has persuaded a federal district court to rule that procedural safeguards must precede a student's involuntary disciplinary transfer even where that transfer does not occasion loss of any scheduled school time.³²⁸ Reasoning that "any disruption in primary or secondary education... is a loss of educational benefits and opportunities,"³²⁹ the court found Goss controlling.³³⁰ These and similar suggestions that educational disruption must be avoided wherever possible³³¹ parallel the ease with which many courts find (or presume) irreparable harm from the mere existence of any teachers' strike.³³²

Still additional support for a broad-based³³³ disruption approach emerges from case-law concerning teacher misconduct. Emphasizing that a teacher serves not only as a transmitter of knowledge but also as a role model for students,³³⁴ a number of courts have upheld teacher dismissals for conduct - whether undertaken inside³³⁵ or outside the classroom³³⁶ - deemed inconsistent with the teacher's duties to foster respect for authority³³⁷ and to demonstrate a character and demeanor worth of emulation.³³⁸ Even courts that have recognized that some such dismissals may implicate first amendment³³⁹ or other constitutional guarantees³⁴⁰ have suggested the special duties of a teacher as role model.³⁴¹

Such concerns have found legislative expression as well. Pennsylvania, for example, has statutorily listed a number of valid causes for termination of a teacher's contract³⁴² consistent with the goal of protecting "an extremely vulnerable and sensitive segment of our society (students)."³⁴³ The statute requires teachers not only to conform to Board of Education procedures and school rules³⁴⁴ but also to answer all questions put to them³⁴⁵ and to refrain from questioning openly the superintendent's or principal's authority or violating his directives.³⁴⁶

Given these legislative and judicial perceptions of the limits of acceptable teacher behavior, a court may well consider a strike, particularly an illegal strike,³⁴⁷ a blatant flouting of authority causing irreparable injury to a teacher's ability to foster student obedience to and respect for authority.³⁴⁸ On the other hand, since many evaluations of alleged teacher misconduct have expressly invoked

local community standards as the gauge for determining precisely what constitutes teacher misconduct,³⁴⁹ illegality alone may not be determinative. Indeed, the modern trend seems to require a greater respect for the "rights" of teachers³⁵⁰ and a correspondingly narrower range of activities satisfying the disruption of "improper role model" standard.³⁵¹ There is some support, moreover, for the view that the teacher is simply one facet of the broader educational "marketplace of ideas."³⁵² Thus, a teacher properly cultivates in his students an ability to question; to do so, a teacher "must always remain free to inquire, to study and to evaluate...."³⁵³ If a strike can be viewed as a legitimate form of inquiry and evaluation,³⁵⁴ an active expression of the teachers' belief of unfair treatment and a step in a bargaining process aimed at reaching a compromise solution, then this aspect of a strike need not be the presumptive equivalent of irreparable harm.³⁵⁵

D. When Schooling Misfires

The cases and statutes examined so far rest on the premise that important and unique benefits inhere in all formal schooling; consequently, any waves -- or even ripples -- in that process presumptively injure students, perhaps irreparably. But any attempt to enhance the understanding of the strike situation through reference to non-strike cases requires consideration of the comparatively few and, for the most part, very recent occasions when courts and legislatures have found schooling to be of little or no value.

Less than a decade ago, statutory provisions for compulsory schooling routinely excluded various handicapped children from their scope.³⁵⁶ Based upon the legislative belief that such children could derive no profit from attending school, these exclusions exemplified the assumption that for certain exceptional categories of children the ordinary generalizations about the benefits of education prove untrue. Although a number of successful challenges, grounded on both state and federal constitutional arguments, have all but buried such automatic exclusions,³⁵⁷ the current drive to ensure educational opportunities for the handicapped has brought a more focused awareness that not all children will benefit from a standardized educational experience.³⁵⁸ Exceptional children require exceptional educational programs; without such programs, schooling for these children may be an empty gesture.³⁵⁹

In the wake of developing educational rights for children with special needs, moreover, has followed recognition that occasionally the academic and social skills schooling is supposed to promote are wholly inappropriate. In Wisconsin v. Yoder³⁶⁰ the United States Supreme Court upheld first amendment claims of the Amish who challenged the state's efforts to compel their children to attend school beyond the eighth grade. While recognizing the important state interests served by universal compulsory education,³⁶¹ the majority found that those who remain within the Amish fold would not profit from school attendance.³⁶² In concluding that continued attendance would unjustifiably endanger the free exercise of the Amish religious

beliefs,³⁶³ the Court explained that the case was "not one in which any harm to the physical or mental health of the child or to the public safety, peace, order or welfare has been demonstrated or may be properly inferred."³⁶⁴ Although the Court tried hard to make Yoder sui generis,³⁶⁵ the case indicates that a court may reasonably find that the benefits of schooling are not universal and that occasionally its loss does not spell imminent public harm.

Some courts have moved beyond Yoder to acknowledge that the disadvantages of compulsory schooling may outweigh its benefits even for those lacking the distinctive characteristics and needs of the Amish.³⁶⁶ A recent New York decision recognized that, if alleged truants could demonstrate that they were receiving no education, then they would have established that the state's compulsory attendance law, as applied, deprived them of liberty without due process of law.³⁶⁷ In other words, if true, the truants' assertions would make their forced schooling an arbitrary and unreasonable confinement.³⁶⁸ Though unsuccessful, plaintiffs in the recent "educational malpractice" cases³⁶⁹ seem to have been trying to make a similar point.³⁷⁰

In rare instances some courts have recognized the possibility that a school or a school district not only may be ill-suited to specific students; the entire school system may be malfunctioning. In Bichrest v. School District of Philadelphia³⁷¹ parents, taxpayers in the Philadelphia school system, brought a civil rights action for damages,³⁷² alleging that the Philadelphia schools' "inadequate education and unsafe conditions denied their son equal protection of the laws by depriving him of the opportunity to obtain a free education."³⁷³ These circumstances had forced plaintiffs to send their son to a private non-secular school for one semester at a cost of \$830.00.³⁷⁴ Although the court granted defendant's motion to dismiss because plaintiffs had not alleged that defendants personally had acted or refused to act to infringe the child's rights,³⁷⁵ the court stated that the complaint averred a sufficient constitutional deprivation to support a civil rights action.³⁷⁶ Analogously, other courts have viewed racial segregation as such a per se educational detriment that they have been willing to exempt students from mandatory attendance in a segregated school system.³⁷⁷

These examples show that courts need not remain chained to an idealized perception of education as an unquestioned and universal good. Once free of such myths, the courts should find no insurmountable barriers, theoretical or practical, presented by a case-by-case assessment of the consequences of a particular teachers' strike.

V. CONCLUSION

Given the traditional perceptions of education by courts and legislatures,³⁷⁸ the illegality of teachers' strikes and the automatic-injunction rule controlling in many jurisdictions³⁷⁹ should evoke little surprise. Yet just as some courts have begun to examine more critically the presumption of the universal benefits of schooling,³⁸⁰ so too have some courts demonstrated the feasibility of a more careful analysis of the effects of teachers' strikes - an analysis like that

required under the traditional irreparable harm test for injunctive relief.³⁸¹

Although the Pennsylvania appellate cases probably offer the most detailed and sustained example of a jurisdiction's cautious use of the injunction against teachers' strikes,³⁸² they do not provide a perfect model. First, their repeated focus on a monetary variable, a school district's eligibility for full state aid,³⁸³ is difficult to reconcile with the traditional search for incalculable and noncompensable injury to support injunctive relief.³⁸⁴ Second, while Pennsylvania's precise statutory directive may require a court to find that a strike creates or threatens certain harms, it remains unclear whether an injury so found must be "irreparable"³⁸⁵ according to traditional standards.³⁸⁶ In other words, because the Pennsylvania opinions concern final injunctive relief³⁸⁷ while many of the opinions analyzed from other jurisdictions concern temporary or preliminary relief,³⁸⁸ a direct comparison proves inconclusive.³⁸⁹ The Pennsylvania cases show, nonetheless, that some judicial appraisal of the impact of teachers' strikes is possible, even if that appraisal falls short of the evaluation contemplated by the irreparable harm standard. At the very least, the Pennsylvania cases suggest how a court might proceed after rejecting a presumption of irreparable harm.³⁹⁰

If courts do or should engage in a true case-by-case assessment of the effects of a teachers' strike, however, they need factual data to examine - particularly if they are to reach findings contradictory to the conventional wisdom on the universal benefits of schooling.³⁹¹ To date, such empirical evidence is scant. Although one social scientist has found that teachers' strikes do affect student attitudes,³⁹² another has found a negligible impact on student achievement.³⁹³ Obviously such data - though never cited in the appellate opinions - should be indispensable to any judicial analysis of harm or irreparable harm.³⁹⁴

FOOTNOTES

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1. See, e.g., Government Employee Relations Report 784:24-27 (1978). According to that tabulation, approximately 123 teachers' strikes in 21 states have occurred during the 1978-79 school year by November 6, 1978.

In 1978, the New York Times reported teachers' strikes in 15 states. See e.g., N.Y. Times, January 29, 1978, § XXII, at 1, col. 4; *id.*, May 3, 1978, § ____, at 21, col. 4; *id.*, Nov. 14, 1978, § III, at 6, col. 5; *id.*, Nov. 21, 1978, § II, at 8, col. 6. Those reports are necessarily incomplete because a strike from August 10 through November 5, 1978 stopped publication of that newspaper for that period of time. See also Ligtenberg, Some Effect [sic] of Strikes and Sanctions - Legal and Practical, 2 J.L. & Educ. 235, 235-36 (1973).

2. See questionnaire circulated to teacher organizations and school boards, on file in the offices of the Center for the Study of Law in Education, Washington University, St. Louis, Missouri, 63130.

3. This generalization, however, may not always prove accurate. In a recent strike by teachers in St. Louis, Missouri, for example, parents of students initiated a lawsuit to halt the strike. See St. Louis Post-Dispatch, Feb. 21, 1979, § B, at 1, col. 1 [?]; *id.* Feb. 26, 1979, § ____, at ____, col. ____; *id.*, March 3, 1979, § ____, at ____, col. ____; St. Louis Globe-Democrat, March 10, 1979, § A, at 1, col. ____.

Similarly, in *Rockwell v. Board of Ed.*, 57 Mich. App. 636, 226 N.W. 2d 596 (1975), parents, homeowners, and taxpayers filed suit to halt a teachers' strike. Compare *Dade County Classroom Teachers' Ass'n v. Rubin*, 238 So.2d 284 (Fla. 1970), cert. denied, 400 U.S. 1009 (1971) with *Allen v. Mauer*, 6 Ill. App. 3d 633, 286, N.E. 2d 135 (1972).

4. See, e.g., *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974) (civil rights action against discriminatory administration of criminal justice); *Beacon Theaters, Inc. v. Westover* 359 U.S. 500, 506-07 (1959) (antitrust litigation); *Adamszewski v. Local Lodge 1487, Internat'l*

Ass'n of Machinists and Aerospace Workers, AFL-CIO, 496 F.2d 777, 786 (7th Cir.), cert. denied, 419 U.S. 997 (1974) (effort to halt union disciplinary actions); Milton Roy Co. v. Bausch & Lomb, Inc., 418 F. Supp. 975, 981 (D.Del.1976) (patent litigation); United States v. City of Asbury Park, 340 F. Supp. 555, 567 (D.N.J.1972) ("Refuse Act" Mitigation); Orlando Sports Stadium, Inc. v. State ex rel. Powell, 262 So.2d 881, 885 (Fla. 1972) (public nuisance); Louisiana State Bd. of Educ. v. National Collegiate Athletic Ass'n, 273 So.2d 912, 914 (La. App. 1973) (effort to halt association's disciplinary proceedings); Cherne Indus. Inc. v. Grounds & Associates, Inc., 278 N.W.2d 81, 92 (Minn. 1979) (breach of covenant not to complete); Steffen v. County of Cuming, 195 Neb. 442, 446 238 N.W. 2d 890, 893 (1976) (action to halt flood damage). See also F. Frankfurter & N. Greene, The Labor Injunction 62 (1930).

According to Professor Dobbs, however, the term "irreparable injury" is not applied literally in permanent injunction cases, see notes 32-34 and accompanying text infra, and simply serves as another way of expressing the requirement that the remedy at law be inadequate. D. Dobbs, Remedies 108 (1973).

5. See Leubsdorf, The Standard for Preliminary Injunctions, 91 Harv. L. Rev. 525, 544 (1978) (preliminary relief); Note, Imminent Irreparable Injury: A Need for Reform, 45 S. Cal. L. Rev. 1025, 1030-31 (1972) (final relief) [hereinafter cited as Imminent Irreparable Injury].

6. See text accompanying note 52 infra.

7. See Part III, B infra.

8. Id. See also Leubsdorf, supra note 5, at 562-63.

9. The focus of this paper is appellate-court treatment of the "irreparable harm standard in proceedings to enjoin teachers' strikes. Other projects undertaken within the N.I.E.-funded study of which this paper is one part examine the same question at the trial court level. Field studies of selected teachers' strikes in progress have been conducted as well. See note * supra.

10. D.Dobbs, supra note 4, at 105; Leubsdorf, supra note 5, at 525.

11. D.Dobbs, supra note 4, at 106-07.

12. Id. at 105.

13. See id. and cases cited therein.

14. See id. at 105, 108.

15. Some cases speak consistently in terms of "irreparable injury," e.g., Morgan v. Fletcher, 518 F.2d 236, 239 (5th Cir. 1975); Doe v. Busbee, 471 F. Supp. 1326, 1329, 1334 (N.D.Ga. 1979). Others use "irreparable harm" and "irreparable injury" interchangeably, e.g. City of Benton

Harbor v. Richardson, 429 F.Supp. 1096, 1101 (D.Mich.1977); Tully v. Mott Supermarkets, Inc., 337 F. Supp. 834, 850 (D.N.J.1972); Federal Maritime Comm'n v. Atlantic & Gulf Panama Canal Zone, 241 F.Supp. 766, 781 S.D.N.Y.1965); Cherne Indus. Inc. v. Grounds and Associates, Inc., 278 N.W.2d 81, 91-92 (Minn.1979). See also e.g., Steeg v. Lawyers Title Ins. Corp., 323 So.2d 237, 239 (La.App.1975) ("irreparable loss"); Czarnick v. Loup River Pub. Power Dist., 190 Neb. 521, 525, 209 N.W.2d 595, 598-99 (1973) (irreparable damage).

16. Morgan v. Fletcher, 518 F.2d 236, 239 (5th.Cir.1975); City of Benton Harbor v. Richardson, 429 F.Supp. 1096, 1101 (D. Mich.1977).

17. See generally Imminent Irreparable Injury, supra note 5; Developments in the Law - Injunctions, 78 Harv. L. Rev. 994, 1005 (1965) [hereinafter cited as Developments].

18. E.g., Heldman v. United States Lawn Tennis Ass'n, 354 F. Supp. 1241, 1249 (S.D.N.Y. 1973); Washington Capitals Basketball Club, Inc. v. Barry, 304 F. Supp. 1193, 1197 (N.D.Cal.1969); Coster v. Department of Personnel, 373 A.2d 1287, 1289, 36 Md.App. 523 (1977).

19. E.g. Schuetzle v. Duba, 201 F.Supp. 754, 757 (D.S.Dak.1962); National Pac. Corp. v. American Com. Financial Corp., 348 So.2d 735, 736 (La. App. 1971); Harris County v. Southern Pac. Transp. Co., 457 S.W.2d 336, 339 (Tex. Civ. App. 1970).

20. Morgan v. Fletcher, 518 F.2d 236, 239 (5th Cir. 1975); Doe v. Busbee, 471 F.Supp. 1326, 1329 (N.D.Ga. 1979); McKay v. Hoffman, 403 F.Supp. 467, 470 (D.D.C.1975). See generally Leubsdorf, supra note 5, at 533-34, 544-45; Developments, supra note 16, at 1006.

21. See D. Dobbs, supra note 4, at 108.

22. See Leubsdorf, supra note 5, at 526.

23. The court in Ohio ex rel. Brown v. Callaway, 497 F.2d 1235, 1241 (6th Cir. 1974), a case cited by Professor Leubsdorf, supra note 5 at 526 n.9, endorsed the district court's list of four prerequisites for a preliminary injunction: "(1) that a substantial question is at issue; (2) that there is a possibility of success on the merits; (3) that a balancing of injuries to the parties requires preliminary injunctive relief; and (4) that the public interest would be served by such preliminary relief." 497 F.2d at 1241. Though not expressly including the irreparable harm test on that list, the court proceeded to approve the preliminary injunction issued below on the ground that the prohibited activity "would significantly or irreparably alter the natural environment" of the areas in question. Id. [emphasis added].

24. Professor Dobbs explains that:

The permanent injunction is the decree entered after a full opportunity to present evidence or after the decision on a

dispositive motion, such as a motion for summary judgment. It is not necessarily permanent in the sense that it can never be modified or dissolved. It is permanent only in the sense that it is intended as a final solution to the dispute rather than as a temporary or emergency one.

D. Dobbs, supra note 4, at 106.

25. See id. at 107

26. See id. at 106.

27. E.g., Blaylock v. Cheker Oil Co., 547 F.2d 962, 965 (6th Cir. 1976) (preliminary injunction); Exhibitor's Poster Exchange, Inc. v. National Screen Service Corp., 441 F.2d 560, 561 (5th Cir. 1971) (preliminary injunction); Bath Industries, Inc. v. Blot, 427 F.2d 97, 111 (7th Cir. 1970) (preliminary injunction); Metropolitan Atlanta Rapid Transit Auth. v. Wallace, 243 Ga. 491, 254 S.E. 2d 822, 824 (1979) (interlocutory injunction); Pure Milk Products Corp. v. National Farmers' Org., 64 Wisc.2d 241, 251, 219 N.W.2d 564, 569 (1974) (temporary injunction). But see Canal Auth. v. Calloway, 489 F.2d 567, 572-73 (5th Cir. 1974) (preliminary injunction); National Ass'n of Letter Carriers v. Sombrotto, 449 F.2d 915, 921 (preliminary injunction) (2d Cir. 1971); Leubsdorf, supra note 5, at 526, 534-35, 545-46.

28. See generally Leubsdorf, supra note 5.

29. Morgan v. Fletcher, 518 F.2d 236, 239 (5th Cir. 1975); D. Dobbs, supra note 4, at 109; F. Frankfurter & N. Greene, supra note 4, at 53-59. See cases cited in note 27 supra.

30. Nonetheless, one of the frequently repeated criteria for preliminary injunctive relief is the probability of success on the merits. E.g., Kampmeier v. Nyquist, 553 F.2d 296, 299 (2d Cir. 1977) ("a clear showing of either (1) probable success on the merits and possible irreparable injury or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting preliminary relief"); Blaylock v. Cheker Oil Co., 547 F.2d 962, 965 (6th Cir. 1976) ("substantial likelihood of success on the merits"); Ohio ex rel. Brown v. Callaway, 497 F.2d 1235, 1241 (6th Cir. 1974) ("possibility of success on the merits"); Hvamstad v. City of Rochester, 276 N.W.2d 632, 633 (Minn. 1979) ("likelihood of success on the merits"). Cf. Proceedings of the Thirty-Eighth Annual Judicial Conference of the District of Columbia Circuit, 77 F.R.D. 251, 273-73 (1977) (remarks of Judge Gesell concerning difficulty of ascertaining likelihood of success on the merits in applications for temporary restraining orders).

31. See Sampson v. Murray, 415 U.S. 61, 90 (1974) (quoting Virginia Petroleum Jobbers Ass'n v. FPC, 104 U.S. App. D.C. 106, 110, 259 F.2d 921, 925 (1958):

The key word in this consideration [of irreparable harm for purposes of temporary injunctive relief] is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

32. Compare Compact Van Equip. Co. v. Leggett & Platt, Inc. 566 F.2d 952, 954 (5th Cir. 1978); Nassau Sports v. Hampson, 355 F.Supp. 733, 736 (D.Minn. 1972) (preliminary injunctions) with Rondeau v. Mo-sinee Paper Corp., 422 U.S. 49, 60-65 (1975); Oppenheimer Mendez v. Acevedo, 388 F.Supp. 326, 337 (D.P.R. 1974) (final injunctions).

33. E.g., Cherne Indus. Inc. v. Grounds and Associates, Inc., 278 N.W.2d 81, 92 (Minn. 1979). Cf. Boomer v. The Atlantic Cement Co., 26 N.Y. 2d 309, 309 N.Y.S.2d 312, 257 N.E.2d 870 (1970) (where injunction against polluting by cement plant would result in serious economic loss, court chooses to grant injunction unless defendant pays permanent money damages to injured property owners).

34. E.g., Anderson v. Souza, 38 Cal.2d 825, 834, 243 P.2d 497, 502 (1952); Diastola v. Department of Reg. & Educ., 72 Ill.App.3d 977, 980, 391 N.E.2d 489, 491 (1979); Cather & Sons Const. v. City of Lincoln, 200 Neb. 510, 519, 264 N.W.2d 413, 417 (1978); Barrier v. Troutman, 231 N.C.47, 50, 55S.E.2d 923, 925 (1949). See Orlando Sports Stadium, Inc. v. State ex. rel. Powell 262 So.2d 881 (Fla. 1972); Leubsdorf, supra note 5, at 563 n.190 ("At a final hearing, the equitable balancing of injuries is...a rule of substantive law.")

35. E.g., pollution, employment discrimination and, in many states, strikes by public employees are statutorily prohibited. See notes 57-68 and accompanying text infra. Alternatively, some statutes may themselves be "illegal" because they violate constitutional guarantees. E.g., Rbe v. Wade, 410 U.S. 113 (1974) (Texas abortion restrictions violate due process clause); Brown v. Board of Educ., 347 U.S. 483 (1954) ("separate but equal" school laws violate equal protection clause).

36. See, e.g., Studebaker Corp. v. Gittlin, 360 F.2d 692, 698 (2d. Cir. 1966); ("A plaintiff seeking an injunction because of the defendant's violation of a statute is not required to show that otherwise rigor mortis will set in forthwith; all that "irreparable injury" means in this context is that, unless injunction is granted, the plaintiff will suffer harm which cannot be repaired."); Steeg v. Lawyers Title Ins. Corp., 323 So.2d 236, 239 (La. App. 1976) ("injunction may be sought, regardless of irreparable injury, when the course of action sought to be enhanced is reprobated by law"); Leubsdorf, supra note 5, at 562.

37. The term "illegality" requires some explanation. While one of the traditional maxims provides that equity will not enjoin a crime, "where such an act injures the property of the state, or

amounts to a public nuisance, the injunction will issue, even though it is also a crime...." H.L. McClintock, *Equity* 441 (2d ed. 1971). See D. Dobbs, *supra* note 4, at 115-18; *Developments, supra* note 17, at 1013-19. See also *Orlando Sports Stadium, Inc. v. State ex rel Powell*, 262 So.2d 881 (Fla. 1972) (injunction of activity designated by statute to be a public nuisance).

38. See Leubsdorf, *supra* note 5, at 562-63 & n.190. But see note 44 and accompanying text *infra*.

39. Leubsdorf, *supra* note 5, at 562 ("Courts are not free to find statutory violations harmless.") See *id.* at 563 n.190.

40. See note 31 *supra*.

41. See, e.g., *Oburn v. Shapp*, 521 F.2d 142, 151 (3d Cir.1975) (loss of benefits from defendants' allegedly discriminatory hiring practices compensable and therefore not appropriate for preliminary injunction). See also *Roe v. Wade*, 410 U.S. 113, 166 (1973) (adequacy of declaratory relief against enforcement of unconstitutional abortion restrictions).

42. See *The Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) (Emergency Price Control Act of 1942 does not allow court asked to grant injunction to ignore the traditional "requirements of equity practice with a background of several hundred years history."); *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 62 (1975) (district court "correct in insisting that respondent satisfy the traditional prerequisites of extraordinary equitable relief by establishing irreparable harm" in addition to violation of securities laws); *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*, 497 F.2d 203, 218 (9th Cir.) (dicta in antitrust case: "A traditional principle of equity is that no injunction will issue unless the allegedly unlawful conduct is likely to cause irreparable harm."), *cert. denied*, 419 U.S. 999 (1974) *Dreyer v. Jalet*, 349 F.Supp. 452, 467 (S.D.Tex.1972) ("Injunctions have been issued to preclude repeated or continuous physical assaults...which are of a peculiar nature and for which the aggrieved party had no adequate remedy.") And indeed, where money damages provide an adequate remedy, equitable relief of any sort is traditionally unavailable. H.L. McClintock, *supra* note 37, at 47-49.

43. Leubsdorf, *supra* note 5, at 562.

44. See cases cited in note 42 *supra* - all apparently final injunction cases.

45. Leubsdorf's explanation is persuasive. See Leubsdorf, *supra* note 5, at 563 n.190. See also note 31 *supra* (suggesting that the "irreparable" aspect of the formula plays a more significant role at the preliminary-relief stage).

46. See Part III *infra*.

47. This is so for a good reason: In labor disputes, "preliminary proceedings...make the issue of final relief a practical nullity."

F. Frankfurter & N. Greene, supra note 29, at 200. See id. at 79-81; notes 76-79 and accompanying text infra.

48. Some courts find conduct illegal and therefore enjoined even in the absence of a statutory prohibition by invoking "public policy". See, e.g., notes 101-03 and 108-17 and accompanying text infra.

49. See Part III infra.

50. See notes 18-19 supra and accompanying text.

51. E.g., Cal. Civ. Pro. § 526 (Deering 1972); Ill. Ann. Stat. ch. 69 § 3-1 (Smith-Hurd 1979 Supp.); La. Civ. Code Proc. Ann. art. 3601, 3603 (West 1961).

52. See, e.g., Reserve Mining Co. v. Environmental Protection Agency, 514 F.2d 492, 536 (8th Cir. 1975). See generally Imminent Irreparable Injury, supra note 5.

53. Indeed, factual complexity, and thus judicial inability to determine whether the requisite harm is occurring or threatens to occur, should theoretically produce judicial reluctance to issue injunctive relief. Instead, in some proceedings to enjoin teacher strikes, empirical uncertainties seem to yield the opposite result: more rather than fewer injunctions, See Part III infra.

54. See notes 10-14 and accompanying text supra.

55. See The Hecht Co. v. Bowles, 321 U.S. 321, 329-330 (1944) ("we are dealing...with the requirements of equity practice with a background of several hundred years of history. ... We do not believe that...a major departure from that long tradition ... should be lightly implied.")

56. See generally Anderson, Strikes and Impasse Resolution in Public Employment, 67 Mich. L. Rev. 943 (1969); Kheel, Strikes and Public Employment, 67 Mich. L. Rev. 931 (1979); Lev, Strikes by Government Employees: Problems and Solutions, 56 Mass.L.Q. 369 (1971); Mulcahy & Schweppé, Strikes, Picketing and Job Actions by Public Employees 59 Marq.L.Rev. 113 (1976); Revelos, Strikes by Public Employees: Is Tweedledee the Answer?, 15 S.Tex.L.J. 14 (1974).

57. N.Y. Civ. Serv. Law §§ 200-14 (McKinney 1973 & 1979 Supp.). See also Bernstein, Alternatives to the Strike in Public Labor Relations, 85 Harv. L. Rev. 459 (1971).

58. Id. at § 210(1).

59. Id. at § 211. Nevada law requires the issuance of an injunction against such strikes. Nev. Rev. Stat. § 288.240 (1973) Iowa's statute requiring temporary injunctions against such strikes explicitly eliminates any need for a finding of irreparable injury to plaintiff. § 20.12(3) Iowa Code Ann. (1978).

60. Alaska Stat. § 23.40.200 (1972).

61. Id. Strikes by essential employees (police; fire protection employees; employees of jails, prisons, and other correctional institutions; hospital employees) are prohibited. The statute gives semi-essential employees (utility, snow removal, sanitation, public school and other educational institution employees) the right to strike after mediation upon approval by a majority of the bargaining unit until the work stoppage has begun to threaten the health, safety or welfare of the public. Nonessential employees (all other public employees) have an unqualified right to strike if a majority of the bargaining unit approve.

62. Vt. Stat. Ann. tit. 16 § 2010 (Supp. 1979). The statute explicitly prohibits the issuance of a restraining order or an injunction unless a court "after due hearing" finds that the strike poses "a clear and present danger to a sound program of a school education which in light of all relevant circumstances it is in the best public interest to prevent." See Rachlin, Developing Labor Law for Vermont Teachers, 40 Ala. L. Rev. 733, 738-39 (1976). The Alaska statute's treatment of strikes by semi-essential employees, supra note 61, seems to contemplate a similar standard. See discussions of Pennsylvania statute and cases at notes 200-68 and accompanying text infra.

63. See Anderson, supra note 56, at 957-58. Wellington & Winter, The Limits of Collective Bargaining in Public Employment, 78 Yale L. J. 1107, 1115-23 (1969). But see Anderson Federation of Teachers v. School City of Anderson, 252 Ind. 558, 564-75, 251 N.E. 2d 15, 18-23 (1969) (DeBruler, C.J., dissenting).

64. See Anderson, supra note 56, at 953-54; Wellington & Winter, Structuring Collective Bargaining in Public Employment, 79 Yale L. J. 805, 822-23 (1970). See also Burton & Krider, The Role and Consequences of Strikes by Public Employees, 79 Yale L. J. 418, 428-32 (1970); Jascourt, Responses to Union Concerted Activity: An Overview, 8 J. L. & Educ. 57, 57 (1979).

65. See Nev. Rev. Stat., § 288.230-1 (1973). See also note 61, supra. But see Anderson, supra note 56, at 956-57.

66. See, e.g., City of Los Angeles v. Los Angeles Bldg. & Const. Trades Council, 94 Cal. App.2d 36, 47-48, 210 P.2d 305, 312 (1949); Norwalk Teachers Assoc. v. Board of Educ. 138 Conn. 269, 275-76 83 A.2d 482, 485 (1951); Jefferson City Teachers Ass'n v. Board of Educ., 463 S.W.2d 627, 628 (Ky. App. 1970), cert. denied, 404 U.S. 865 (1971); Anderson Federation of Teachers v. School City of Anderson, 252 Ind. 558, 563, 251 N.E.2d 15, 18 (1969); Anderson, supra note 56, at 959; Wellington & Winter, supra note 63, at 1125-26; Wellington & Winter, More on Strikes by Public Employees, 79 Yale L. J. 441, 442 (1970); Wellington & Winter, supra note 64, at 842-47. Compare Burton & Krider, supra note 65, at 443 with id. at 438.

67. See Jascourt, supra note 64, at 70.
68. See Parts III, B, 1 & 2 infra.
69. 29 U.S.C. §§ 101-115 (1970). The statute, broadly defining "labor disputes," limits the jurisdiction of the lower federal courts by regulating procedure and enumerating the acts which such courts cannot enjoin.
70. E.g., Ill. Ann. Stat. ch. 48, § 2a (Smith-Hurd 1969); N.J. Stat. Ann. § 2A:15-51 (West 1952); Wash. Rev. Code § 49.32.010-49.32.910 (1962 & Supp. 1979). See generally H. McClintock, supra note 37, at 416-21.
71. H. McClintock, supra note 37, at 420.
72. Id. at 419. See note 80 and accompanying text infra. Even the Norris-LaGuardia Act, supra note 69, has been held subject to specific well-defined exceptions. See, e.g., Boys Market Inc. v. Retail Clerks Union, 398 U.S. 235 (1970) (allowing injunctions against strikes over arbitrable grievances). But see Buffalo Forge Co. v. United Steelworkers of America, AFL-CIO, 428 U.S. 397 (1976).
73. Milk Wagon Drivers' Union v. Lake Valley Farm Products, Inc., 311 U.S. 91, 102 (1940); F. Frankfurter & N. Greene, supra note 4, at 200.
74. See generally H. Wellington, Labor and the Legal Process 38-46 (1968) (describing modern federal labor statutes). Governmental employees, however, are expressly excluded from the scope of some of the significant statutes. E.g., 29 U.S.C. §§ 152 (2)-(3) (1970 & Supp. IV 1974) (Labor Management Relations Act).
75. Wellington, supra note 74, at 39-41. As Wellington points out, however, some of the post-Norris-LaGuardia legislation brought the courts back into the picture though not as an unalloyed ally of management. Compare Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235, 250 (1970) with H. Wellington, supra note 74, at 41-43.
76. See Buffalo Forge Co. v. United Steelworkers of America, AFL-CIO, 428 U.S. 397, 410-411 (1976); Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235, 250 (1970); Milk Wagon Drivers' Union v. Lake Valley Farm Products, Inc., 311 U.S. 91, 102-03 (1940); H. Wellington, supra note 74, at 38-41.
77. F. Frankfurter & N. Greene, supra note 4.
78. Note 69 supra. See Petro, Injunctions and Labor Disputes, 14 Wake Forest L.Rev. 341, 343-44 (1978).
79. F. Frankfurter & N. Greene, supra note 4, at 201. See id. at 80, 130, 210. But see generally Petro, supra note 78

(questioning the Frankfurter and Greene analysis); Comment, Public Employee Legislation: An Emerging Paradox, Impact, and Opportunity, 13 San D.L. Rev. 931, 940 (1976) ("temporary restraining orders and preliminary injunctions have little effect on the termination of [public employee] strike[s]").

80. See e.g., City of Pana v. Crowe, 57 Ill.2d 547, 552, 316 N.E.2d 513, 515 (1974); Anderson Federation of Teachers v. School City of Anderson, 242 Ind. 558, 560, 251 N.E.2d 15,16 (1969); Joint School Dist., No. 1 City of Wisconsin Rapids v. Wisconsin Rapids Educ. Assoc., 70 Wis.2d 292, 306-07, 234 N.W.2d 289, 297-98 (1975). See also United States v. UMW, 330 U.S. 258 (1974) (construing federal Norris-LaGuardia Act, supra note 69, as inapplicable to disputes between government and its employees).

81. See generally H. Wellington & R. Winter, The Unions and the Cities 33-48 (1971); Kheel, supra note 56; Shaw & Clark, Public Sector Strikes: An Empirical Analysis, 2 J.L. & Educ., 217 (1973); Note 76 U.L.A.331 (1979).

82. See Douglas, Injunctive Relief in Public Sector Work Stoppages: Alternative Approaches, 30 Labor L.J. 406 (1979); Mulcahy & Schweppe, supra note 56, at 139.

83. See notes 57-68 and accompanying text supra.

84. See National Institute of Education, State Legal Standards for the Provision of Public Education 23-26 (1978); A. Steinhilber & C. Sokolowski, State Law on Compulsory Attendance (1966). See also Part IV infra.

85. Compare Burton and Krider, supra note 65, at 432-38 with Wellington & Winter, supra note 66, at 442. See note, Striking a Balance in Bargaining with Public School Teachers, 56 Iowa L. Rev. 598, 610 (1971).

86. See School Committee of the Town of Westerly v. Westerly Teachers' Ass'n., 111 R.I. 96, 103, 299 A.2d 441, 445 (1972).

87. See Note, supra note 85, 610-11 (1971), quoted in Armstrong Educ. Ass'n. v. Armstrong School Dist., 5 Pa. Cmwlth, 378, 384, 291 A.2d 120, 124 (1972).

88. See tabulation cited in note 1, supra. Data collected by other participants in this NIE-sponsored project, see note* supra, reveal that one-day work stoppages, though not uncommon, are decreasing in comparison to considerably longer teachers' strikes.

89. See authorities cited in note 85, supra. Of course, for those who view teachers' strikes as harmful for reasons that would make all public sector strikes susceptible of the same description, the effects of such a strike transcend the missed school time itself and its immediate consequences. See notes 62-66 and accompanying text supra.

90. H. Wellington & R. Winter, supra note 81, at 194;

Wellington & Winter, supra note 64, at 845. See Comment, supra note 79, at 953.

91. See note 40 supra and accompanying text.

92. See Bristol Township Educ. Ass'n v. School Dist. of Bristol Township, 14 Pa. Cmwlth. 463, 322 A.2d 767 (1974); Root v. Northern Cambria School Dist., 10 Pa. Cmwlth. 174, 309 A.2d 175 (1973), discussed at notes 223 and 261 infra.

93. See discussion of Pennsylvania cases at notes 200-68 and accompanying text infra.

94. See Part I supra.

95. The standards used by trial courts in such cases are examined in other parts of this project. See note 9 supra.

96. The Florida Constitution provides that "Public employees shall not have the right to strike." Fl. Const. art. 1, § 6. Under legislation enacted in 1974, public employee strikes are specifically prohibited by statute, Fla. Stat. Ann. § 447.505 (Supp.1979). Another statute permits a court to grant, upon request, a temporary injunction if "there is a clear, real, and present danger that such a strike is about to commence," Fla. Stat. Ann. § 447.507 (Supp.1979). The constitutional prohibition is an adaptation of earlier legislation precluding public employee strikes, Fla. Stat. Ann. § 839.221 (1967), cited in Pinellas County Teachers' Ass'n v. Board of Pub. Instruction, 214 So.2d 34, 36 (Fla. 1968).

97. See Broward County Classroom Teachers' Ass'n, Inc. v. Public Employees Relations Comm'n., 331 So.2d 342 (Fla. Dist. Ct. App.), cert. denied Fla., 341 So.2d 1080 (1976) (state Public Employees Relations Committee has authority to enforce anti-strike legislation by obtaining injunction; injunction proper because teachers' strike illegal); Dade County Classroom Teachers' Ass'n v. Rubin, 338 So.2d 285, 289 (Fla. 1970) (case decided under older legislation cited in note 96 supra; because public employees have no right to strike, "temporary injunction was appropriate even in the absence of any showing of violence or the threat of violence"), cert. denied, 400 U.S. 1009 (1971).

98. 331 So.2d at 344.

99. In Pinellas County Classroom Teachers' Ass'n v. Board of Pub. Instruction, 214 So.2d 34, 38 (Fla. 1968), a permanent injunction case decided before the constitutional amendment but under the similar legislation noted in note 96 supra, the court, quoting the Chancellor who had granted the injunction initially, affirmed an injunction against striking teachers:

To allow such action would permit the breakdown of governmental functions, would sanction the control of a governmental function

for private gain; and further, to allow such action is the same as saying that governmental employees may deny the authority of government through its duly elected representatives. To permit this is to take the first step toward anarchy.

The Florida Supreme Court relied on this reasoning in approving the issuance of a temporary injunction in *Dade County Classroom Teachers' Ass'n v. Rubin*, 238 So.2d 285, 288-89 (Fla. 1970), cert. denied, 400 U.S. 1009 (1971).

100. Fla. Stat. Ann. § 447.507 (West 1979), quoted in note 96, supra. The language of the statute tends to reinforce the inattention accorded the traditional irreparable harm test in the cases decided before its 1974 enactment, supra notes 97-99.

101. *Los Angeles Unified School Dist. v. United Teachers*, 42 Cal. App.3d 142, 100 Cal. Rptr. 806 (Ct. App. 1972) (trial court order authorizing temporary restraining order against striking teachers sustained on basis of common law rule that public employees have no right to strike).

102. *Trustees of the California State Colleges v. Local 1352*, 13 Cal. App.3d 863, 867, 92 Cal. Rptr. 134, 136 (Ct. App. 1970). In affirming the summary judgment enjoining the strike, following an earlier temporary restraining order and a preliminary injunction, the court stated:

California follows and applies the common law rule that public employees do not have the right to strike in the absence of a statutory grant thereof; ...no such grant exists; ... the strike at the college, enjoined by the present judgment, was unlawful (in the sense that it was violative of state policy, although not attended by criminal sanctions); and ... that the judgment is accordingly valid...."

103. 13 Cal. App. 3d at 865, 92 Cal. Rptr. at 135. The court noted, in stating the facts of the case, that "masses of pickets" physically interfered with ingress and egress at the campus and interrupted the routine of the college; police intervention became necessary, resulting in violence and arrests; and campus bombings occurred.

104. *Norwalk Teachers' Ass'n. v. Board of Educ.*, 138 Conn.269, 83 A.2d 482 (1951). The court in *Norwalk* stressed the public policy considerations supporting injunctive relief against public employee strikes. A subsequently enacted statute prohibits certified professional employees from striking and authorizes enforcement of this provision in superior court, Conn. Gen. Stat. § 10-153e(a) (1979).

105. See 138 Conn. at 274-75, 83 A.2d at 484-85.

106. See *McTigue v. New London Educ. Ass'n.*, 164 Conn. 348, 357 321 A.2d 462, 466 (1973) (ruling on contempt citations). Query

whether the "under proper circumstances" language suggests the sort of factual analysis contemplated by the traditional irreparable harm test? Compare cases discussed in Part III, B, 4 infra.

107. Conn. Gen. Stat. § 10-153e (a) (1979).

108. Ind. Code § 20.7.5.-1-14 (1975), enacted in 1973, prohibits teachers' strikes but does not specify the standard governing the issuance of injunctions in such cases.

109. Anderson Fed. of Teachers v. School City of Anderson, 252 Ind. 558, 251 N.E.2d 15 (1969). In Anderson, a small percentage of public school teachers peacefully struck for better wages. The schools never closed. The court found inapplicable to public employee strikes a statute prohibiting the issuance of injunctions in labor disputes.

110. 252 Ind. at 563, 251 N.E.2d at 18.

111. Id.

112. 252 Ind. 558, 251 N.E. 2d 15.

113. 252 Ind. at 564-81, 251 N.E.2d at 18-27 (DeBruler, C.J. dissenting).

114. 252 Ind. at 565, 251 N.E.2d at 19.

115. 252 Ind. at 571, 251 N.E.2d at 22, quoting School Dist. for City of Holland v. Holland Educ. Ass'n., 380 Mich. 314, 326, 157 N.W.2d 206, 210 (1968).

116. 252 Ind. at 564, 251 N.E.2d at 19.

117. See Leubsdorf, supra note 5, at 562.

118. These cases differ only superficially from those examined in Part III, B, 1 supra; the difference is primarily one of language in that these cases acknowledge the traditional standard of injunctive relief, albeit emasculated in actual application.

119. N.Y. Civ. Serv. Law §§ 200-214 (McKinney 1973). See text accompanying notes 57-59 supra.

120. Board of Educ. of City School Dist. of City of Buffalo v. Pisa, 55 A.D.2d 128, 134, 389 N.Y.S.2d 938, 942-43 (1976) (contempt convictions for violations of temporary restraining order, and preliminary injunction against striking teachers affirmed). The court added, apparently gratuitously, that the "affidavit filed in support of the order specifically alleged that the threatened strike would result in injury to the students as well as a disruption of the fundamental activity of the Buffalo School System. These allegations were corroborated by newspaper stories...." 55 A.D.2d at 134, 389 N.Y.S.2d at 943. See also Board of Educ. of Lakeland Cent. School Dist. v. Lakeland Fed. of Teachers, 59 A.D.2d 900, 399 N.Y.S.2d 61 (1977).

121. See Board of Educ. of Union Free School Dist. No. 3 v. National Educ. Ass'n, 37 A.D.2d 711, 323 N.Y.S.2d 1007 (1971), rev'd, 30 N.Y.2d 938, 287 N.E.2d 383, 335 N.Y.S.2d 690 (1972) (adopting dissenting opinion below). The Court of Appeals reversed an injunction restraining nonstriking teachers from distributing statements urging teachers not to "take employment" in the district; because freedom of speech was at stake, the trial court should have required complainant to prove that immediate and irreparable harm would result in absence of an injunction. Dissenting members of the Court of Appeals pointed out that, by urging collective action, the association may have precipitated an illegal strike in violation of the Taylor Law.

122. See, e.g., City School Dist. of the City of Schenectady v. Schenectady Fed. of Teachers, 49 A.D.2d 395, 397, 375 N.Y.S.2d 179, 181-182, appeal dismissed, 382 N.Y.S.2d 1033, 345 N.E.2d 586 (1975) ("The instigation or encouragement of a strike by a public employee or employee organization is specifically prohibited by law and injunctive relief is available, indeed mandated, when such a strike is threatened.... Furthermore, the issuance of a temporary restraining order upon an ex parte application in this situation is definitely permissible and was clearly proper upon this record....") (emphasis added); Central School Dist. v. Susquehanna Valley Teachers' Ass'n., 43 A.D.2d 198, 201, 350 N.Y.S.2d 805, 808, motion for leave to appeal dismissed, 359 N.Y.S.2d 562, cert. denied, 419 U.S. 1033 (1974) ("The record establishes that the plaintiff made a preliminary showing of immediate and irreparable injury which would result if the strike continued and there was no abuse of discretion on the part of Special Term....")

123. See e.g., Central School Dist. v. Susquehanna Valley Teachers' Ass'n., 43 A.D.2d 198, 201 350 N.Y.S.2d 805, 808, motion for leave to appeal dismissed, 359 N.Y.S.2d 562, cert. denied, 419 U.S. 1033 (1974) (finding no abuse of discretion below).

124. Note 119 supra. But see City of Buffalo v. Mangan, 49 A.D.2d 697, 370 N.Y.S.2d 771, 772 (1975) (court, without deciding whether such action violates Taylor Law, affirms denial of preliminary injunction against resolution by firemen's union not to respond to voluntary call-ins because "plaintiff has failed to make the requisite showing of irreparable harm").

125. Jefferson County Teachers' Ass'n v. Board of Educ., 463 S.W.2d 627, 630 (Ky.App.), cert. denied, 404 U.S. 865 (1970), quoting City of Los Angeles v. Los Angeles Building and Const. Trades Council, 94 Cal. App.2d 36, 42-43, 210 P.2d 305, 309 (1949).

The original statute governing labor relations specifically excluded public employees from the right to strike against others. The statute, as revised, § 336.130 K.R.S., contained no such exclusion. The court found this change inadvertent and concluded that the legislature had intended no change in the existing law or public policy. 463 S.W.2d at 629. Additional statutory revisions were adopted in 1978. § 336.130 K.R.S. (1979).

126. 463 S.W.2d at 630.

127. Id.

128. Id. at 631.

This acknowledgement, albeit one unaccompanied by much analysis, is particularly significant because the opinion is one reviewing the issuance of a permanent injunction. According to Professor Leubsdorf, supra note 5, criticisms of any facile equations of illegality and irreparable harm are less apt in this context than when the relief sought is temporary or preliminary. See notes 38-48 and accompanying text supra.

129. Appellant argued that appellee failed to establish irreparable harm to support the injunction; the court found in the record "ample proof of serious and irreparable impairment of the school system of Jefferson County (of which a court would probably take judicial notice)." 463 S.W.2d at 631. In other words, in approving the determination of harm reached below, the court failed to identify the precise interests infringed by the strike.

130. See Board of Educ. v. Redding, 32 Ill.2d 2237, 207 N.E.2d 427 (1965) (denial of injunctive relief against striking school custodial employees reversed; court mentions types of harm resulting from strike but relies on illegality of strikes by governmental employees); Allen v. Maurer, 6 Ill. App.3d 633, 286 N.E.2d 135 (1972) (in reversing for lack of standing injunctive relief in taxpayers' suit against striking teachers, court, in dicta, stresses overriding public policy against public school teachers' strikes because they violate constitutional mandate that legislature operate "thorough and efficient" school system; court below had found both illegality and "immediate and irreparable damage to the public"). See also Board of Educ. of Kankakee School Dist. v. Kankakee Fed. of Teachers Local No. 886, 46 Ill.2d 439, 264 N.E.2d 18 (1970) (upholding contempt convictions of federation members who violated temporary restraining order issued against unlawful teachers' strike violating state public policy); Board of Educ. of Peoria School Dist. v. Peoria Educ. Ass'n, 29 Ill. App.3d 411, 330 N.E.2d 235 (1975) (although strike by public school teachers unlawful, injunction unnecessary where underlying labor dispute settled).

131. See Board of Community College Dist. No. 508 v. Cook County College Teachers' Union, Local 1600, 42 Ill. App.3d 1056, 356 N.E.2d 1089 (1976). There, inter alia, the court of appeals reviewed an ex parte temporary restraining order and a preliminary injunction issued against striking teachers at a public college. In reversing, the court explained that the Illinois Injunction Act, Ill. Ann. Stat. Ch. 69 § 3-1 (Smith-Hurd Supp. 1979), requires that temporary restraining orders issue only upon notice to the adverse party unless immediate and irreparable injury would result prior to notification; the order must state why the injury is irreparable in the absence of notice. The TRO in this case failed to meet these statutory requirements. 42 Ill. App.3d at 1062, 356 N.E.2d at 1094.

Query whether the judicial perception of the harm resulting from the closing of a college differs qualitatively from the harm resulting from the closing of an elementary or secondary school? See Part IV infra. Art. 10, § 1 of the Illinois Constitution provides:

A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities.

The State shall provide for an efficient system of high quality public educational institutions and services. Education in public schools through the secondary level shall be free. There may be such other free education as the General Assembly provides by law.

The State has the primary responsibility for financing the system of public education.

132. See, e.g., Board of Educ. v. Parkhill, 50 Ill.App.3d 60, 365 N.E.2d 195 (1977) (following strike, refusal to enjoin teachers' recognition picketing reversed; court cited disruption caused by picketing, discusses overriding public interest in unimpeded education, but does not mention irreparable harm).

133. The Illinois cases cited in notes 130-132, supra, seem to recognize harm to (1) students and (2) the public in general notwithstanding taxpayers' inability to seek injunctive relief, established in Allen V. Mauer, 6 Ill.App.3d 633, 286 N.E.2d 135 (1972).

134. See note 119-29 and accompanying text supra.

135. E.g., Wilmington Fed. of Teachers v. Howell, 374 A.2d 832 (Del. 1977); Board of Educ. v. New Jersey Educ. Ass'n, 53 N.J. 29, 247 A.2d 867 (1968). In the former, the court affirmed injunctions issued against teachers who had voted to strike citing the illegality of strike, the threat of irreparable injury to the public posed by the imminent strike, and precedent defining "irreparable harm" as interference with a right for which no adequate money damages exist. In the latter, the court affirmed an injunction issued against teachers whose resignations were found to constitute a strike; in response to defendants' claim that plaintiffs had failed to prove the requisite injury, the court explained that irreparable harm "means only that equity will leave the parties to a remedy at law if money damages will adequately compensate for the wrong." 53 N.J. at 43, 247 A.2d at 875.

Particularly illuminating here is language from a Delaware chancery court opinion denying applications for preliminary injunction against a one-day strike which had already occurred and which did not threaten imminent repetition. State v. Delaware State Educ. Ass'n, 326 A.2d 868 (Del.Ch. 1974). This is the case the state supreme court relied upon in Howell, 374 A.2d 832. In rejecting case law from other states requiring a specific showing of

irreparable harm before the issuance of an injunction against a school strike (see Part III, B, 4 infra), the court observed:

Delaware law is clear. We have recognized that, at common law, public employees are not entitled to collective bargaining, and public employees are without power to enter collective bargaining agreements.... We have also recognized in judicial opinion the general common law rule that, even in the absence of an express statutory provision, public employees are denied the right to strike or to engage in a work stoppage against a public employer Moreover, we have statutes which clearly prohibit strikes by public employees Indeed, it is in effect an express condition of the statutory right of public employees to organize that the Union is given the duty not to strike.... Confronted by an illegal strike by public employees, this Court's authority to issue preliminary injunctive relief, including temporary restraining orders, and to enforce such relief through its contempt powers, as well as other equitable powers, cannot be questioned.... Faced with such an illegal strike, an equity court is generally acknowledged to have the power to apply injunctive coercion wherever it will do the most good.... Although it is difficult to foresee and generalize about all circumstances in all labor disputes involving public employees, this Court has not hesitated to enjoin or restrain illegal strikes including strikes by school employees....

* * *

The second policy ground gleaned from the cases [from other states] suggests the harm caused by a strike is not of sufficient significance to justify judicial interference. In so suggesting [these] decisions simply misunderstand the nature of irreparable harm. Irreparable harm does not depend on a catastrophe or on violence or on an epidemic. Irreparable harm depends on interference with a legal right and should be judged by traditional equitable principles applicable in all cases for preliminary relief. Generally, irreparable harm exists when the injury cannot be adequately compensated in damages.... It is not necessary that the injury be beyond the possibility of repair by money compensation but it must be of such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the injunction would be a denial of justice.... To be a substantial legal injury for irreparable harm purposes, it is not even necessary that the pecuniary damages be shown to be great....

In cases of illegal strikes by public employees irreparable harm would generally seem apparent from the interference with rights of others by illegal acts... There is obviously no comparison between a school closing caused by an illegal strike and one duly directed by proper authority. And, as the Court in this case noted at the hearing on the temporary restraining order, in a school strike situation, there can be "staggering" economic waste as well as human waste. Moreover, in an illegal strike situation, there is generally no hardship to the defendants to

weight in opposition save the duty to obey the law. In short, without trying to list every conceivable harm caused by an illegal strike by school employees, there simply can be no doubt that, under the State law, school children have a right to go to school, indeed they are required to go to school, and no one should be permitted through illegal action to interfere with the right and the duty of children to attend school. 326 A.2d at 874-76.

Compare this statement with notes 15-21 and accompanying text supra.

136. In *State v. Delaware State Educ. Ass'n.*, 326 A.2d 868, (Del.Ch.1974), quoted in note 135, supra, however, the court specifically noted the interference with children's rights the threatened teachers' strike would create: "no one should be permitted through illegal action to interfere with the right and the duty of children to attend school". 326 A.2d at 816. See note 135 supra.

137. See, e.g., *Wilmington Fed. of Teachers v. Howell*, 37 A.2d 832, 836 Del. (1977) (imminent threat of illegal teachers' strike justifies restraining order); *In re Hoboken Teachers' Ass'n*, 147 N. J. Super. 240, 248, 371 A.2d 99, 103 (1977) ("whenever public employees resort to the illegal activity of a strike, necessarily the general public must suffer harm in some way. Immediate relief is required in most instances.")

138. The Delaware view seems to be that some injuries which are compensable in money damages may, nonetheless, satisfy the irreparable harm test. See the quotation from the chancery court, supra, note 135. This standard is considerably looser than most definitions of the test. See Part I supra. If the irreparable harm standard controls here, then it does so only after significant redefinition.

139. 380 Mich. 314, 157 N.W.2d 206 (1968). Holland has been followed not only in Michigan, e.g., *Crestwood School Dist. v. Crestwood Educ. Ass'n*, 382 Mich. 577, 370 N.W. 2d 840 (1969); cf. *Warren Educ. Ass'n v. Adams*, 57 Mich.App. 496, 226 N.W.2d 536 (1975) (Holland purportedly followed but irreparable harm is found upon stipulation); but also in other jurisdictions, e.g., *School Dist. No. 351 v. Oneida Educ. Ass'n*, 98 Idaho 486, 567 P.2d 830 (1977); *Timberlane Regional School Dist. v. Timberlane Regional Educ. Ass'n*, 114 N.H.245, 317 A.2d 555 (1974); *Menard v. Woonsocket Teachers' Guild-AFT*, 117 R.I.121, 363 A.2d 1349 (1976); *School Com. of the Town of Westerly v. Westerly Teachers' Ass'n*, 111 R.I.96, 299 A.2d 441 (1973). See also *Anderson, Fed. of Teachers v. School City of Anderson*, 252 Ind. 558, 251 N.E.2d 15 (1969).

140. The Hutchinson Act barred public employee strikes. The current version of the statute appears at Mich. Stat. Ann. § 17.455 et. seq. (1975 & Supp. 1979).

141. 380 Mich. at 326, 157 N.W.2d at 210. The court feared that any looser standard that the legislation might compel would destroy the judiciary's independence. Id.

142. Id.

143. 380 Mich. at 326-27, 157 N.W.2d at 210-11.

144. Justice Kelly, joined by Justice Dethmers, dissenting, would have been satisfied with the proof that the majority had rejected as a "meager record," 380 Mich. at 326, 157 N.W.2d at 210. 380 Mich. at 329-30, 157 N.W.2d at 212 (Kelly, J., dissenting.) Justice Brennan's dissent offers a fuller explanation, including the specific function of the temporary injunction issued below:

The function of an injunction pendente lite is to prevent irreparable harm which would result from natural delay in reaching a trial on the merits. It may be argued that in this case the status quo was summer vacation and that the temporary injunction permitted a change in the status quo by permitting schools to open at the usual time. But the maintenance of actual status quo is not the only function of an injunction pendente lite. The court can consider whether under all the facts and circumstances of the case the issuance of the temporary injunction will maintain the parties in that status which is least likely to do irreparable injury to the party who ultimately prevails. 380 Mich. at 331, 157 N.W.2d at 213 (Brennan, J., dissenting).

145. 114 N.H. 245, 317 A.2d 555 (1974).

146. See 114 N.H. at 248, 317 A.2d at 557.

147. Manchester v. Manchester Teachers' Guild, 100 N.H. 507, 509, 131 A.2d 59, 61 (1957) (trial court properly enjoined completely peaceful teachers' strike because "public policy renders illegal strikes by school teachers in public employment").

148. 114 N.H. at 250, 317 A.2d at 558.

149. 114 N.H. at 251, 317 A.2d at 559.

150. See notes 140 & 144 and accompanying text supra.

151. See text accompanying note 143 supra.

152. School Dist. No. 351 v. Oneida Educ. Ass'n, 98 Idaho 486, 491, 567 P.2d 830, 835 (1977). See 98 Idaho 486, 493, 567 P.2d 830, 837 (Bakes, J., concurring in the judgment and dissenting in part).

153. 98 Idaho at 489, 567 P.2d at 833.

154. 98 Idaho at 490, 567 P.2d at 834.

155. 98 Idaho at 490-91, 567 P.2d at 834-35.

156. 70 Wis.2d 292, 234 N.W.2d 289 (1975)

157. 70 Wis.2d at 310-11, 234 N.W. 2d at 299-301. Recent Wisconsin legislation now permits some strikes by some public employees, Wis. Stat. Ann. § 111.70 (West Supp. 1979), and requires a judicial finding of "an imminent threat to the public health or safety" to support injunctive relief, Wis. Stat. Ann. § 111.70 (7) (b) (West. Supp. 1979). See Jascourt, Responses to Union Concerted Activity: An Overview, 8 J.L. & Educ. 57, 64 (1979).

158. 70 Wis.2d at 312, 234 N.W.2d at 300-01. See notes 85 & 90 and accompanying text supra.

159. 70 Wis.2d at 312, 234 N.W.2d at 300-01.

160. Under Wisconsin law, the state is obligated to contribute financially to an educational program only if the school district meets certain state standards. Wis. Stat. Ann. § 121.01 (West 1973). To be eligible for such aid, school must be in session 180 days each year. Wis. Stat. Ann. §§ 121.02(1) (C) & 121.02 (2) (a) (West 1973). More recent legislation explicitly insures state aid to a district which has failed to meet the 180-day requirement as the result of a strike. Wis. Stat. Ann. § 121.02 (1) (h) (West Supp. 1979).

161. 70 Wis.2d at 309, 234 N.W. 2d at 299.

162. See note 158 and accompanying text supra.

163. Compare cases discussed in Part III, B, 2, infra.

164. The strike began on January 2, 1974, and the circuit court issued the temporary restraining order on January 7, 1974. See 70 Wis.2d at 297-98, 234 N.W.2d at 293-94 (syllabus). The Supreme Court observed, however, that the trial judge had no assurance the strike would end in the absence of injunctive relief. 114 Wis.2d at 313, 234 N.W.2d at 301.

165. See 141 and accompanying text supra. The possible use of substitute teachers is discussed neither in this case nor in Holland.

166. See note 161 and accompanying text supra.

167. Compare note 138 and accompanying text supra.

168. 111 R.I. 96, 299 A.2d 441 (1973). On a purely chronological basis, consideration of Westerly should follow the discussion of Holland, 380 Mich. 314, 157 N.W.2d 206 (1968), see notes 139-44 and accompanying text supra. Indeed, Timberlane, 114 N.H. 245, 317 A.2d 555 (1973), see notes 145-151 supra, and Oneida, 98 Idaho 486, 567 P.2d 830 (1977), see notes 152-55 supra, examined immediately after Holland, rely in part upon Westerly. Nonetheless, the analysis undertaken here makes this the more logical and instructive point to consider Westerly.

169. 380 Mich. 314, 157 N.W.2d 206 (1968).
170. School Dist. No. 351 v. Oneida Educ. Ass'n, 98 Idaho 486, 490, 567 P.2d 830, 834 (1977); Timberlane Regional Educ. Ass'n, 114 N.H. 245, 250, 317 A.2d 555, 558 (1973).
171. 111 R.I. at 98, 299 A.2d at 442.
172. 111 R.I. at 103, 299 A.2d at 445.
173. Id. For Rhode Island's approach before the Westerly decision, see City of Pawtucket v. Pawtucket Teachers' Alliance, 87 R.I. 364, 141 A.2d 624 (1958).
174. 111 R.I. at 103-04, 299 A.2d at 445.
175. See text accompanying notes 160-61 supra.
176. Rescheduling of missed classes following a recent teachers' strike in St. Louis, Missouri, proved difficult and onerous. See St. Louis Globe-Democrat, March 13, 1979, ¶ A, at 1, col. ____ [?]; St. Louis Post-Dispatch, March 21, 1979, ¶ ____, at ____, col. ____; St. Louis Post-Dispatch, June 14, 1979, ¶ B, at 1, col. 1.
177. 117 R.I. 121, 363 A.2d 1349 (1976).
178. See 117 R.I. at 128, 363 A.2d at 1354. The injunction was issued September 11, 1975. Although the strike began August 29, 1975, the first scheduled day for classes was September 3. 117 R.I. at 123-24, 363 A.2d at 1351.
- The Supreme Court opinion reviews both the injunction itself and the teachers' appeal from contempt convictions for violation of that injunction.
179. 117 R.I. at 127, 363 A.2d at 1353.
180. Id.
181. 117 R.I. at 128, 363 A.2d at 1354.
182. Id.
183. See text accompanying note 181 supra.
184. See text accompanying note 174 supra.
185. 117 R.I. at 128, 363 A.2d at 1354.
186. In other words, a student arguably can "make up" lost learning. But see Part IV infra.
187. Once postponed, a student's employment opportunities can only be recaptured in the limited sense that the earnings thereby

lost might be obtainable additional work, e.g., "overtime," at some later date. But the jobs available following a lengthened school year as the result of a strike may be quite different, for better or worse, than those available at the initially scheduled time of graduation. Similarly, missed lunches cannot be consumed on the days initially scheduled if a strike closes the school, but could be made available subsequently upon extension of the academic year.

188. 117 R.I. at 128, 363 A.2d at 1354.

189. See 117 R.I. 126-27, 363 A.2d at 1353. Other courts have expressed other sorts of concerns about the relationship between judicial intervention and the collective bargaining process. See, e.g., School Dist. No. 351 v. Oneida Educ. Ass'n, 98 Idaho 486, 490, 567 P.2d 830, 834 (1977) ("denial of the right to strike has the effect of weighing the scales heavily in favor of the government during the collective bargaining process"); School Committee of the Town of Westerly v. Westerly Teachers' Ass'n, 111 R.I. 96, 104, 299 A.2d 441, 446 (1973) ("Ex parte relief in instances such as teachers-school committee disputes can make the judiciary an unwitting party at the bargaining table and potential coercive force in the collective bargaining process.").

190. 117 R.I. 203, 365 A.2d 499 (1976)

191. 117 R.I. 206-07, 365 A.2d at 501.

192. See 117 R.I. 205-07, 365 A.2d at 500-01. The strike began September 1, 1975. The schools had been scheduled to open on September 2, 1975. The court held hearings on the request for a preliminary injunction on September 8 and 10 and enjoined the strike at the conclusion of the hearings.

193. 117 R.I. at 206, 365 A.2d at 501.

194. 117 R.I. at 205, 365 A.2d at 501.

195. The Supreme Court found "no abuse of discretion." 117 R.I. at 207, 365 A.2d at 501.

196. 117 R.I. at 205, 365 A.2d at 501.

197. 117 R.I. at 207, 365 A.2d at 501. "The injunction did not issue, as [appellant] maintains, solely because the strike was found to be illegal."

198. See 117 R.I. at 206, 365 A.2d at 501. ("The injunction did not issue automatically [in violation of Westerly]").

199. See 117 R.I. at 205, 365 A.2d at 501. (evidence of "hopelessly deadlocked negotiations" and "no reasonable prospect for imminent resolution"). See note 189 supra.

200. Indeed, appellate opinions from Pennsylvania provide virtually the only examples. Although a number of other states (Vermont, Montana, Hawaii, Alaska, Minnesota, and Oregon) permit some public employee strikes, see Jascourt, supra note 64, at 61-64; a dearth of relevant case law can be found in those jurisdictions. In Hawaii Public Employment Relations Board v. Hawaii State Teachers Association, 54 Haw. 531, 511 P.2d 1080 (1973), the single non-Pennsylvania opinion on point, the analysis is much like that used by courts enjoining strikes on the basis of illegality alone. The Supreme Court of Hawaii noted that the legislature had legalized some public employee strikes, see Haw. Const. art XII, § 2, and immunized them from judicial interference, Haw. Rev. Stat. § 380-4 (1) (1976). It had also barred such strikes under specified conditions, Haw. Rev. Stat. § 89-12 (a) (1976). Because the strike in question fell within one of the prohibited conditions (because the dispute was to be resolved by referral to arbitration, Haw. Rev. Stat. § 89-12 (a) (2) (1976)), the court upheld the preliminary injunction issued below and concluded that a finding of irreparable harm, required by Haw. Rev. Stat. § 89-12(c) and (e) (1976) ("imminent or present danger to the health and safety of the public"), need only be made where the strike to be enjoined is a legal one. 54 Haw. at 543, 511 P.2d at § 1086. In other words, the illegality of this strike was sufficient to support the preliminary injunction. See also Hawaii State Teachers Ass'n v. Hawaii Pub. Emp. Rel. Bd., ___ Haw. ___, 590 P.2d 993 (1979); Board of Educ. v. Hawaii Pub. Emp. Rel. Bd., 56 Haw. 85, 528 P.2d 809 (1974); Hawaii Pub. Emp. Rel. Bd. v. Hawaii State Teachers Ass'n, 55 Haw. 386, 520 P.2d 422 (1974).

201. Pa. Stat. Ann. tit. 24 § 1101.1002 (Purdon Supp. 1979). But see Jascourt, supra note 64, at 62 ("only the passage of the time periods for those procedures must be expired").

202. Pa. Stat. Ann. tit. 43 § 1101.1003 (Purdon Supp. 1979). For conflicting constructions of this provision, see Philadelphia Fed. of Teachers v. Ross, 8 Pa. Commw. Ct. 204, 301 A.2d 405 (1973), discussed at notes 224-47 and accompanying text infra. The statute refers to "appropriate injunctions" and apparently the same standard governs applications for preliminary relief and final injunctions. But see School Dist. of Pittsburgh v. Pittsburgh Fed. of Teachers, 31 Pa. Commw. Ct. 461, 472-73, 376 A.2d 1021, 1026-27 (1976) (judicial finding of requisite "clear and present danger or threat" is basis of final injunction because it is a final adjudication on the merits; therefore, special standards for preliminary relief, including a finding of irreparable harm, inapplicable).

203. Pa. Stat. Ann. tit. 43 § 1101.1003 (Purdon Supp. 1979).

204. Pa. Stat. Ann. tit. 43 § 1101.1002 (Purdon Supp. 1979).

205. 5 Pa. Commw. Ct. 378, 291 A.2d 120 (1972).

206. This strike began on August 30, 1971, the first day of classes of the 1971-72 academic year, and the trial court granted the request for injunctive relief following hearings held on September 14, 1971; an earlier request to enjoin the strike had been

denied following hearings on September 1, 1971. The same efforts to reach a collective bargaining agreement had precipitated during the previous academic year a strike beginning on April 27, 1971 and ending upon the issuance of an injunction on May 11, 1971. See 5 Pa. Commw. Ct. at 380-81; 291 A.2d at 122.

207. Pennsylvania law requires the provision of a minimum of 180 instructional days. Pa. Stat. Ann. tit. 24 15-1501 (Purdon 1962). See 5 Pa. Commw. Ct. at 380, 385-86, 291 A.2d at 122, 124-25; Pittenger v. Union Area School Bd., 24 Pa. Commw. Ct. 442, 356 A.2d 866 (1976) (mandamus to schedule 180 school days despite teachers' strike.)

208. See 5 Pa. Commw. Ct. at 380-81, 291 A.2d at 122.

209. See note 206 supra.

210. See 5 Pa. Commw. Ct. at 381, 291 A.2d at 122.

211. See 5 Pa. Commw. Ct. at 381, 384, 291 A.2d at 122-23, 124.

212. 5 Pa. Commw. Ct. at 382, 291 A.2d at 123 ("[W]e will look only to see if there were any apparently reasonable grounds for the action of the court below, and we will not further consider the merits of the case or pass upon the reasons for or against such action, unless it is plain that no such grounds existed or that the rules of law relied on are palpably wrong or clearly inapplicable.")

213. 5 Pa. Commw. Ct. at 384, 291 A.3d at 124.

214. Id.

215. Id.

216. 5 Pa. Commw. Ct. at 385, 291 A.2d at 124. The court also observed that such activities were not necessarily attributable to the strikers and that, in any event, "[t]here are other laws available to deal with such disorders." Id.

217. 5 Pa. Commw. Ct. at 385-86, 291 A.2d at 124-25.

218. 5 Pa. Commw. Ct. at 385, 291 A.2d at 124.

219. See notes 201-03 supra. But see Haw. Rev. Stat. § 89-12 (1976), discussed in note 200 supra; Vt. Stat. Ann. tit. 16 § 2010 (Supp. 1979), note 62 supra.

220. See notes 35-43, 96-117 and accompanying text supra.

221. School Committee of the Town of Westerly v. Westerly Teachers' Ass'n, 111 R.I. 96, 103, 299 A.2d 441, 445-(1973); see notes 168-76 and accompanying text supra.

222. See note 207 supra.

223. The court seems to clarify these problems as those "inevitable" "inconveniences" the legislature was willing to tolerate. 5 Pa. Commw. Ct. at 384, 291 A.2d at 124. See also Blackhawk Sch. Dist. v. Pennsylvania State Educ. Ass'n, 74 D. & C. 2d 665, 671 (1976) (harm to students other than seniors does not meet statutory test "because ample time and opportunity to substantially make up the work will be available to such students prior to completion of their public school education, coupled with the natural enthusiasm and resilience of youth"). But see Root v. Northern Cambria School Dist., 10 Pa. Commw. Ct. 174, 181, 309 A.2d 175, 179 (1973) (unsuccessful taxpayers' suit to compel 180 days of instruction following teachers' strike; court observes that education of pupils is primary consideration in such matters).

224. 8 Pa. Commw. Ct. 204, 301 A.2d 405 (1973).

225. 8 Pa. Commw. Ct. at 214, 301 A.2d at 410.

226. Id.

227. Id.

228. Id. See 8 Pa. Commw. Ct. at 208, 301 A.2d at 407.

229. 8 Pa. Commw. Ct. at 215, 301 A.2d at 410.

230. 8 Pa. Commw. Ct. at 215, 301 A.2d at 411. The opinion leaves unclear whether the court below found this particular fact or whether the Commonwealth Court is simply extrapolating here.

One alternative approach the court apparently failed to consider is exemplified by Blackhawk School Dist. v. Pennsylvania State Educ. Ass'n, 74 D. & C. 2d 665 (Pa. 1976), where, after finding that a teachers' strike "has created a clear and present danger or threat to the welfare of the public to the extent of the interruption of the educational program for seniors and high school special education programs," id. at 690, without doing so in any other respect, the court issued a limited injunction covering only those employees responsible for the educational programs for "senior year students, including those seniors who may be enrolled in a special education program, limited to major subjects only." Id.

231. See 8 Pa. Commw. Ct. at 211-13, 301 A.2d at 408-10.

232. See note 212 and accompanying text supra.

233. See notes 225-230 and accompanying text supra.

234. The specific facts listed seem to be the sorts of consequences that many strikes might produce. But see note 235 infra.

235. References to the likelihood of increased gang activity, the related need for additional police protection, and the "debt-ridden" condition of the district arguably reflect the special

problems of an urban area like Philadelphia. The court nonetheless disclaims "laying down a special rule for Philadelphia." 8 Pa. Commw. Ct. at 216, 301 A.2d at 411. Cf. Jascourt, supra note 64, at 65 (discussing lower court's issuance of injunction Commonwealth v. Ryan, 459 Pa. 148, 327 A.2d 351 (1974)). The loss of additional school days as the result of an earlier strike cannot alone serve to distinguish Ross from Armstrong, for a similar fact characterized the latter case. See note 206 supra. In Armstrong, however, the earlier strike had disrupted the previous academic year while in Ross both strikes occurred during the 1972-73 school year. This fact may be significant with respect to each district's ability to meet the annual 180 day minimum required for state aid. See note 207 supra.

See also 8 Pa. Commw. Ct. at 223, 301 A.2d at 414 (Blatt, J., dissenting).

236. 8 Pa. Commw. Ct. at 218-23, 301 A.2d at 412-14.

237. See note 206 supra.

238. 5 Pa. Commw. Ct. at 383-84, 291 A.2d at 123-24.

239. 8 Pa. Commw. Ct. at 213, 301 A.2d at 410. See 8 Pa. Commw. Ct. at 223, 301 A.2d at 414 (Blatt, J., dissenting).

240. See note 236 and accompanying text supra. See also Commonwealth v. Ryan, 459 Pa. 148; 327 A.2d 351 (1974) (court lacks jurisdiction to enjoin strike before it begins).

241. In other words, under the majority's construction of the statute, in order to enjoin a strike by public employees, a court must find an existing danger to be "clear and present," yet it need not find that a "threat to the health, safety or welfare of the public" is "clear and present." Moreover, if "health, safety or welfare of the public" describes only the "threat," what or whom must the "danger" affect? Cf. Blackhawk School Dist. v. Pennsylvania State Educ. Ass'n., 74 D. & C. 2d 665, 667 (1976) (distinguishing "health and safety" from "welfare": because "no evidence suggesting an adverse impact upon the health and safety of the public, ... the sole issue ... is, whether the strike, ... has created a clear and present danger or threat to the welfare of the public").

242. 5 Pa. Commw. Ct. at 385, 291 A.2d at 124 ("If we were to say that such inconveniences, which necessarily accompany any strike by school teachers from its very inception, are proper grounds for enjoining such a strike, we would in fact be nullifying the right to strike granted to school teachers by the legislation....").

243. 8 Pa. Commw. Ct. at 215-16, 301 A.2d at 411 ("To deny [that the facts found below meet the statutory test] would ignore

reality and afford no particular meaning to the legislative mandate that not only strikes which create a clear and present danger may be enjoined, but also those that create a threat to the health, safety or welfare of the public").

244. See notes 217, 222, 226 and accompanying text supra. The court in Ross not only feared loss of state educational funds but also the additional expenditures for police protection required by the strike. See note 226 and accompanying text supra.

245. 9 Pa. Commw. Ct. 210, 304 A.2d 922 (1973).

246. 9 Pa. Commw. Ct. at 214-15, 304 A.2d at 923-24.

247. 9 Pa. Commw. Ct. at 215-16, 304 A.2d at 924.

Judge Kramer, concurring, expressed concern for the school-children of the district whose state constitutional right to a "thorough and efficient public education" the strike jeopardized; he saw the possibility of rescheduled instructional days as a less than perfect solution for them. 9 Pa. Commw. Ct. at 219-20, 304 A.2d at 926.

248. 14 Pa. Commw. Ct. 463, 322 A.2d 767 (1974).

249. 14 Pa. Commw. Ct. at 468, 322 A.2d at 769.

250. See text accompanying note 236 supra.

251. See 14 Pa. Commw. Ct. at 468 n.1, 322 A.2d at 769 n.1.

252. See 14 Pa. Commw. Ct. at 468-69, 322 A.2d at 769-70.

253. 14 Pa. Commw. Ct. at 469-70, 322 A.2d at 770.

254. Id.

255. 14 Pa. Commw. Ct. at 472, 322 A.2d at 771 (Mencer, J., dissenting).

256. See part I supra.

257. See notes 241-55 and accompanying text supra.

258. See notes 219-220 and accompanying text supra. School Dist. of Pittsburgh v. Pittsburgh Fed. of Teachers, 31 Pa. Commw. Ct. 461, 472-73, 376 A.2d 1021, 1026-27 (1976), however, casts doubt upon such an assumed equivalence. Appellants, contending that the order issued below halting their teachers' strike was a preliminary injunction, argued that it was defective because the judge issuing it failed to apply the special procedural rules for such preliminary relief. Among these rules is a finding that the preliminary injunction is necessary to prevent "immediate and irreparable harm." The Commonwealth Court disagreed, concluding

that the special procedural rules were inapplicable because the adjudication below -- which determined that the strike created "a clear and present danger, or threat, to the health, safety or welfare of the public" -- was a resolution of the merits of the case. Thus, the Pennsylvania cases may provide a model for judicial assessments of "harm" but not for judicial assessments of "irreparable harm." See notes 31-51 and accompanying text supra.

It nonetheless remains possible that the standards are roughly equivalent but that any effort to apply them will so closely address the merits of the case that the court will thereby obviate the need for preliminary relief. If that is true, then the only remaining differences, if any, will be procedural, i.e., whether the need for immediate relief is so compelling that the court can act before notice can be given to defendant or a hearing conducted. See School Dist. of Pittsburgh v. Pittsburgh Fed. of Teachers, 31 Pa. Commw. Ct. 461, 472-73, 376 A.2d 1021, 1026-27 (1976).

259. See Part I supra.

260. Pasadena Unified School Dist. v. Pasadena Fed. of Teachers, 72 Cal. App. 3d 100, 111-12, 140 Cal. Rptr. 41, 48 (Ct. App. 1977) (affirming the liability in damages imposed upon the teachers' union by the court below on a theory of tortious inducement of breach of contract and on an independent theory of direct liability for harm resulting from unlawful acts, i.e. an illegal public employees' strike). But see Lamphere Schools v. Lamphere Fed. of Teachers, 400 Mich. 104, 252 N.W.2d 818 (Mich. 1977) (rejecting civil damage action in tort against illegally but peacefully striking teachers). Query whether such liability for damages resulting from such a strike would attach where, as in Pennsylvania, the strike is not illegal?

281. See Root v. Northern Cambria School Dist., 10 Pa. Commw. Ct. 174, 181 309 A.2d 175, 178-79 (1973) (unsuccessful taxpayers' suit to compel provision of 180 instructional days following teachers' strike): "It is quite true ... in this case (and as our calculations of the complex, ingenious reimbursement formula of the Public School Code in almost all cases) that the local taxpayers will pay less for education by the system's teaching fewer than 180 days and paying teachers on the basis of days taught, than they will by providing 180 days...."; Foley v. West Middlesex Area School Dist., 68 D. & C.2d 115 (1974) (inconvenience to pupils, parents and teachers would make any plan to reschedule school days missed during teachers' strike impractical; court cites Root). In Pittenger v. Union Area School Board, 24 Pa. Commw. Ct. 442, 356 A.2d 866 (1976), the court ordered the provision of the 180 instructional days notwithstanding a teachers' strike; in so doing it expressly overruled any portions of Root inconsistent with its holding. See also Blackhawk School Dist. v. Pennsylvania State Educ. Ass'n, 74 D. & C.2d 665, 671 (1976):

The permanent loss of school days would not cause a financial loss to the school district, although it would cause a reduction of revenue in the 1976-77 school year. Indeed, there will be a net increase in available revenues over the long run. The loss, sad to state, will be purely a loss of education to children, incalculable in dollars. Some expenses continue whether school is in session, just as during vacation periods.

262. See notes 224-35 and accompanying text supra.

263. See 14 Pa. Commw. Ct. at 468-69, 322 A.2d at 769-70.

264. Regarding the possible utility of a Pennsylvania focussed analysis outside Pennsylvania, see Is Looking Up Case Precedent in Other Jurisdictions Worthwhile in Public Sector Labor Relations, 6 J.L. & Educ. 205 (1977) (symposium).

265. See Armstrong School Dist. v. Armstrong Educ. Ass'n, 5 Pa. Commw. Ct. at 384, 291 A.2d at 124.

266. See e.g., Parts III. B. 1, 2, and 3 supra.

267. See text accompanying notes 218 and 252-55 supra.

268. This rejection rests on a judicial imputation of legislative intent: Whatever harm flows from predictable strike consequences, the legislature has made it, standing alone, insufficient to support an injunction. See id.

269. Cf. Currie, Survival of Actions: Adjudication versus Automation in the Conflict of Laws, 10 Stan. L. Rev. 205, 210-11 (1958) ("the purpose [of evaluating cases as precedents] is to provide a basis for predicting future decisions, and for that practical purpose it is often necessary to read between the lines of the opinion"); Llewellyn, The Rule of Law in our Case-Law of Contract, 47 Yale L.J. 1243, 1256 (1938) ("ideal rule of law in case-law" is one that, inter alia, "offers real hope of appealing to present day courts; and so of guiding them with some sureness; and so of affording a counselor a moderately accurate prediction, and an advocate a solid basis of case-planning").

270. 347 U.S. 483 (1954).

271. Id. at 493.

272. Cases quoting Brown directly include: Goss v. Lopez, 419 U.S. 565, 576 (1975); San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 29-30, (1973); Wisconsin v. Yoder, 406 U.S. 205, 238 (1972) (White, J., concurring); Lora v. Board of Educ., 456 F.Supp. 1211, 1276 (E.D.N.Y. 1978); Mills v. Board of Educ., 348 F.Supp. 866, 874-75 (D.D.C. 1972); Serrano v. Priest, 5 Cal.3d 584, 608-09, 487 P.2d 1241, 1256, 96 Cal. Rptr. 60, 616-17 (1971). See, e.g. Abington Sch. Dist. v. Schempp, 374 U.S. 203, 230 (1963) ("Americans regard the public schools as a most vital civic institution for the preservation of a

democratic system of government") (Brennan, J., concurring); *McCullum v. Board of Educ.*, 333 U.S. 203, 216-17 (1948) (the public school is "[d]esigned to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people") (Frankfurter, J., concurring); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 157 (5th Cir. 1961) (education enables individuals "to earn an adequate livelihood, to enjoy life to the fullest, ... to fulfill as completely as possible the duties and responsibilities of good citizens"); *Van Duzart v. Hatfield*, 334 F.Supp. 870, 875, (D.Minn. 1971) ("[e]ducation has a unique impact on the mind, personality, and future role of the individual child [and education] is basic to the functioning of a free society and thereby evokes special judicial solicitude"); *Piper v. Big Pine Sch. Dist.*, 193 Cal. 664, 673 226 P. 926, 930 (1924) ("[t]he common schools are doorways opening into chambers of science, art and the learned professions, as well as into fields of industrial and commercial activities"); *Malone v. Hayden*, 329 Pa. 213, 223, 197 A. 344, 352 (1938) ("[e]ducation is today regarded as one of the bulwarks of democratic government").

273. At certain times, however, the courts have evaluated or ordered the establishment of specific educational programs. See, e.g., *Milliken v. Bradley*, 433 U.S. 267 (1977) (order establishing in district previously segregated by race remedial programs in reading, testing, counseling and career guidance, and in-service teacher and administrative training); *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967), aff'd sub. nom. Smuck v. Hobson, 408 F.2d 175 (D.C.Cir. 1969) (extensive examination of District of Columbia's discriminatory practices in faculty placement and resource inequities). See also cases cited in notes 356-76 infra, where courts have examined allegedly malfunctioning school systems.

274. See, e.g., *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (refusing to equalize interdistrict educational expenditures); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (exempting Amish from compulsory education beyond the eighth grade).

275. E.g., *Lau v. Nichols*, 414 U.S. 563 (1974) (relying on § 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976)); *Martin Luther King Elementary School Children v. Michigan Bd. of Educ.*, 473 F.Supp. 1371 (E.D.Mich. 1979) (relying on Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1703 (1976)); *Serna v. Portales Mun. Schools*, 351 F.Supp. 1279 (D.N.Mex. 1972) (relying on equal protection clause, aff'd on other grounds, 499 F.2d 1147 (10th Cir. 1974) (relying on § 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976)). But see *Guadalupe Org., Inc. v. Tempe Elementary School Dist.*, 587 F.2d 1022 (9th Cir. 1978).

See generally Foster, *Bilingual Education*, 5 J.L. & Ed. 149 (1976); Grubb, *Breaking the Language Barrier: The Right to Bilingual Education*, 9 Harv. Civ. Rights-Civ. Lib. L. Rev. 53 (1974); Sugarman & Widdess, *Equal Protection for Non-English-Speaking School Children: Lau v. Nichols*, 62 Cal. L. Rev. 157 (1974);

Bilingual Education and Desegregation, 127 U. Pa. L. Rev. 1564 (1979).

276. Boxall v. Sequoia Union High School Dist., 464 F. Supp. 1104 (N.D. Cal. 1979) (refusal to dismiss action on behalf of autistic child for individualized instruction under Rehabilitation Act of 1973, 29 U.S.C. § 701 et. seq. (1976); Civil Rights Act of 1964, 42 U.S.C. §2000d (1976); Education of the Handicapped Act, 20 U.S.C. §1401-61 (1976 Supp. I); Lora v. Board of Educ., 456 F. Supp. 1211 (E.D.N.Y. 1978) (students in "special day schools" have right to treatment, due process rights and rights under federal legislation); Kruse v. Campbell, 431 F.Supp. 180 (E.D.Va. 1977) (relying on equal protection clause), vacated and remanded, 434 U.S. 808 (1978); Hairston v. Drosick, 423 F.Supp. 180 (S.D.W.Va 1976) (relying upon §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (1976)). See e.g., Fialkowski v. Shapp, 405 F.Supp. 946 (E.D. 1975). (refusing to dismiss equal protection and due process claims); Panitch v. Wisconsin, 371 F. Supp. 955 (E.D. Wisc. 1974) (proceedings in equal protection challenge stayed pending implementation of state statute); Harrison v. Michigan, 350 F. Supp. 846 (E.D. Mich. 1972) (equal protection challenge mooted by state statute). But see Southeastern Community College v. Davis, 99 S.Ct. 2361 (1979) (§504 of Rehabilitation Act of 1973, 20 U.S.C. § 794 (1976) does not require major adjustments in college's nursing program to meet needs of handicapped applicant). See generally Dimond, The Constitutional Right to Education: The Quiet Revolution, 24 Hastings L.J. 1087 (1973); Haggerty & Sachs, Educating the Handicapped: Towards a Definition of an Appropriate Education, 50 Temp. L.Q. 961 (1977); Handell, The Role of the Advocate in Securing the Handicapped Child's Right to an Effective Minimal Education, 36 Ohio St. L.J. 349 (1975); McClung, Do Handicapped Children Have a Legal Right to a Minimally Adequate Education? 3 J.L. & Ed. 153 (1973); Weintraub & Abeson, Appropriate Education for all Handicapped Children: A Growing Issue, 23 Syr. L. Rev. 1037 (1972). Many authorities use the terms "handicapped" and "exceptional" interchangeably, e.g., Special Education: The Struggle for Equal Educational Opportunity in Iowa, 62 Iowa L. Rev. 1283, 1291 n. 29 (1977). See note 277 infra.

277. E.g., Frederick L. V. Thomas, 557 F.2d 373 (3d Cir. 1977) (relying on Pennsylvania state law); Mills v. Board of Educ., 348 F.Supp. 866 (D.D.C. 1972) (relying upon the equal protection clause and a variety of local Board of Education rules). See generally Kirp, Schools as Sorters: The Constitutional and Policy Implications of Student Classification, 121 U. Pa. L. Rev. 705, 710-17 (1973); Kirp, Buss and Kuriloff, Legal Reform of Special Education: Empirical Studies and Procedural Proposals, 62 Cal. L. Rev. 40 (1974); Special Education: The Struggle for Equal Educational Opportunity in Iowa, 62 Iowa L. Rev. 1283 (1977). Cf. note 276 supra ("exceptional" and "handicapped" used interchangeably).

278. E.g., Pennsylvania Ass'n. of Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972) (consent decree enforced on basis of plaintiffs' colorable claim of equal protection and due process violations). See generally Herr, Retarded Children and the Law: Enforcing the

Constitutional Rights of the Mentally Retarded, 23 *Syr. L. Rev.* 995 (1972); Kubetz, Educational Equality for the Mentally Retarded, 23 *Syr. L. Rev.* 1141 (1972); Toward a Legal Theory of the Right to Education of the Mentally Retarded, 34 *Ohio St. L. J.* 554 (1973).

279. Federal legislation now abounds, see statutes cited in notes 275-76 supra, and has obviated the need for courts and litigants to rely on constitutional grounds. See *Boxall v. Sequoia Union High School Dist.*, 464 F.Supp. 1104, 1108 (N.D.Cal. 1979); "The conscience of Congress ... has responded to the problems of the handicapped which had led to the constitutional decisions. Federal statutory reforms have now gone as far or even farther than the constitutionally based decisions of the early 1970's."

280. See, e.g., *Boxall v. Sequoia Union High School Dist.*, 464 F. Supp. 1104, 1114 (N.D.Cal. 1979) ("Congress has determined that the burden on resources is worth the price to develop the potential of the handicapped"); *Harrison v. Michigan*, 350 F.Supp. 846, 849 (E.D.Mich. 1972) (in dismissing action as moot, "court takes notice of the fact that all the parties...seek the same goal: an adequate and free public education for the children of this state, regardless of handicap"); *Mills v. Board of Educ.*, 348 F.Supp. 866, 874-75 (D.D.C. 1972) (quoting *Brown v. Board of Educ.*, 347 U.S. 483 (1954)).

281. 433 U.S. 267 (1977).

282. See id. at 285. The Milliken Court reasoned that the remedial programs would cure the "habits of speech, conduct and attitudes reflecting the [students'] cultural isolation" from segregation. Id. at 287.

283. Pa. Stat. Ann. tit. 24 § 15-1511 (Purdon 1979 Supp.). For references to comparable legislation in the other 49 states and the District of Columbia, see State Legal Standards for the Provision of Public Education 27-29 (N.I.E. 1978) [hereinafter State Legal Standards]. See generally Education and the Law: State Interests and Individual Rights, 74 *Mich. L. Rev.* 1373, 1423-26 (1976) [hereinafter, Education and the Law].

284. See, e.g., Pa. Stat. Ann. Tit. 24 §§ 12-1202-12-1258 (Purdon 1962 & 1979 Supp.). For descriptions of and references to comparable legislation in the 49 other states and the District of Columbia, see State Legal Standards, supra note 283, at 99-106.

285. E.g., *Ariz. Rev. Stat. Ann.* § 15-321 (B) (2) (West 1975); *Ark. Stat. Ann.* § 80-1502 (1960 Replacement); *Del. Code Ann. tit. 14* §§ 2702-03 (1975); *Ill. Ann. Stat. Ch. 122* § 26-1 (Smith-Hurd 1979 Supp.); *N.J. Stat. Ann.* § 18A: 38-25 (West 1968); Pa. Stat. Ann. tit. 24 § 13-1327 (Purdon Supp. 1979); *Scoma v. Chicago Bd. of Educ.*, 391 F. Supp. 452 (N.D.Ill. 1974); *Stephens v. Bongart*, 15 *N.J. Misc.* 80, 189 A.131 (Juv. & Dom. Rel. Ct. 1937). But see *State v. Massa*, 95 *N.J. Super.* 382, 231 A.2d

252 (Morris Cty. Ct., L. Div. 1967) (mother allowed to teach her daughter at home upon showing that home instruction was academic equivalent of that provided in public schools). Cf. *Farrington v. Tokushige*, 273 U.S. 284 (1926) (state regulation of nonpublic schools); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (recognition of parental right to choose private education for their children assumes state power to require some schooling and to regulate reasonably all schools). See generally, Education and the Law, supra note 283, at 1387-99.

286. See generally McClung, Competency Testing Programs: Legal and Educational Issues, 47 Ford L. Rev. 651 (1979); Weston, Competency Testing and the Potential Constitutional Challenges of Every Student, 28 Cath. U. L. Rev. 469 (1979); The Wall Street Journal, May 9, 1978, at 1, col. 1.

287. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

288. Id. at 493.

289. See R. Dawson & K. Prewitt, Political Socialization 143-44 (1969); D. Kirp & M. Yudof, Educational Policy and the Law 88-134 (1974); Education and the Law, supra note 283, 1383-99.

290. E.g. Ariz. Rev. Stat. Ann. § 15-1021 (West 1975); Ark. Stat. Ann. § 80-1613-80-1614 (1960 Replacement); Ill. Ann. Stat. ch. § 122 § 27-3 (Smith-Hurd 1962); N.J. Stat. Ann. § 18A:35-3 (West 1968); Wash. Rev. Code Ann. §§ 28A.02.080-090 (West 1970). See R. Dawson & K. Prewitt, supra note 289, at 144. See also In re Wilson, Comm'r of Educ., State of N.Y., No. 8421 (1972) (reproduced in D. Kirp & M. Yudof, supra note 289, at 132-34.

291. E.g., Ark. Stat. Ann. § 80-1613 (1960 Replacement) ("American history shall be taught with the primary object of "instilling into the hearts of various pupils an understanding of the United States and of a love of country and of a devotion to principles of American government"); Ill. Stat. Ann. ch. 122 § 27-3 (Smith-Hurd 1962) ("American patriotism...shall be taught in all public schools"); N.J. Stat. Ann. § 18A:35-3 (West 1968) (civics, especially civics of New Jersey, shall be taught "with the object of producing the highest type of patriotic citizenship"); Pa. Stat. Ann. tit. 24 § 15-1511 (Purdon Supp. 1979) ("civics, including loyalty to the United States and National Government").

292. Pa. Stat. Ann. tit. 24 § 16-1605 (Purdon 1962); see Ariz. Rev. Stat. Ann. § 15-1025 (West 1975) ("All public high schools shall give instruction on the essentials and benefits of the free enterprise system"); N.J. Stat. Ann. 18A:35-2 (West 1968) (curriculum shall include instruction in "[t]he history of, the origin and growth of the social, economic and cultural development of the United States, of American family life and of the high standard of living and other privileges enjoyed by the citizens of the United States").

293. E.g., Miss. Code Ann. § 37-13-11 (1972); Wash. Rev. Code Ann. § 28A.05.010 (West 1970).

294. Ariz. Rev. Stat. Ann. § 15-1023 (West 1975); Ark. Stat. Ann. § 80-1618 (1960 Replacement); Miss. Code Ann. § 37-13-11, § 37-13-37 (1972); Wash. Rev. Code Ann. § 28A.05.010 (West 1970).

295. E.g., Ark. Stat. tit. 8 § 80-1612 (1960 Replacement) (celebration of Bird Week); N.J. Stat. Ann. § 18A:35-4.1 (West 1968) ("principles of humanity...and avoidance of a cruelty to animals and birds"); Pa. Stat. Ann. tit. 24 § 15-1541 (Purdon 1962) ("humane education"); Wash. Rev. Code Ann. § 28A.05.010 (West 1970) ("teachers shall stress the importance of...the worth of kindness to all living things").

296. E.g., Ark. Stat. Ann. §§ 80-1621-80-1622 (1960 Replacement); Ill. Ann. Stat. ch. 122 § 27-13.1 (Smith-Hurd Supp. 1979); Pa. Stat. Ann. tit. 24 § 15-1541 (Purdon 1979 Supp.).

297. See, e.g., Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 512 (1969); Stephens v. Bongart, 15 N.J. Misc. 80, 189 A.131 (Juv. & Dom. Rel. Ct. 1937). But see State v. Massa, 95 N.J. Super. 382, 231 A.2d 252 (Morris Cty. Ct. L. Div. 1967). See also Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957). See generally D. Kirp & M. Yudof, supra note 289, 126-32. Cf. Yodof Equal Educational Opportunity and the Courts, 51 Tex. L. Rev. 411, 461-62 (1973) (value inculcation approved).

298. See note 285 and accompanying text supra.

299. Tinker v. Des Moines Sch. Dist., 383 U.S. 503, 512 (1969).

300. See, e.g., Cook v. Hudson, 511 F.2d 744 (5th Cir. 1975) (dismissal of teachers whose own children attended segregated private schools upheld; teachers are "reinforcers"), cert. granted, 424 U.S. 941 cert. dismissed as improvidently granted, 429 U.S. 165 (1976); Sullivan v. Meade County Indep. School Dist. No. 101, 387 F.Supp. 1237, 1243 (D.S.D 1975) (dismissal of female teacher cohabitating with man upheld; pupils "are taught by example as well as by lecture"), aff'd, 530 F.2d 799 (8th Cir. 1976); Freeman v. Town of Bourne, 170 Mass. 289, 49 N.E. 435 (1898) (indictment for adultery sufficient reason to discharge superintendent). See also Stephens v. Bongart, 15 N.J. Misc. 80, 89, 189 A.131, 135 (Juv. Dom. Rel. Ct. 1937) ("teacher...becomes the guiding influence"); D. Kirp & M. Yudof, supra note 289, at 199-200, 227. But see Andrews v. Drew Municipal Separate School Dist., 371 F. Supp. 27 (N.D. Miss. 1973) (teacher who was unwed mother could not be dismissed solely on that basis), aff'd, 507 F.2d 611 (5th Cir.), cert. granted, 423 U.S. 820 (1975), cert. dismissed as improvidently granted, 425 U.S. 559 (1976).

301. E.g., Mo. Ann. § 168.031 (Vernon 1965); Pa. Stat. Ann. tit. 24 § 12-1209 (Purdon 1962).

302. See note 284 and accompanying text supra.

303. See authorities cited in notes 300-01 supra.

304. See, e.g., L. Cremin, The Transformation of the School 68-69 (1961), quoting Zangwill, the Melting Pot 37; E. Cubberly, Changing Conceptions of Education 15-16 (1909). See also, e.g., D. Kirp & M. Yudof, supra note 289, at 4-10, Education and the Law, supra note 283, at 1383-99 & n.43; D. Tyack, the One Best System (1974). But see C. Greer, The Great School Legend ____ (1972).

305. See A. Mann, A Historical Overview: the Lumpen-proletariat, Education and Compensatory Act in the Quality of Inequality: Urban and Suburban Public Schools (The University of Chicago Center for Policy Study), quoting Horace Mann, Twelfth Annual Report of the Board of Education, Together with the Twelfth Annual Report of the Secretary of the Board 13 (1849). L. Cremin, supra note 304, at 9, quoting Horace Mann, Twelfth Annual Report of the Board of Education, Together with the Twelfth Annual Report of the Secretary of the Board 84 (1849).

306. See, e.g., Tinker v. Des Moines Indep. Com. School Dist., 393 U.S. 503, 512 (1969) (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)). See also Shelton v. Tucker, 364 U.S. 479, 487 (1960).

307. See text at note 271 supra.

308. The perceived educational loss in Brown v. Board of Education, 347 U.S. 483 (1954), was not attributable to deprivation of scheduled school time but rather to the stigma and other "intangible" effects upon blacks of the segregated system. See id. at 493-95. See also Yudof, supra note 297, at 437-39. In Griffin v. County School Board, 377 U.S. 218 (1964), where the Court reviewed Prince Edward County's closure of its public schools in the wake of an order to desegregate them, loss of schooling was the issue raised by plaintiff's equal protection challenge. Finding the closure unconstitutional, the Court ordered the schools opened - a result it refused to reach where the withdrawn public service was public swimming facilities instead, Palmer v. Thompson, 403 U.S. 217 (1971). See Shoettle, The Equal Protection Clause in Public Education, 71 Col.L.Rev. 1355, 1364, (1971) (theorizing that the importance of schooling may explain Griffin).

309. See Part I supra. In School Committee of the Town of Westerly v. Westerly Teachers Ass'n, 111 R.I. 96, 299 A.2d 441 (1973), although rejecting automatic injunctive relief against striking teachers, the court refused to recognize a constitutional right to strike for teachers; the court observed:

The state has a compelling interest that one of its most precious assets - its youth - have the opportunity to drink at the fount of knowledge so that they may be nurtured and develop into the responsible citizens of tomorrow. No one has the right to turn off the fountain's spigot and keep it in a closed position.

111 R.I. at 100, 299 A.2d at 443-44.

310. 419 U.S. 565 (1975).

311. Id. at 581.

312. See id. at 582 n.10. (during delay attending state's post-suspension review procedures, "the suspension will not be stayed pending hearing, and...the student meanwhile will irreparably lose his educational benefits") (emphasis added.).

313. Id. at 582. The Goss Court found the due process clause applicable because the suspensions infringed both property and liberty interests of the affected students. See id. at 574-76. While the former occurs because a suspension deprives a student of his "legitimate entitlement to a public education," as guaranteed by state law, id. at 574 the latter is attributable to the stigma accompanying the suspensions, id. at 574-75. But see Paul v. Davis, 424 U.S. 693 (1976) (undercutting stigma rationale); Goss v. Lopez, 419 U.S. at 598-99 n.19 (Powell, J., dissenting):

For average, normal children - the vast majority - suspension for a few days is simply not a detriment; it is a commonplace occurrence, with some 10% of all students being suspended; it leaves no scars; affects no reputations; indeed, it often may be viewed by the young as a badge of some distinction and a welcome holiday.

314. Compare Mathews v. Eldridge, 424 U.S. 319 (1976) (due process does not require hearing before termination of disability benefits), with Goldberg v. Kelly, 397 U.S. 254 (1970) (due process requires hearing before termination of welfare benefits). See generally Dixon v. Love, 431 U.S. 105 (1977). Goss, of course, should not be read to mean that the Constitution prohibits student suspensions altogether. The procedural safeguards imposed by the Court are designed primarily to minimize the risk of erroneous deprivations or unjustified suspensions. See Carey v. Phipus, 435 U.S. 247, 259-60 (1978) ("such rules minimize substantively unfair or mistaken deprivations of life, liberty or property").

315. 430 U.S. 651 (1977).

316. Id. at 682.

317. Id. at 678.

318. Id. at 682.

319. Id. at 678 n.46.

320. Cf. Carey v. Phipus, 435 U.S. 247, 260 (1978) (suggesting unjustified suspensions imposed in violation of required procedural due process compensable in damages).

321. See generally Part III supra.

322. See, e.g., School Committee of the Town of Westerly v. Teachers Ass'n, 111 R.I. 96, 299 A.2d 441 (1973) (flexibility). See also supra notes 90-91 and accompanying text supra.

323. See Lytle & Yanoff, The Effects (if Any) of a Teacher Strike on Student Achievement, 55 Phi Delta Kappan 270 (1973) (describing how many schools, staffed with administrators and substitutes, remained open during the 1972 and 1973 Philadelphia Teachers' strikes.)

324. 393 U.S. 503 (1969)

325. See id. at 511-14.

326. Id. at 505-14.

327. Id. at 513. See Guzick v. Drebus, 431 F.2d 594 (6th Cir. 1970) (threatened disruption supports school's suspension of student wearing button soliciting participation in antiwar demonstration where similar buttons had caused previous disruption); Crews v. Cloncs, 432 F.2d 1259, 1265 (7th Cir. 1970) (school rule or disciplinary action infringing fundamental rights is valid only if the record contains evidence reasonably leading school authorities to forecast substantial disruption of or material interference with school activities). Cf. Trachtman v. Anker, 563 F.2d 512 (2d Cir. 1977) (distribution of sex questionnaire by student publication justifiably restrained by school authorities who had reason to believe harmful consequences to students would follow). A similar standard has been applied to university student activities as well. Healy v. James, 408 U.S. 169, 189 (1972) ("associational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education").

328. Everett v. Marcase, 426 F. Supp. 397 (E.D.Pa. 1977). See Lora v. Board of Educ., 456 F.Supp. 1211, 1278 (E.D.N.Y. 1978) ("The argument that there is no right to notice and hearing prior to a change in educational setting [here, a transfer to special schools] is without merit.").

329. Id. at 400.

330. Id. at 401.

331. For example, in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), the Supreme Court, while authorizing busing as a remedy for unconstitutional school segregation, cautioned: "An objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process." Id. at 30-31 (emphasis added). See also American Bar Association, Juvenile Justice Standards Project: Standards

Relating to Schools and Education 128-37 (1977) (limitations on student expulsions and suspensions); Children's Defense Fund, School Suspensions: Are they Helping Children (1975).

332. See Parts III B, 1, 2, and 3 supra.

333. That is, an inquiry that views the purposes of schooling as more than purely academic. See text accompanying notes 287-306 supra.

334. See notes 300-03 and accompanying text supra.

335. See generally D. Kirp & M. Yudof, supra note 289, at 203-16.

336. See generally id. at 216-31.

337. See, e.g., Cook v. Hudson, 511 F.2d 744 (5th Cir. 1975), cert. granted, 424 U.S. 941, Cert. dismissed as improvidently granted, 429 U.S. 165 (1976) (upholding refusal to rehire teachers whose own children attended segregated private schools); Birdwell v. Hazelwood School Dist. 491 F.2d 490 (8th Cir. 1974) (upholding dismissal of teacher after his suggestion to students that they could get ROTC off campus resulted in disruption); Calvin v. Rupp, 334 F.Supp. 358 (E.D. Mo. 1971) (upholding dismissal of teacher for refusing to publish school paper and failing to report suspicious conduct).

338. See, e.g., Bradford v. School Dist. No. 20, 364 F.2d 185 (4th Cir. 1966) (conviction for public drunkenness); Sullivan v. Meade County Indep. School Dist. No. 101, 387 F.Supp. 1237 (D.S.D. 1975), aff'd, 530 F.2d 799 (8th Cir. 1976) (nonmarital cohabitation); Gaylord v. Tacoma School Dist. No. 10, 88 Wash. 2d 286, 559 P.2d 1340, cert. denied, 434 U.S. 879 (1977) (admitted homosexuality). But see Andrews v. Drew Mun. Sep. School Dist., 371 F. Supp. 27 (N.D. Miss. 1973), aff'd, 507 F.2d 611 (5th Cir.), cert. granted, 423 U.S. 820 (1975), cert. dismissed as improvidently granted, 425 U.S. 559 (1976); Burton v. Cascade School Dist. Union High School No. 5, 353 F.Supp. 254 (D. Ore. 1973), aff'd, 512 F.2d 850 (9th Cir.), cert. denied, 423 U.S. 839 (1975).

339. See, e.g., East Hartford Ed. Ass'n v. Board of Educ., 562 F.2d 838, 859 (2d Cir. 1977) (on petition for rehearing en banc) ("Balanced against appellant's claim of free expression is the school board's interest in promoting respect for authority and traditional values, as well as discipline in the classroom, by requiring teachers to dress in a professional manner"); James v. Board of Educ., 461 F.2d 566, 573 (2d Cir.) (though recognizing teachers' free speech claim, court observes that "a principal function of all elementary and secondary education is indoctrination - whether it be to teach the ABC's or multiplication tables or to transmit the basic values of the community"), cert. denied, 409 U.S. 1042 (1972). See also Givhan v. Western Line Consol. School Dist., 439 U.S. 410, _____ n.4 (1979) (different considerations in evaluating first amendment claims of teachers

speaking publicly and teachers speaking privately): Pickering v. Board of Educ., 391 U.S. 63, 574 (1968) (need to balance interests of teacher and state).

340. See, e.g., Miller v. School Dist. No. 127, 495, F.2d 658 664 (7th Cir. 1974) (assuming teacher has a liberty interest in choosing style of dress; limitations may be justified by, inter alia, "desire to encourage respect for tradition... [or] traditional manners"); Andrews v. Drew Mun. Sep. School Dist., 371 F. Supp. 27, 35 (N.D. Miss. 1973) (court sets aside denial of teaching jobs to unwed mothers as violative of due process and equal protection; court rejects school's role model argument given "absence of overt, positive stimuli"), aff'd, 507 F.2d 611 (5th Cir.), cert. granted, 423 U.S. 820 (1975), cert. dismissed as improvidently granted, 425 U.S. 559 (1976).

341. See also Goss v. Lopez, 419 U.S. 565, 594 (Powell, J. dissenting) (the "normal teacher-pupil relationship [is]...one in which the teacher must occupy many roles - educator, adviser, friend, and, at times, parent-substitute"); Brief for Petitioners at 3-4, Drew Mun. Sep. School Dist. v. Andrews 425 U.S. 559 (1976), quoted in Perry, Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases, 71 Nw. U.L. Rev. 417, 461 (1976) ("[T]he role of a teacher, apart from imparting instruction is to mold character and development through being a 'role model.'"; Dressler, Gay Teachers: A Disesteemed Minority in an Overly Esteemed Profession, 9 Rutgers Camden L.J. 399, 416 (1978) ("the teacher is expected to serve as an exemplar and role model of a life style that the child may and presumably will emulate").

342. Pa. Stat. Ann. tit. 24 § 11-1122 (Gordon 1962) provides for termination of a teachers' contract for: "Immortality, incompetency, intemperance, cruelty, persistent negligence, mental derangement, advocacy of or participating in un-American or subversive doctrine, persistent and willful violation of the school laws of this Commonwealth on the part of the professional employee..." See Del. Code Ann. tit. 14 § 1411 (1975) (allows for termination of a showing of "[i]mmorality, misconduct in office, incompetency, disloyalty, neglect of duty, willful and persistent insubordination"); N.J. Stat. Ann. § 18A:28-5 (West 1968) (tenured teacher may be dismissed for "inefficiency, incapacity, or conduct unbecoming such a teaching staff member").

343. Bovino v. Board of School Dirs., 32 Pa. Commw. Ct. 105, 113, 377 A.2d 1284, 1289 (1977). See Adler v. Board of Educ., 342 U.S. 485, 493 (1957) ("A teacher works in a sensitive area in the classroom. There, he shapes the attitude of young minds toward the society in which they live. In this, the State has a vital concern").

344. See, e.g., Stroman v. Board of School Directors, 7 Pa. Commw. 418, 300 A.2d 286 (1972) (teacher's unwillingness to conform to required Board procedures); Johnson v. United School Dist., 201 Pa. Super. Ct. 375, 191 A.2d 897 (1963) (teacher's refusal to

attend "open house" for parents of students); Board of School Directors v. Snyder, 346 Pa. 103, 29 A.2d 34 (1942) (Teacher's failure to follow Board procedures in applying for maternity leave).

345. Board of Pub. Educ. v. August, 406 Pa. 229, 177 A.2d 809 (1962) (refusal to answer questions about possible Communist affiliation), cert. denied, 370 U.S. 904 (1962). The case, admittedly reflecting the concerns of an apparently bygone era, nonetheless remains instructive. See also Acanfora v. Board of Educ., 491 F.2d 498 (4th Cir.), cert. denied, 419 U.S. 836 (1974) (upholding transfer of teacher to nonteaching position for failing to disclose on application his involvement in activist homosexual group).

346. Spano v. School Dist. of Breatwood, 12 Pa. Commw. 170, 316 A.2d 162, cert. denied, 420 U.S. 966 (1974) (teacher, with otherwise laudable teaching record, called school superintendent a "liar" and "autocratic administrator" and told PTA president she did not have to take orders from him); Fenstermacher's Appeal, 36 Pa D & C 373 (1939) (teacher criticized educational policy of principal and refused to follow it and distributed questionnaire to parents and pupils inquiring about their desire to retain him as a teacher). But see Givhan v. Western Line Consol. School Dist., 439 U.S. 410, (1979) (private disagreement with school authorities); Pickering v. Board of Educ., 391 U.S. 563, 572-73 & n.5 (1968) (teacher's false statements did not justify dismissal where no showing that they impeded the "proper performance of his daily duties" or called "into question his fitness to perform his duties").

347. See Parts III B, 1, 2, 3, and 4a supra.

348. See generally D. Kirp & M. Yudo, supra note 289 at 226-27 (insubordination as grounds for teacher dismissal). In Board of Educ. v. Lakeland Fed. of Teachers, 59 A.D.2d 900, 900, 399 N.Y.S. 2d 61, 62 (1977), affirming contempt citations of striking teachers, the court observed:

The Taylor Law, rightly or wrongly, represents the public policy of this State. Its object is to proscribe strikes such as that herein which "would not only deprive children of their fundamental and statutory right to a basic education - thereby severely handicapping them in their efforts to attain higher education and future employment - but it would also impair their respect for law...."

349. See, e.g., Wishart v. McDonald, 500 F.2d 1110, 1116 (1st Cir. 1974); Sullivan v. Meade County Indep. School Dist., No. 101, 387 F.Supp. 1237, 1247 (D.S.D. 1975), aff'd, 530 F.2d 799 (8th Cir. 1976); Fischer v. Snyder, 476 F.2d 375, 378 (8th Cir. 1973); Baker v. School Dist. of Allentown, 29 Pa. Commw. Ct. 435, 456, 371 A.2d 1028, 1029 (1977); Horosko v. Mount Pleasant Twnshp. Sch. Dist., 335 Pa. 369, 372, 6 A.2d 866, 868 (1939).

350. See, e.g., *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979); *Mount Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *City of Madison Joint School Dist. v. Wisconsin Emp. Relations Comm'n*, 429 U.S. 167 (1977); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

351. See, e.g., *James v. Board of Educ.*, 461 F.2d 566 (2d Cir.), cert. denied, 409 U.S. 1042 (1972); *Andrews v. Drew Mun. Sep. School Dist.*, 371 F.Supp. 27 (N.D. Miss. 1973), aff'd, 507 F.2d 611 (5th Cir.), cert. granted, 423 U.S. 820 (1975), cert. dismissed as improvidently granted, 425 U.S. 559 (1976); *Morrison v. State Bd. of Educ.*, 1 Cal.2d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969).

352. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Shelton v. Tucker*, 364 U.S. 479, 487, (1960).

353. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957); see *Wieman v. Updegraff*, 344 U.S. 183, 195-97 (1952) (Frankfurter, J., concurring).

354. But cf. *Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, (1976) (dismissal of illegally striking teachers); *Board of Educ. v. Lakeland Fed. of Teachers*, 59 A.D.2d 900, 399 N.Y.S.2d 61 (1977) (illegal teachers' strike impairs students' respect for law).

355. Cf. *Hashway, Long Range Effects of Teacher Strikes on Student Attitudes*, 2 Educational Research Q. 12 (1977) (teachers' strikes affect student attitudes on teachers and school system's concern for students' personal welfare). This study is apparently the only effort to establish the sorts of empirical assumptions the courts frequently make in these cases. See *St. Louis Post-Dispatch* March 4, 1979, § A, at 1, col. 1. Significantly, however, one study in Pennsylvania has shown that teachers' strikes - even those of considerable duration - have negligible impact on pupils' academic achievement. Lytle & Yanoff, *The Effects (if Any) of a Teacher Strike on Student Achievement*, 55 Phi Delta Kappan 270 (1973) (finding "prolonged, bitter teacher strike" has no effect on arithmetic and reading achievement of junior high school students).

356. Despite legal recognition that children with special needs are entitled to meaningful state-provided educational opportunities, see notes 275-80 and accompanying text supra, many state compulsory attendance statutes continue to exempt children who are mentally or physically incapable of attending school. See, e.g., *Ariz. Rev. Stat. Ann.* § 15-321 (B) (3) (West 1975); *Ark. Stat. Ann.* § 80-1504 (1960 Replacement); *Ill. Ann. Stat. ch. 122* § 26-1 (Smith-Hurd 1979 Supp.); *Wash. Rev. Code Ann.* § 28A:27.010 (West 1979 Supp.).

357. See notes 275-80 and accompanying text supra.

358. See, e.g., *Boxall v. Sequoia Union High School Dist.*, 464 F.Supp. 1104 (N.D.Cal. 1979) (artistic child who cannot fit in any other educational setting is entitled to full-time tutor at home).

359. See generally D. Kirp & M. Yudof, *supra* note 289, at 642-43 ("functional exclusion" through inclusion of children with special needs in regular education program); Horowitz, *Unseparate But Unequal - The Emerging Fourteenth Amendment Issue in Public Education*, 13 U.C.L. A.L. Rev. 1147 (1966) (Constitution requires education program permitting each student to achieve to the full extent of his capacity). See also *Lau v. Nichols*, 483 F.2d 791, 801 (9th Cir. 1973) (Hill, J., dissenting) (English education for non-English-speaking pupils becomes "mere physical presence as audience to a strange play which they do not understand"), *rev'd* 414 U.S. 563 (1974). But see *McInnis v. Shapiro*, 293 F.Supp. 327 (D.N.Ill. 1968), *aff'd sub nom.*, *McInnis v. Ogilvie*, 394 U.S. 322 (1969) (Constitution does not require state to tailor educational expenditures to "educational needs" of students).

360. 406 U.S. 205 (1972)

361. *Id.* at 215; 238 (White, J. concurring).

362. *Id.* at 227. Cf. *Davis v. Page*, 385 F. Supp. 395 (D.N.H. 1974) (court rejects *Yoder*-based challenges to curriculum by Apostolic Lutherans who do not lead a sheltered and isolated existence).

363. 406 U.S. at 219.

364. *Id.* at 230.

365. *Id.* at 235. See *Davis v. Page*, 385 F.Supp. 395 (D.N.H. 1974).

366. A number of critics have questioned current schooling practices altogether. See, e.g., P. Goodman, *Compulsory Mis-Education* (1964); I. Illich, *Deschooling Society* (1970). Everhard, *From Universalism to Usurpation: An Essay on the Antecedents to Compulsory School Attendance Legislation*, 47 Rev. of Educ. Research 499 (1977).

367. *In re Gregory B.*, 88 Misc. 2d 313, 387 N.Y.S.2d 380 (Fam. Ct. 1976).

368. 88 Misc. at 317, 387 N.Y.S.2d at 383. See *Fialkowski v. Shapp*, 405 F.Supp. 946, 959 n.10 (E.D.Pa. 1975); *The Right to Education: "A Constitutional Analysis"*, 44 U. of Cin.L.Rev. 796, 807 (1975) See also W. Rickenbacker, *The Twelve Year Sentence* (1974).

369. E.g., *Donohue v. Copaugue Union Free Sch. Dist.*, 95 Misc. 2d 1, 408 N.Y.S.2d 584 (1977), *aff'd*, 64 A.D.2d 29, 407 N.Y.S.2d 874 (1978) *aff'd*, 47 N.Y.2d 440, 418 N.Y.S.2d 375 (1979); *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App.3d 814, 131 Cal. Rptr.854 (1976).

370. The complaint in *Donohue v. Copaugue Union Free School Dist.*, 95 Misc.2d 1, 408 N.Y.S.2d 584 (1977), *aff'd*, 64 A.D.2d 29, 407 N.Y.S.2d 874 (1978), *aff'd*, 47 N.Y.2d 440, 418 N.Y.S.2d 375 (1979), alleged

negligent breach of a statutory duty to educate and breach of a third-party-beneficiary contract. In *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976), plaintiff alleged negligent breach of both a common law and a statutory duty to educate. See generally Elson, A Common Law Remedy for the Educational Harms Caused by Incompetent or Careless Teachers, 73 Nw. U.L. Rev. 641 (1978), 43 Alb. L. Rev. 339 (1979); Note 13 Supp. U.L. Rev. 27 (1979); Note 14 Tulsa L.J. 383 (1978); Note 124 U. Pa. L. Rev. 755 (1976).

371. 346 F. Supp. 249 (E.D. Pa. 1972).

372. Plaintiffs sued under 42 U.S.C. § 1983 (1976).

373. 346 F. Supp. at 251-52.

374. Id. at 250-52.

375. Id. at 253.

376. Id. at 253.

377. See In re Skipwith, 14 Misc. 2d 325, 180 N.Y.S. 852 (Dom. Rel. Ct. 1958) (parents who refused to send children to educationally inferior, discriminatorily staffed, and segregated schools could not be adjudicated guilty of neglect); *Dobbins v. Commonwealth*, 198 Va. 697, 96 S.E.2d 154 (1957) (father who had unsuccessfully attempted to enroll child in all-white school could not be convicted for failure to send child to all-black school). Contra: *People v. Serna*, 71 Cal. App. 3d 229, 139 Cal. Rptr. 426 (1977); *State v. Vaughn*, 44 N.J. 142, 207 A.2d 537 (1965).

378. See Part IV supra.

379. See Part III, B, 1, 2, and 3 supra.

380. See Part IV, D. supra.

381. Compare Part I supra with Part III, 4-5 supra.

382. See Part III, B, 4, b and 5 supra.

383. See text accompanying notes 244-61 supra.

384. See notes 50-52 and accompanying text supra.

385. See notes 202 and 258 and accompanying text supra.

386. See notes 31-49 and accompanying text supra.

387. See notes 202 and 258 supra. See generally Part III, B, 4 and 5.

388. See Part III, B, 1, 2 and 3 supra.

389. Perhaps significantly, the opinions reviewing grants or denials of preliminary injunctions, so prevalent in other jurisdictions, are not apparent in an examination of Pennsylvania case law. Given the number of teachers' strikes occurring in that state and the number of opinions reviewing proceedings for final relief, see Part III, 4b and 5 supra, one can only infer that requests for preliminary relief are rarely made - perhaps because of the legality of teachers' strikes in Pennsylvania and the resulting difficulty of establishing irreparable harm. In other words, if the irreparable harm standard is more stringent than Pennsylvania's "clear and present danger or threat" test, then plaintiffs' frequent failures to establish the latter may well discourage any efforts to convince a court of the former. Cf. note 47 and text at note 79 supra (preliminary relief gives advantage to management and, in effect, obviates the need for final relief).

390. Cf. Part III, B, 2 and 3 (harm presumed from illegality or found from factual generalizations.)

391. See part IV supra.

392. Hashway, Long Range Effects of Teacher Strikes on Student Attitudes, 2 Educational Research Quarterly 12 (1977). Hashway concludes that "the main effects of the strikes seem to be directed toward the teachers and the student's perception of how the system is concerned with his welfare." Id. at 21.

393. Lytle & Yanoff, The Effects (if Any) of a Teacher Strike on Student Achievement, 55 Phi Delta Kappan 270 (1973). Lytle and Yanoff, compared students attending schools kept open during a "prolonged bitter teacher strike," id., those attending schools operating on a shortened day, and those whose schools were completely closed. They conclude: "Our data show no significant differences in the arithmetic and reading achievement of junior high school students who attended full time during the strike and those who were out the entire eight weeks." Id. They hypothesize a range of possible explanations including that "[s]chools have relatively little, if any, effect on student cognitive development," id., and the "tensions of the strike had the same detrimental effect on all students whether they were in school or out." Id. Such speculation confirms the need for additional empirical studies.

394. Depending on its complexity and its perceived accuracy, the utility of such data may vary in proceedings for preliminary and final injunctions according to the availability of a full hearing in the former. See notes 11 and 25-27 and accompanying text supra.

STATUTORY PROVISIONS FOR INJUNCTIVE RELIEF
IN TEACHER STRIKES

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CONTENTS

STATUTORY PROVISIONS FOR INJUNCTIVE RELIEF IN TEACHER STRIKES 1

 Problems of Statute-Finding 2

 1. Time-Frame 2

 2. Coverage of Various Employee Groups 2

 3. Statutory Context 3

 4. Words and Meanings 4

 5. Injunctions and other strike penalties..... 4

 Overview of the Statutes 4

 The Silent Statute States (N=30) 4

 States Providing for Injunctive Relief (N=20)..... 6

REFERENCES 9

APPENDIX: STATUTORY PROVISIONS A-1

STATUTORY PROVISIONS FOR INJUNCTIVE RELIEF
IN TEACHER STRIKES

The ensuing Session of the Legislature will be a very important one....Our whole code is to pass in review.... Any one who will take the trouble to look at Geyer's Digest and the subsequent pamphlets of "acts," will perceive that there is ample room for alteration and amendment.

Many of the Statutes will be discovered to be couched in untechnical and (what is much worse) indefinite phraseology. This is a most fruitful source of litigation....

We are sincerely of the opinion that if some unprejudiced, disinterested person, could be induced to read the Statutes supposed to be in force in this State at the present time...he would unavoidably come to the conclusion that it must be intended as an intellectual labyrinth in which to entangle and perpetually lead astray the heedless and unwary. Such repeated legislation on the same subject; such misusing of ands for ors and omissions of words all important to the meaning; such clumsy sentences, in which the kernel of legal wisdom is successfully hidden amidst the chaff of bungling phraseology; such absurd attempts to improve on the laws of former times by reenacting those same laws with just sufficient variations in the diction to throw the whole subject into doubt and obscurity; such downright suicidal effects of certain words and clauses in particular acts, which strangle the substance of the enactment at the moments of its birth!

—Editor, St. Louis Missouri
Republican, May 31, 1824

...a government of laws and not of men.

—Constitution of Massachusetts,
Art. 30, 1780

Legislation is regarded by some as the foundation of a free society. Legislation, it is held, sets forth the rules and standards by which people are to organize their affairs and resolve their disputes. Without legislation, chaos reigns and might prevails. But there is another view. It holds that legislation encodes society's foibles and frailties, creating rigidity where there ought to be discretion, and codifying ambiguity where there needs to be clarity.

This technical report describes state legislative provisions for injunctive relief from teacher strikes. Our purpose is not to assess the legislation; other reports from this project illuminate the part that legislation plays in school board efforts to seek injunctive relief in teacher strikes. The report is descriptive. The first section of the report identifies the problems and procedures associated with our effort to pinpoint statutory provisions concerning the availability of injunctive relief. The second section presents a brief discussion of the statutory provisions, with particular attention to the irreparable harm standard. The statutory provisions themselves are presented in a state-by-state format in an Appendix.

Problems of Statute-Finding

One encounters difficulty in identifying the "statutory provisions for injunctive relief from teacher strikes." Finding the statute-books is not a problem, if one has access to legal collections such as that of the Washington University School of Law. The real problems arise in deciding which statutes are pertinent. The following problems warrant special notice: (1) time-frame, (2) coverage of various employee groups, (3) statutory context, (4) words and meanings, and (5) other strike penalties.

1. Time-Frame. A complete inventory of statutory provisions concerning injunctive relief from teacher strikes would require an historical analysis of each state's statutes, for in several states the provisions that exist today are different from those that existed in prior years. New York State's Condon-Wadlin Act, for example, was a tough anti-strike measure adopted in the 1940s; in 1967 it was replaced by the Taylor Law, which incorporates quite different anti-strike measures. Several other states, e.g., Pennsylvania, also have progressed to their second or even third generation of statutes concerning collective relationships, strikes, and injunctive relief. Undoubtedly it would be instructive to examine statutory provisions in a longitudinal manner, both within and among states. What factors induce change over time? Are first generation statutes pretty much the same everywhere, or does the content of a statute seem to reflect the particular point in time at which it was adopted? Does the political-social milieu make a difference? Such questions, unfortunately, are beyond the scope of the present inquiry. The statutes presented in the Appendix are those in force at the beginning of 1979, i.e., midway through the period of time in which our survey study and field studies were being conducted.

2. Coverage of Various Employee Groups. While teachers constitute the largest category of state and local public employees, they are not the only category. In addition to police, firefighters, street crews, and other municipal employees, there are school employees who are not teachers, e.g., custodians, clerks, bus drivers,

principals. And there are teachers who are employed in institutions of higher education, both public and private. Some state statutes include separate provisions for elementary and secondary public school teachers; others make special provisions for school employees (including non-teachers); still others make provisions for public employees generally. California and Washington for example, have several public employee bargaining statutes--each covering different categories of employees. Missouri has a general statute, but it exempts certain categories of employees (including teachers) from its coverage. Other states, e.g., Minnesota, create degrees of "essentiality" among public employees, but leave room for some discretion as to when teachers become so essential that their strikes warrant injunctive relief. The Appendix includes the statutory language in each state which is most closely pertinent to teachers in public elementary and secondary schools. Where there is some doubt as to applicability to teachers, a note is included, indicating the source of the difficulty.

A closely related problem arises in those states which have adopted statutes governing labor-management relations (including strikes and injunctive remedies) in the private sector. Do these statutes apply to teacher strikes? We have assumed that they do not, unless otherwise noted. That assumption is based on (1) the practice of some states (e.g., California) to make statutory declarations that such legislation does not apply, and (2) court decisions in several states where teachers have been unsuccessful in persuading courts that private-sector anti-injunction statutes also cover public employees (e.g., Anderson Federation of Teachers v. School City of Anderson, 251 N.E.2d 15, Ind. Sup. Ct., 1969). In other states however, the absence of statutory language and the absence of definitive court opinions has left open the possibility that statutes initially drawn for private sector phenomena may still become relevant in teacher strike situations. The Appendix does not cover such eventualities. That is, it does not provide a reliable guide for those who may be searching for statutes which conceivably might be applicable to anti-strike injunctions. We have concentrated on those whose relevance is most obvious.

3. Statutory Context. Usually, but not always, provisions regarding teacher strikes and injunctive relief therefrom are found in the context of statutes providing for collective relationships between public employees and their employers. Often the larger statutory context is of crucial significance, as it was, for example, in the Holland case; there the court observed that the legislature had sought to introduce collective bargaining into the public sector, and that strikes, even though illegal, should not be routinely enjoined in view of the apparent legislative intent (School District of Holland v. Holland Education Association, 157 N.W.2d 206, Mich. Sup. Ct., 1967). While the Appendices do not undertake a full reconstruction of the statutory context in which provisions for injunctive relief from teacher strikes are found, summary information is

provided so that the reader will know something of the context. The Appendices do not endeavor to distinguish among the several kinds of collective relationships elaborated in the statutes; other sources provide such information (Education Commission of the States, 1978; Midwest Center for Public Sector Labor Relations, 1979).

4. Words and Meanings. Statutory interpretation is a necessary and important aspect of law. The only authoritative interpretations, of course, are those of the courts, and even they are subject to re-interpretation and change. Sometimes the statutory language pertaining to injunctive relief from teacher strikes has no plain meaning, i.e., it requires some interpretation. Even statutory silence sometimes has to be interpreted, as in Washington, where the legislature's failure to provide for injunctive relief from teacher strikes is in contrast to its action respecting other categories of public employees. Is the silence significant? In the Appendices we simply report that the statute is silent. Where there is ambiguity or uncertainty concerning the applicability of statutory language, notes to that effect are included along with the statute. However these notes merely reflect our uncertainties; in the real world words which seem quite straightforward to a layperson may become objects of disputed meaning. As our case studies illustrate, efforts to secure injunctive relief from teacher strikes often are confounded by disputes about specific words and their meaning. The Appendices simply present the words; the courts' interpretations of the words are omitted.

5. Injunctions and other strike penalties. In some states provisions for injunctive relief are intertwined with other anti-strike measures. In other states the measures are separable. Insofar as possible the Appendices present only the injunctive form of relief from teacher strikes.

Overview of the Statutes

For each state, statutes were searched to ascertain whether they included (1) provisions for collective relationships between teachers and school boards, (2) provisions concerning teacher strikes, and (3) provisions concerning injunctive relief from teacher strikes. The accompanying Table categorizes the states in terms of their statutory provisions regarding these three questions. The states indicated by bold-face type (N=20) are those whose statutes provide for injunctive relief in the event of a teacher strike. Before turning to a detailed description of the statutes in these states, it is useful to take note of certain features of the remaining 30 states.

The Silent Statute States (N=30). In 30 states teachers and school boards contemplating strikes and strike remedies must do so without benefit of direct statutory guidance concerning injunctive relief. That is, the statutes in these states simply do not say whether,

STATUTORY PROVISIONS FOR INJUNCTIVE RELIEF
FROM TEACHER STRIKES*

	Teacher-Board Collective Relationships Authorized	Teacher-Board Collective Relationships Not Authorized
All Teacher Strikes Prohibited	<p>CONNECTICUT Delaware FLORIDA INDIANA IOWA KANSAS MAINE Maryland MASSACHUSETTS Michigan</p> <p>MINNESOTA NEBRASKA NEVADA NEW HAMPSHIRE NEW YORK N. Dakota Oklahoma Rhode Island S. DAKOTA TENNESSEE</p>	<p>Ohio Texas Virginia</p>
Limited Right to Strike	<p>ALASKA HAWAII OREGON PENNSYLVANIA WISCONSIN VERMONT</p>	
No Provisions Concerning Teacher Strikes	<p>California Idaho Montana New Jersey Washington</p>	<p>Alabama Arizona Arkansas Colorado Georgia Illinois Kentucky Louisiana</p> <p>Mississippi Missouri New Mexico N. Carolina S. Carolina Utah W. Virginia Wyoming</p>

*States having statutory provisions concerning the availability of injunctive relief are shown in BOLD FACE TYPE.

how, or when injunctive relief might be available in the face of a teacher strike. In a majority of these states the statutes also fail to authorize collective relationships between teachers and school boards. Thus labor-management relations in education in these states may be marked not merely by uncertainty regarding collective relationships, but also by uncertainty as to the availability of judicial remedies when strikes occur. The situation provides room for major judicial discretion, particularly in states such as Illinois, Ohio, and Missouri where de facto bargaining is widespread even in the absence of authorizing legislation. In such states the political posture of the courts may significantly affect school board decisions about seeking injunctive relief.

Eleven states make no statutory provisions for injunctive relief but do authorize collective relationships between teachers and their employers. These states are California, Delaware, Idaho, Maryland, Michigan, Montana, New Jersey, North Dakota, Oklahoma, Rhode Island, and Washington. Both proponents and opponents of collective bargaining are prone to assert that strikes are an inevitable concomitant of bargaining relationships. If that is true, the legislatures in these states have created situations in which strikes are increasingly likely, but then the legislatures have failed to make provisions for injunctive relief from such strikes. Interestingly this set of 11 states includes four where the courts have moved (without explicit statutory authorization) toward limiting the use of injunctions in teacher strikes. In Michigan the Holland decision indicated that irreparable harm was a standard applicable to court decisions to award or withhold injunctive relief (School District of Holland v. Holland Education Association, 157 N.W. 2d 206, Mich. Sup. Ct., 1967). The Rhode Island Court followed suit (School Committee of Westerly v. Westerly Teachers Association, 299 A.2d 441, 1973). Idaho's recent Oneida case has been similar (School District No. 351 v. Oneida Education Association 567 P. 2d 830, 1977). In a fourth state (California) a recent case appears to have shifted the initial responsibility for reviewing teacher strikes from the courts to the Public Employee Relations Board (San Diego Teachers Association v. Superior Court of San Diego County, Cal. Sup. Ct., Case No. 399394, 1979). Thus it seems that where legislatures have authorized collective relationships between teachers and school boards, and simultaneously have failed to provide for injunctive relief in the event of teacher strikes, the courts have been inclined to act in a restrained manner, i.e., by limiting the ease with which injunctions can be secured. However the pattern is by no means clear-cut; there are other states whose statutes provide for collective relationships and are silent on the matter of injunctive relief, where the courts routinely award such relief (e.g., Washington, New Jersey, Delaware).

States Providing for Injunctive Relief (N=20). The following 20 states have adopted legislation pertaining to the availability of injunctive relief in the event of a teachers' strike:

Alaska
Connecticut
Florida
Hawaii
Indiana
Iowa
Kansas

Maine
Massachusetts
Minnesota
Nebraska
Nevada
New Hampshire
New York

Oregon
Pennsylvania
South Dakota
Tennessee
Vermont
Wisconsin

Within this group of states it is possible to distinguish three rather different approaches to the matter of injunctive relief. The first approach reflects a posture of legislative disinterest: teacher strikes are prohibited, and the statutes simply provide that injunctive relief may or must be solicited in the event of a strike. The states are Connecticut, Indiana, Kansas, Massachusetts, Minnesota, Nebraska, New Hampshire, New York, South Dakota, and Tennessee. These states do not specifically encourage the courts to award such relief, nor do they discourage such awards. The statutes open the doors to the courts, but then leave it up to the actors to decide whether or under what circumstances to award injunctive relief.

A smaller group of states, four in number, encourage the courts to award injunctive relief. Nevada specifies that an injunction shall be awarded upon a showing that a strike has occurred or will occur; here the irreparable harm standard is implicitly waived. (Technically, the standard must be utilized in an ex parte proceeding, but not in other phases of injunction proceedings.) The mere existence of a strike, or just the threat of a strike, warrants relief. Interestingly, the waiver is accompanied by a statement of legislatively ascertained "fact": the continuity of government services is declared to be essential to the health, safety, and welfare of the people of Nevada. Thus, unless Nevada courts are willing to challenge the fact-finding capabilities of the legislature, there is no possibility of finding that a teacher strike does not impair an essential service. Florida's statute is similar. Iowa is much more explicit with respect to the harm standard. Its statute specifies that "the plaintiff need not show that the (strike) would greatly or irreparably injure him." Maine's statute similarly provides that "neither an allegation nor proof of unavoidable substantial and irreparable injury" is required as a prerequisite to preliminary injunctive relief. In these states then, it appears that the legislatures have taken steps to head off Holland-type decisions wherein the courts might withhold injunctive relief on the basis of an insufficient showing of irreparable harm. Put differently, where there is a clear legislative intent to assure that teacher strikes are enjoined, the irreparable harm standard may be statutorily removed as a condition for the award of relief.

The remaining six states are the most interesting. In contrast to all other states, in these six states legislatures have given teachers a limited "right to strike." It is important to emphasize at the outset that none of these six states has legalized all teacher strikes. Instead, each state has created a "window" or "slot": a

teacher strike is legal only if certain preconditions are met, and it remains legal only so long as certain consequences are avoided. The preconditions are designed to assure that collective bargaining procedures are followed. Thus if strikes are conducted by unrecognized bargaining units, or if they occur before exhaustion of required impasse procedures, the strike is illegal. These illegal strikes may be enjoined simply because they are illegal, much as teacher strikes may elicit injunctive relief in the preceding group of states.

An otherwise legal strike becomes enjoinable if, and only if, it creates certain consequences. In Pennsylvania and Oregon a strike becomes enjoinable when it presents "a clear and present danger or threat to the public health, safety or welfare." Alaska's statute is very similar; a teacher strike becomes enjoinable when it has "begun to threaten the health, safety or welfare of the public." At first glance the statutes in Hawaii and Wisconsin are similar to those of the preceding states; significantly however, these two states omit the term "welfare." In Hawaii a teacher strike becomes enjoinable when it is "endangering the public health and safety." In Wisconsin, a strike becomes illegal when it "poses an imminent threat to the public health or safety." The sixth state, Vermont, takes a quite unique approach. A teacher strike becomes enjoinable if it presents "a clear and present danger to a sound program of school education which in the light of all relevant circumstances it is in the best public interest to prevent." Thus Vermont is the only one of the six right-to-strike states which explicitly directs attention to the relationship between strikes and educational programs.

None of the six states mentions irreparable harm, per se. Yet the phrase "clear and present danger...to the public health, safety, or welfare" (and the variants of this phrase) seems to be kindred in spirit to the irreparable harm standard. In the absence of legislative studies it is impossible to ascertain what impelled legislatures to adopt the peculiar language used to limit injunctive relief in legal public school teacher strikes. Nor do we know, for sure, whether courts equate the older irreparable harm phrase and newer language emanating from the right-to-strike statutes. Other reports in this study provide some evidence on this point.

REFERENCES

Education Commission of the States, Cuebook: State Education Collective Bargaining Laws, Denver, 1978.

Midwest Center for Public Sector Labor Relations, Labor Legislation in the Public Sector: A Practitioner's Guide, Bloomington, 1979.

APPENDIX: STATUTORY PROVISIONS

ALABAMA

The statutes are silent on the matter of teacher strikes and injunctive relief therefrom. The statutes also are silent with respect to collective relationships between teachers and school boards. (Note: There is one statute which requires county superintendents to "consult" with teacher representatives, but that is all that the statute provides (Ala. Code §16-8-10); we have arbitrarily decided that the language does not warrant inclusion of Alabama with the other states which provide more elaborate arrangements for collective relationships between teachers and their employers--ed.)

ALASKA

One statute provides for collective relationships between teachers and school boards; however this statute is silent with respect to teacher strikes and injunctive relief therefrom (Alaska Stat. §14.20.550-.610). Another statute, providing for collective relationships by public employees generally, contains ambiguous language concerning teacher strikes and injunctive relief. At one point this statute excludes teachers from its coverage (Alaska Stat. §23.40.250(5)). However the portion of the statute pertaining to strikes and injunctive relief includes provisions for teacher strikes (Alaska Stat. §23.40.200 (a), (c)).

Strikes

Ambiguous language; see above.

Injunctive Relief

"(a) For purposes of this section, public employees are employed to perform services in one of the following three classes:

- (1) those services which may not be given up for even the shortest period of time;
- (2) those services which may be interrupted for a limited period but not for an indefinite period of time; and
- (3) those services in which work stoppages may be sustained for extended periods without serious effects on the public.

(c) The class in (a)(2) of this section is composed of public utility, snow removal, sanitation and public school and other educational institution employees. Employees in this class may engage in a strike...for a limited time. The limit is determined by the interests of the health, safety or welfare of the public. The public employer or the labor relations agency may apply to the superior court in the judicial district in which the strike is occurring for an order enjoining the strike. A strike may not be enjoined unless it can be shown that it has begun to threaten the health, safety or welfare

ALASKA (continued)

Injunctive Relief (continued)

of the public. A court, in deciding whether or not to enjoin the strike, shall consider the total equities in the particular class. "Total equities" includes not only the impact of the strike on the public but also the extent to which employee organizations and public employers have met their statutory obligations. If an impasse or deadlock still exists after the issuance of an injunction, the parties shall submit to arbitration..." (Alaska Stat. §23.40.200(a), (c)).

ARIZONA

The statutes are silent on the matter of teacher strikes and injunctive relief therefrom. The statutes also are silent with respect to collective relationships between teachers and school boards.

ARKANSAS

The statutes are silent on the matter of teacher strikes and injunctive relief therefrom. The statutes also are silent with respect to collective relationships between teachers and school boards.

CALIFORNIA

A California statute provides for collective relationships between teachers and school boards (Cal. Gov't. Code §3540-3549 (Deering)). The statute is silent with respect to teacher strikes and injunctive relief therefrom, except that the statute provides that "this chapter shall not be construed as making the provisions of Sec. 923 of the Labor Code applicable to public school employees..." (Cal. Gov't. Code §3549 (Deering)). Section 923 of the Labor Code protects workers' right to strike and limits the use of injunctions in labor disputes (Cal. Lab. Code §923 (Deering)).

COLORADO

The statutes are silent on the matter of teacher strikes and injunctive relief therefrom. The statutes also are silent with respect to collective relationships between teachers and school boards.

CONNECTICUT

A Connecticut statute provides for collective relationships between teachers and school boards, prohibits teacher strikes, and provides for injunctive relief (Conn. Gen. Stat. §10-153a-153j).

CONNECTICUT (Continued)

Strikes

"No certified professional employee shall, in an effort to effect a settlement of any disagreement with his employing board of education, engage in any strike or concerted refusal to render services" (Conn. Gen. Stat. §10-153e(a)).

Injunctive Relief

"This provision may be enforced in the superior court of any county in which said board of education is located by an injunction issued by said court or judge pursuant to sections 52-471 to 52-479, inclusive" (Conn. Gen. Stat. §10-153e(a)).

(Note: Sections 52-471 to 52-479 incorporate the state's general injunction statute. Ex parte injunctions will not be granted unless affidavits or the verified complaint show that irreparable harm will result. It is not clear whether a similar showing is required for injunctions issued after notice--ed.)

DELAWARE

A statute provides for collective relationships between teachers and school boards, and prohibits strikes, but is silent with respect to injunctive relief (Del. Code Ann. Tit. 14 §4001-4013).

Strikes

"No public school employee shall strike while in the performance of his official duties" (Del. Code Ann. Tit. 14 §4011(c)).

Injunctive Relief

Not mentioned in the statute.

FLORIDA

An omnibus public employee negotiations law applies to teachers as well as other public employees (Fla. Stat. §447.201-.609). The statute outlaws teacher strikes and provides for injunctive and other forms of relief in the event of strikes. In addition to the provisions for direct injunctive relief cited below, the statute declares that strikes are unfair labor practices, appealable to a commission which itself may seek injunctive relief (Fla. Stat. §447.501). However it seems unlikely that this alternate procedure would be utilized in the event of a strike.

FLORIDA (continued) .

Strikes

"No public employee or employee organization may participate in a strike against a public employer by instigating or supporting, in any manner, a strike. Any violation of this section shall subject the violator to the penalties provided in this part (Fla. Stat. §447.505).

Injunctive Relief

"(1) Circuit courts having jurisdiction of the parties are vested with the authority to hear and determine all actions alleging violations of section 447.505 Florida Statutes. Suits to enjoin violations of section 447.505, Florida Statutes, will have priority over all matters on the court's docket except other emergency matters."

"(2) If a public employee, a group of employees, an employee organization, or any officer, agent, or representative of any employee organization engages in a strike in violation of §447.505, either the commission or any public employer whose employees are involved or whose employees may be affected by the strike may file suit to enjoin the strike in the circuit court having proper jurisdiction and proper venue of such actions under the Florida Rules of Civil Procedure and Florida Statutes. The circuit court shall conduct a hearing, with notice to the commission and to all interested parties, at the earliest practicable time. If the plaintiff makes a prima facie showing that a violation of §447.505 is in progress or that there is a clear, real, and present danger that such a strike is about to commence, the circuit court shall issue a temporary injunction enjoining the strike. Upon final hearing, the circuit court shall either make the injunction permanent or dissolve it."

"(3) If an injunction to enjoin a strike issued pursuant to this section is not promptly complied with, on the application of the plaintiff, the circuit court shall immediately initiate contempt proceedings against those who appear to be in violation. An employee organization found to be in contempt of court for violating an injunction against a strike shall be fined an amount deemed appropriate by the court. In determining the appropriate fine, the court shall objectively consider the extent of lost services and the particular nature and position of the employee group in violation. In no event shall the fine exceed five thousand dollars (\$5,000). Each officer, agent, or representative of an employee organization found to be in contempt of court for violating an injunction against a strike, shall be fined not less than fifty dollars (\$50) nor more than one hundred dollars (\$100) for each calendar day that the violation is in progress." (Fla. Stat. §447.501(1), (2), (3)).

GEORGIA

The statutes are silent on the matter of teacher strikes, and injunctive relief therefrom. The statutes also are silent with respect to collective relationships between teachers and school boards.

HAWAII

An omnibus bill provides for collective relationships in the public sector; teachers are included (Hawaii Rev. Stat. §89-1-20). Strikes may be lawful or unlawful, depending upon the circumstances; injunctive relief is provided for both types of strikes.

Strikes

"(a) Participation in a strike shall be unlawful for any employee who (1) is not included in an appropriate bargaining unit for which an exclusive representative has been certified by the board, or (2) is included in an appropriate bargaining unit for which process for resolution of a dispute is by referral to final and binding arbitration."

"(b) It shall be lawful for an employee, who is not prohibited from striking under paragraph (a) and who is in the appropriate bargaining unit involved in an impasse, to participate in a strike after (1) the requirements of 89-11 relating to the resolution of disputes have been complied with in good faith, (2) the proceedings for the prevention of any prohibited practices have been exhausted, (3) sixty days have elapsed since the fact-finding board has made public its findings and any recommendation, (4) the exclusive representative has given a ten-day notice of intent to strike to the board and to the employer". (Hawaii Rev. Stat. §89-12(a), (b)).

Injunctive Relief

"(c) Where the strike occurring, or is about to occur, endangers the public health or safety, the public employer concerned may petition the board to make an investigation. If the board finds that there is imminent or present danger to the health and safety of the public, the board shall set requirements that must be complied with to avoid or remove any such imminent or present danger."

"(d) No employee organization shall declare or authorize a strike of employees, which is or would be in violation of this section. Where it is alleged by the employer that an employee organization has declared or authorized a strike of employees which is or which would be in violation of this section, the employer may apply to the board for a declaration that the strike is or would be unlawful and the board, after affording an opportunity to the employee organization to be heard on the application, may make such a declaration."

"(e) If any employee organization or any employee is found to be violating or failing to comply with the requirement of this section, or if there is reasonable cause to believe that an employee organization or an employee is violating or failing to comply with such requirements, the board shall institute appropriate proceedings in the circuit in which the violation occurs to enjoin the performance of any acts or practices forbidden by this section, or to require the employee organization or employees to comply with the requirements of this section. Jurisdiction to hear and dispose of all actions under this section is conferred upon each circuit court, and each

HAWAII (continued)

Injunctive Relief (continued)

court may issue, in compliance with Chapter 380, such orders and decrees, by way of injunction, mandatory injunction, or otherwise, as may be appropriate to enforce this section" (Hawaii Rev. Stat. §89-12(c), (d), (e)).

IDAHO

A statute authorizes collective relationships between school boards and teachers (Idaho Code, §33.1271-.1276). However the statute is silent on the matter of teacher strikes and injunctive relief therefrom.

ILLINOIS

The statutes are silent on the matter of teacher strikes and injunctive relief therefrom. The statutes also are silent with respect to collective relationships between teachers and school boards.

INDIANA

Collective relationships between teachers and school boards are authorized by statute (Ind. Code, §20-7.5-1.1-14). The statute provides for injunctive relief and other penalties against teacher strikes.

Strikes

"It shall be unlawful for any school employee, school employee organization, or any affiliate, including but not limited to state or national affiliates thereof, to take part in or assist in a strike against a school employer or school corporation" (Ind. Code, §20-7.5-1-14(a)).

Injunctive Relief

"Any school corporation or school employer may, in an action at law, suit in equity, or other proper proceeding, take action against any school employee organization, any affiliate thereof, or any person aiding or abetting in a strike, for redress of such unlawful act" (Ind. Code, §20-7.5-1-14(b)).

IOWA

Iowa's Public Employment Relations Act permits collective relation-

ships for teachers and other public employees. The statute provides for injunctive relief as well as other penalties against strikes (Iowa Code Ann., §20.1-20.22). In addition to direct applications for court relief, an employer may complain to the PERB which may investigate, issue orders, and seek injunctive relief (Iowa Code Ann., §20-10-3-h; §20-11).

Strikes

"It shall be unlawful for any public employee or any employee organization, directly or indirectly, to induce, instigate, encourage, authorize, ratify or participate in a strike against any public employer" (Iowa Code Ann., §20.12.1)

Injunctive Relief

"3. In the event of any violation or imminently threatened violation of subsection 1 or 2, any citizen domiciled within the jurisdictional boundaries of the public employer may petition the district court for the county in which the violation occurs or the district court for Polk county for an injunction restraining such violation or imminently threatened violation. Rules of civil procedure 320 to 350 regarding injunctions shall apply. However, the court shall grant a temporary injunction if it appears to the court that a violation has occurred or is imminently threatened; the plaintiff need not show that the violation or threatened violation would greatly or irreparably injure him; and no bond shall be required of the plaintiff unless the court determines that a bond is necessary in the public interest. Failure to comply with any temporary or permanent injunction granted pursuant to this section shall constitute a contempt punishable pursuant to chapter 665. The punishment shall not exceed five hundred dollars for an individual, or ten thousand dollars for an employee organization or public employer, for each day during which the failure to comply continues, or imprisonment in a county jail not exceeding six months, or both such fine and imprisonment. An individual or an employee organization which makes an active good faith effort to comply fully with the injunction shall not be deemed to be in contempt."

"4. If a public employee is held to be in contempt of court for failure to comply with an injunction pursuant to this section, or is convicted of violating this section, he shall be ineligible for any employment by the same public employer for a period of twelve months. His public employer shall immediately discharge him, but upon his request the court shall stay his discharge to permit further judicial proceedings."

"5. If an employee organization or any of its officers is held to be in contempt of court for failure to comply with an injunction pursuant to this section, or is convicted of violating this section, the employee organization shall be immediately decertified, shall cease to represent the bargaining unit, shall cease to receive any

IOWA (continued)

Injunctive Relief (continued)

dues by checkoff, and may again be certified only after twelve months have elapsed from the effective date of decertification and only after a new compliance with section 20.14. The penalties provided in this section may be suspended or modified by the court, but only upon request of the public employer and only if the court determines the suspension or modification is in the public interest."

"6. Each of the remedies and penalties provided by this section is separate and several, and is in addition to any other legal or equitable remedy or penalty." (Iowa Code Ann., §20.12.3-.6).

KANSAS

A statute authorizes collective relationships between teachers and school boards, prohibits teacher strikes, and provides for injunctive relief (Kans. Stat. Ann., §72.5413-.5431).

Strikes

"It shall be a prohibited practice for professional employees or professional employees' organizations or their designated representatives willfully to:...(5) authorize, instigate, aid or engage in a strike or in any picketing of any facility under the jurisdiction and control of the board of education" (Kans. Stat. Ann., §72.5430(c)(5)).

Injunctive Relief

"Any board of education or professional employees' organization may file a petition in the district court for the county in which the principal offices of the pertinent board of education are located, for injunctive relief and to restrain the commission of a prohibited practice under this section. The procedures for obtaining injunctions and related remedies shall be in accordance with the code of civil procedure, except that the provisions of K.S.A. 60-904 shall not govern actions arising under this section" (Kans. Stat. Ann., §72.5430(d)).

(Note: Section 60-904 restricts the use of injunctions in labor disputes in the private sector.)

KENTUCKY

The statutes are silent on the matter of teacher strikes and injunctive relief therefrom. The statutes also are silent with respect to collective relationships between teachers and school boards.

LOUISIANA

The statutes are silent on the matter of teacher strikes and injunctive relief therefrom. The statutes also are silent with respect to collective relationships between teachers and school boards.

MAINE

A statute provides for collective relationships between public employers and employees, prohibits strikes, and provides two avenues for injunctive relief (Maine Rev. Stat. Ann., 268.961-.972).

Strikes

"Public employees, public employee organizations, their agents, members and bargaining agents are prohibited from... (C) Engaging in (1) a work stoppage; (2) a slowdown; (3) a strike..." (Maine Rev. Stat. Ann., 268.964(2)).

Injunctive Relief

(An employer who believes that a prohibited act has occurred may file a complaint with the state labor board. After investigation the board may issue a cease and desist order--ed.) "If after the issuance of an order by the board requiring any party to cease and desist or to take any other affirmative action, said party fails to comply with the order of the board then the party in whose favor the order operates or the board may file a civil action in the Superior Court of Kennebec County to compel compliance with the order of the board. Upon application of any party in interest or the board, the court may grant such temporary relief or restraining order and may impose such terms and conditions as it seems just and proper; provided that the board's decisions shall not be stayed except where it is clearly shown to the satisfaction of the court that substantial and irreparable injury shall be sustained or that there is a substantial risk of danger to the public health or safety. In such action to compel compliance the Superior Court shall not review the action of the board other than to determine whether the board has acted in excess of its jurisdiction....E. Whenever a complaint is filed with the ...board...the party making the complaint may simultaneously seek injunctive relief from the Superior Court in the county in which the prohibited practice is alleged to have occurred pending final adjudication of the board with respect to such matter.... G. In any judicial proceeding authorized by this subsection in which injunctive relief is sought...neither an allegation nor proof of unavoidable substantial and irreparable injury to the complainant's property shall be required to obtain a temporary restraining order or injunction" (Maine Rev. Stat. Ann., 268.968.5(A-G)).

MARYLAND

A statute provides for collective relationships between teachers and school boards, and prohibits strikes (Md. Code Ann. (Educ.) §160A). The statute makes no provision for injunctive relief.

Strikes

"Employee organizations shall be prohibited from calling or directing a strike" (Md. Code Ann. (Educ.) §160A(m)).

MASSACHUSETTS

A statute provides for collective relationships between public employers and employees, prohibits strikes, and provides for injunctive relief (Mass. Ann. Laws, ch. 150E).

Strikes

"No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall induce, encourage or condone any strike, work stoppage, slowdown or withholding of services by such public employees" (Mass. Ann. Laws, ch. 150E, §9A(a)).

Injunctive Relief

"Whenever a strike occurs or is about to occur, the employer shall petition the commission to make an investigation. If, after investigation, the commission determines that any provision of paragraph (a) of this section has been or is about to be violated, it shall immediately set requirements that must be complied with, including, but not limited to, instituting appropriate proceedings in the superior court for the county wherein such violation has occurred or is about to occur for enforcement of such requirements" (Mass. Ann. Laws, ch. 150E, §9A(b)).

MICHIGAN

Michigan's public employment relations statute provides for collective bargaining for teachers and other public employees. (Mich. Stat. Ann. §423.201-.216). Strikes are prohibited. There are no provisions for injunctive relief against strikes.

Strikes

"No person holding a position by appointment in...the public school service...shall strike" (Mich. Stat. Ann. §423.202).

MINNESOTA

An omnibus public employee bargaining bill covers teachers (Minn. Stat. Ann. §179.61-179.76). Provisions concerning strikes and injunctive relief are included. Jurisdictional strikes are prohibited. Other strikes also are prohibited, but the statute provides that failure to adhere to certain impasse procedures constitutes a defense to a strike. It is not clear from the statute as to how a court is to weigh the defense.

Strikes

"Employee organizations, their agents or representatives, and public employees are prohibited from:...(6) calling, instituting, or maintaining or conducting a strike or boycott against any public employer on account of any jurisdictional controversy" (Minn. Stat. Ann. §179.68.3(6)).

"No person holding a position...in the service of the public schools...may engage in a strike...except as may be provided in subdivision 7. ...Subd. 7. Either a violation of section 179.68, subdivision 2, clause (9), or a refusal by the employer to request binding arbitration when requested by the exclusive representative pursuant to section 179.69, subdivision 3 or 5, is a defense to a violation of this section, except as to essential employees..." (Minn. Stat. Ann. §179.64(1), (7)).

(Note: the referenced subsections concern arbitration procedures. The reference to "essential employees" refers to §179.63, and evidently excludes teachers unless it is found that their work is "essential to the health or safety of the public and the withholding of such services would create a clear and present danger to the health or safety of the public" (§179.63(11)--ed.)

Injunctive Relief

"Any employee, employer, employee or employer organization, exclusive representative, or any other person or organization aggrieved by an unfair labor practice as defined in sections 179.61 to 179.77 may bring an action in district court of the county wherein the practice is alleged to have occurred for injunctive relief" (Minn. Stat. Ann. §179.68(1)). (Note: unlawful strikes are defined as unfair labor practices in §179.68(3), (11)--ed.)

MISSISSIPPI

The statutes are silent on the matter of teacher strikes and injunctive relief therefrom. The statutes also are silent with respect to collective relationships between teachers and school boards.

MISSOURI

A Missouri statute provides for collective relationships between public employees and employers, and prohibits strikes. However teachers are excluded from coverage by the statute (Mo. Rev. Stat. §105.500-105.530). In effect, then, Missouri statutes are silent with respect to teacher-board collective relationships, teacher strikes, and injunctive relief therefrom.

MONTANA

The statutes are silent on the matter of teacher strikes and injunctive relief therefrom.

The statutes provide for collective relationships in the public sector, including schools (Mont. Rev. Code, §59.1601-.1617).

NEBRASKA

A Teachers' Negotiation Act provides for collective relationships in certain classifications of school districts, however this Act is silent with respect to strikes and injunctive relief (Neb. Rev. Stat. §79-1287 to 79-1295). An omnibus act covers all teachers, including those covered by the Negotiations Act after its impasse procedures have been exhausted; the omnibus act prohibits strikes and provides for injunctive relief (Neb. Rev. Stat. §48-801 to 48-838).

Strikes

"It shall be unlawful for any person: (1) to hinder, delay, or suspend the continuity or efficiency of any governmental service ... by lockout, strike, slowdown, or other work stoppage" (Neb. Rev. Stat. §48-821(1)).

Injunctive Relief

(Note--The omnibus act creates a Court of Industrial Relations which hears disputes on industrial disputes and issues orders which "shall be deemed to be of the same force and effect as like orders entered by a district court and shall be enforceable in appropriate proceedings in the courts of this state" (Neb. Rev. Stat. §48-419). Injunctive relief is not specifically mentioned, but it appears to be within the purview of the Court created by the statute--ed.)

NEVADA

A public employee labor relations act permits collective relationships between teachers and school boards (Nev. Rev. Stat. §288.010-.075). Strikes are prohibited and there are provisions for injunctive relief.

NEVADA (continued)

Sections not presented here define penalties that courts and employers can assess in the event that court orders are violated.

Strikes

"1. The legislature finds as facts:

(a) That the services provided by the state and local government employers are of such nature that they are not and cannot be duplicated from other sources and are essential to the health, safety and welfare of the people of the State of Nevada;

(b) That the continuity of such services is likewise essential, and their disruption incompatible with the responsibility of the state to its people; and

(c) That every person who enters or remains in the employment of the state or a local government employer accepts the facts stated in paragraphs (a) and (b) as an essential condition of his employment.

2. The legislature therefore declares it to be the public policy of the State of Nevada that strikes against the state or any local government employer are illegal" (Nev. Rev. Stat. §288.230).

Injunctive Relief

1. If a strike occurs against the state or a local government employer, the state or local government employer shall, and if a strike is threatened against the state or a local government employer, the state or local government employer may, apply to a court of competent jurisdiction to enjoin such strike. The application shall set forth the facts constituting the strike or threat to strike.

2. If the court finds that an illegal strike has occurred or unless enjoined will occur, it shall enjoin the continuance or commencement of such strike. The provisions of N.R.C.P. 65 and of the other Nevada Rules of Civil Procedure apply generally to proceedings under this section, but the court shall not require security of the state or of any local government employer" (Nev. Rev. Stat. §288.250).

(Note: one rule of civil procedure requires that ex parte injunctions may not be granted unless "it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury (will result) before the adverse party...can be heard." This rule need not apply if notice is given--ed.)

NEW HAMPSHIRE

A statute provides for collective relationships between public employees and employers; teachers are covered. The statute prohibits strikes and provides for injunctive relief (N.H. Rev. Stat. Ann. ch. 273-A).

NEW HAMPSHIRE (continued)

An employer may respond to a strike by filing a complaint with the state labor board, which then can issue an order prohibiting a strike; obedience to such orders can be sought through the courts. (N.H. Rev. Stat. Ann. ch. 273-A.6-.7). Pending issuance of an order by the board, an employer can seek injunctive relief directly, as shown below.

Strikes

"Strikes and other forms of job action by public employees are hereby declared to be unlawful" (N.H. Rev. Stat. Ann. ch. 273-A, §13).

Injunctive Relief

"A public employer shall be entitled to petition the superior court for a temporary restraining order pending a final order of the (employment relations board) for a strike or other form of job action in violation of the provisions of this chapter, and may be awarded costs and other reasonable legal fees at the discretion of the court" (N.H. Rev. Stat. Ann. ch. 273-A, §13).

NEW JERSEY

A statute provides for collective relations for public employees, but is silent with respect to strikes and injunctive relief therefrom (N.J. Stat. Ann. §34: 13A).

NEW MEXICO

The statutes are silent on the matter of teacher strikes and injunctive relief therefrom. The statutes also are silent with respect to collective relationships between teachers and school boards.

NEW YORK

New York's "Taylor" Act provides for public employee bargaining (N.Y. Civ. Serv. Law §200-214 (McKinney)). Strikes are prohibited and there are provisions for seeking injunctive relief.

Strikes

"No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage, or condone a strike" (N.Y. Civ. Serv. Law §210(1) (McKinney)).

Injunctive Relief

"Notwithstanding the provisions of section eight hundred seven of

NEW YORK (continued)

Injunctive Relief (continued)

the labor law, where it appears that public employees or an employee organization threaten or about to do, or are doing, an act in violation of section two hundred ten of this article... the chief legal officer of the government involved shall forthwith apply to the supreme court for an injunction against such violation. If an order of the court enjoining or restraining such violation does not receive compliance, such chief legal officer shall forthwith apply to the supreme Court to punish such violation..." (N.Y. Civ. Serv. Law §211 (McKinney)).

NORTH CAROLINA

The statutes are silent on the matter of teacher strikes and injunctive relief therefrom. The statutes also are silent with respect to collective relationships between teachers and school boards.

NORTH DAKOTA

A statute provides for collective relationships between teachers and school boards (N.D. Cent. Code §15-38.1).

The statute prohibits teacher strikes, but is silent with respect to injunctive relief therefrom.

Strikes

"No teacher, administrator, or representative organization shall engage in a strike" (N.D. Cent. Code §15-38.1-14).

Injunctive Relief

No provision in the statute.

OHIO

The "Ferguson Act" outlaws public employee strikes, but makes no provisions for injunctive relief. The statutes are silent with respect to collective relationships between teachers and school boards.

Strikes

"No public employee shall strike" (Ohio Rev. Code, §4117.02).

OHIO (continued)

Injunctive Relief

No provision in the statute.

OKLAHOMA

A statute provides for collective relationships between teachers and school boards (Okla. Stat. Ann., §70:509.1-.10).

The statute prohibits teacher strikes but is silent with respect to injunctive relief therefrom.

Strikes

"It shall be illegal for the professional organization or the non-professional organization to strike or threaten to strike as a means of resolving differences with boards of education" (Okla. Stat. Ann., §70:509.8).

OREGON

An omnibus statute provides for collective relationships in the public sector; teachers are included (Ore. Rev. Stat. §243.650-.782). Strikes may be lawful or unlawful, and injunctive relief may be sought.

Unlawful Strike

"No labor organization shall declare or authorize a strike of public employees which is or would be in violation of this section" (Ore. Rev. Stat. §243.726(4)).

Injunctive Relief: Unlawful Strike

"When it is alleged in good faith by the public employer that a labor organization has declared or authorized a strike of public employees which is or would be in violation of this section, the employer may petition the board for a declaration that the strike is or would be unlawful. The board, after conducting an investigation and hearing, may make such declaration if it finds that such declaration or authorization of a strike is or would be unlawful...When a labor organization or individual disobeys an order of the appropriate circuit court issued pursuant to enforcing an order of the board involving this section...they shall be punished according to the provisions of ORS Ch. 33, except that the amount of the fine shall be at the discretion of the court" (Ore. Rev. Stat. §243.726(4)).

OREGON (continued)

Lawful Strike

"It shall be lawful for a public employee which is not prohibited from striking...and who is in the appropriate bargaining unit involved in a labor dispute to participate in a strike after: (several conditions are met--ed.)" (Ore. Rev. Stat. §243.726(2)).

Injunctive Relief: Lawful Strike

"Where the strike occurring or is about to occur creates a clear and present danger or threat to the health, safety, or welfare of the public, the public employer concerned may petition the circuit court of the county in which the strike has taken place or is about to take place for equitable relief including but not limited to appropriate injunctive relief...If, after hearing, the court finds that the strike creates a clear and present danger or threat to the health, safety or welfare of the public, it shall grant appropriate relief. Such relief shall include an order that the labor dispute be submitted to final and binding arbitration within 10 days of the court's order" (Ore. Rev. Stat. §243.726(3)).

PENNSYLVANIA

Pennsylvania has adopted a comprehensive public employee bargaining law (Pa. Stat. Ann. Tit. 43 §1101.101-1101.2301 (Purdon)). The law provides for authorized strikes, prohibited strikes, and jurisdictional strikes, with injunctive procedures specified for each.

Authorized Strikes and Injunctive Relief

"If a strike by public employees occurs after the collective bargaining processes set forth in section 801 and 802 of Article VIII of this act have been completely utilized and exhausted, it shall not be prohibited unless or until such a strike creates a clear and present danger or threat to the health, safety or welfare of the public. In such cases the public employer shall initiate, in the court of common pleas of the jurisdiction where such strike occurs, an action for equitable relief, including but not limited to appropriate injunctions and shall be entitled to such relief if the court finds that the strike creates a clear and present danger or threat to the health, safety or welfare of the public....Hearings shall be required before relief is granted under this section and notices of the same shall be served in the manner required for the original process with a duty imposed upon the court to hold such hearings forthwith" (Pa. Stat. Ann. Tit. 43 §1101.1003 (Purdon)).

PENNSYLVANIA (continued)

Prohibited Strikes and Injunctive Relief

"Strikes by public employees during the pendency of collective bargaining procedures set forth in sections 801 and 802 of Article VIII are prohibited. In the event of a strike during this period the public employer shall forthwith initiate an action for the same relief and utilizing the same procedures required for prohibited strikes under section 1001" (Pa. Stat. Ann. Tit. 43 §1101.1002 (Purdon)). (Note: section 1001 applies to certain categories of essential personnel, and provides that in strikes by such employees "the public employer shall forthwith initiate in the court of common pleas of the jurisdiction where the strike occurs, an action for appropriate equitable relief including but not limited to injunctions..."--ed.)

Jurisdictional Strikes and Injunctive Relief

"Employee organization, their agents, or representatives, or public employees are prohibited from: ...calling, instituting, maintaining, or conducting a strike or boycott against any public employer...on account of any jurisdictional controversy" (Pa. Stat. Ann. Tit. 43 §1101.1201 (Purdon)). Procedures are given for petitioning the public employment relations board in the event of alleged violations, and for seeking injunctive relief in the event a violation is found by the board--ed.)

RHODE ISLAND

A statute provides for collective relationships between teachers and school boards (R.I. Gen. Laws § 28-9.3).

The statute contains ambiguous language on the legality of strikes, and makes no provision for injunctive relief.

Strikes

"...Nothing contained in this chapter shall be construed to accord to certified public school teachers the right to strike" (R.I. Gen. Laws §28-9.3-1).

SOUTH CAROLINA

The statutes are silent on the matter of teacher strikes and injunctive relief therefrom. The statutes also are silent with respect to collective relationships between teachers and school boards.

SOUTH DAKOTA

A statute provides for collective relationships between public employers and employees, prohibits strikes, and provides for injunctive relief (S. Dak. Comp. Laws Ann., §3-18).

Strikes

"No public employee shall strike against the state of South Dakota, any of the political subdivisions thereof, any of its authorities, commissions, or boards, the public school system or any other branch of the public service" (S. Dak. Comp. Laws Ann., §3-18-10).

Injunctive Relief

"The governing boards of the state and its political subdivisions may apply for injunctive relief in circuit court immediately upon the existence of a strike or related activities, and the state's attorney of every county shall have the same duty in enforcement of the chapter" (S. Dak. Comp. Laws Ann., §3-18-14).

TENNESSEE

A statute provides for collective relationships between teachers and school boards; prohibits strikes, and provides for injunctive relief therefrom (Tenn. Code Ann. §49-55).

Strikes

"It shall be unlawful for a recognized professional employees' organization or its representatives...to engage in a strike... (Tenn. Code Ann. §49-5508(b)(5)).

Injunctive Relief

"If a strike occurs, the board of education may apply to the chancery court in the county to enjoin such strike. The application shall set forth the facts constituting the strike. If the court finds, after a hearing, that a strike has occurred, the court may enjoin the employees from participating in such strike" (Tenn. Code Ann. §49-5509).

TEXAS

The statutes prohibit public employee strikes and collective bargaining, but make no provisions for injunctive relief in the event of a strike.

Strikes

"It is declared to be against the public policy of the

TEXAS (continued)

Strikes (continued) - 2

State of Texas for public employees to engage in strikes or organized work stoppages against the State of Texas or any political subdivision thereof" (Tex. Labor Code Ann. Tit. 83, §5154c(3)).

UTAH

The statutes are silent on the matter of teacher strikes and injunctive relief therefrom. The statutes also are silent with respect to collective relationships between teachers and school boards.

VERMONT

There are two applicable statutes in Vermont, and their provisions are not fully compatible. A Labor Relations Act for Teachers provides for collective relationships between teachers and school boards, says nothing about the legality or illegality of strikes, but provides for limited injunctive relief from teacher strikes. This law can be construed as a "limited right to strike law", even though strikes are not explicitly labelled as legal or illegal (Vt. Stat. Ann. Tit. 16, §1981-2010). In addition there is a Municipal Employee Relations Act. Certain of its provisions apply to teachers; these provisions include those which define strikes as unfair labor practices, and which provide procedures, including injunctive relief, in the event of such strikes (Vt. Stat. Ann. Titl 21 §1721-1734). Under the first act it appears that a school board could seek injunctive relief on the claim that a strike presented a clear and present danger; under the second act a school board could seek injunctive relief on the claim that a strike was a prohibited unfair labor practice.

Strikes

No provisions under the Labor Relations Act for Teachers.

The Municipal Labor Relations Act:

"It shall be an unfair labor practice for an employee organization or its agents: ... (5) to engage in, or to induce or encourage any person to engage in a strike..." (Vt. Stat. Ann. Tit. 17, §1726(b)).

Injunctive Relief

The Labor Relations Act for Teachers:

"No restraining order or temporary or permanent injunction shall be granted in any case brought with respect to any action taken

VERMONT (continued)

Injunctive Relief (continued)

by a representative organization or an official thereof or by a school board or representative thereof in connection with or relating to pending or future negotiations, except on the basis of findings of fact made by a court of competent jurisdiction after due hearing prior to the issuance of the restraining order or injunction that the commencement or continuance of the action poses a clear and present danger to a sound program of school education which in the light of all relevant circumstances it is in the best public interest to prevent. Any restraining order or injunction issued by a court as herein provided shall prohibit only a specific act or acts expressly determined in the findings of fact to show a clear and present danger" (Vt. Stat. Ann. Tit. 16, §2010).

The Municipal Labor Relations Act:

"The (state labor relations board) may prevent any person from engaging in any unfair labor practice. Whenever a charge is made that any person has engaged in or is engaging in any unfair labor practice, the board may issue and cause to be served upon that person a complaint stating the charges and containing a notice of hearing before the board....(d) If upon the preponderance of the evidence the board finds that any person named in the complaint has engaged or is engaging in any unfair labor practice, it shall state its finding of fact in writing and shall issue and cause to be served on that person an order requiring him to cease and desist from the unfair labor practice, and to take such affirmative action as the board shall order" (Vt. Stat. Ann. Tit. 17 §1727(a)(d)).

"The labor relations board shall have the power to enforce all orders and decisions made under the authority of this chapter by petition to the court of Washington County with equity jurisdiction... (b) Upon filing of a petition by the board, the court may grant such temporary relief, including a restraining order, as it deems proper pending formal hearing. (c) The sole issue before the court shall be whether or not the records of the board and the law relating thereto support the order..." (Vt. Stat. Ann. Tit. 17 §1729).

VIRGINIA

The statutes are silent with respect to teacher strikes and injunctive relief therefrom. However the statutes do provide that striking public employees lose their employment (Va. Code §40.1.55).

The statutes are silent with respect to collective relationships between teachers and school boards.

WASHINGTON

There is statutory authorization for collective relationships between teachers and school boards; however the statute is silent with respect to teacher strikes and injunctive relief therefrom (Wash. Rev. Code §41.59).

WEST VIRGINIA

The statutes are silent on the matter of teacher strikes and injunctive relief therefrom. The statutes also are silent with respect to collective relationships between teachers and school boards.

WISCONSIN

An omnibus act provides for collective relationships between teachers and school boards (Wisc. Stat. Ann. §111.70). Strikes are prohibited except under specified circumstances; injunctive relief is provided for both prohibited and permitted strikes.

Strikes

"Except as authorized under par. (cm) 5 and 6.c, nothing contained in this chapter constitutes a grant of the right to strike by any municipal employee, and such strikes are hereby expressly prohibited. Par. (cm) does not authorize any strike after an injunction has been issued against such strike..." (Wisc. Stat. Ann. §111.70(4)(1)). (The material in par. (cm) 5 and 6.c defines the conditions under which strikes may occur--ed.)

Injunctive Relief: Authorized Strikes

"At any time after a labor organization gives advance notice of a strike...which is expressly authorized...the municipal employer or any citizen directly affected by such strike may petition the circuit court to enjoin the strike. If the court finds that the strike poses an imminent threat to the public health or safety, the court shall, within 48 hours of the receipt of the petition but after notice to the parties and after holding a hearing, issue an order immediately enjoining the strike, and in addition shall order the parties to submit a new final offer on all disputed issues to the commission for final and binding arbitration..." (Wisc. Stat. Ann. §111.70(7m)(b)).

Injunctive Relief: Prohibited Strikes

"At any time after the commencement of a strike which is prohibited... the municipal employer or any citizen directly affected by such strike may petition the circuit court for an injunction to immediately termi-

WISCONSIN (continued)

Injunctive Relief: Prohibited Strikes (continued)

nate the strike. If the court determines that the strike is prohibited...it shall issue an order immediately enjoining the strike, and in addition shall impose the penalties provided in par. (c)" (Wisc. Stat. Ann. §111.70(7m)(a)).

Injunctive Relief: Authorized and Prohibited Strikes

"Any labor organization which violates sub. (4)(1) after an injunction has been issued shall be required to forfeit \$2 per member per day, but not more than \$10,000 per day. Each day of continued violation constitutes a separate offense" (Wisc. Stat. Ann. §111.70(7m)(c)(1)(b)).

"Any individual who violates sub. (4)(1) after an injunction against a strike has been issued shall be fined \$10. Each day of continued violation constitutes a separate offense...The court shall order that any fine imposed under this subdivision be paid by means of a salary deduction at a rate to be determined by the court" (Wisc. Stat. Ann. §111.70(7m)(c)(2)).

"The penalties provided in this paragraph do not preclude the imposition by the court of any penalty for contempt provided by law" (Wisc. Stat. Ann. §111.70(7m)(c)(4)).

WYOMING

The statutes are silent on the matter of teacher strikes and injunctive relief therefrom. The statutes also are silent with respect to collective relationships between teachers and school boards.

A TEACHER STRIKE IN COLLINSVILLE, ILLINOIS

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CONTENTS

A TEACHER STRIKE IN COLLINSVILLE, ILLINOIS 1

 The Legal Setting 1

 The Social Setting 5

 Prelude 7

 August 28: The Decision to Seek Injunctive Relief 8

 Getting to Court: August 28-31 10

 The Issues Before the Court: August 30 - September 1 12

 The Hearing: September 1 14

 The Court's Order: September 1 17

 Court-Ordered Negotiations: September 1 - 4 19

 Evasion and Delay: September 4 - 6 20

 Toward Contempt: September 7 22

 Settlement: September 8 - 9 23

 Aftermath 23

FOOTNOTES 26

REFERENCES 27

A TEACHER STRIKE IN COLLINSVILLE, ILLINOIS¹

On August 30, 1978 the Collinsville Board of Education sought an injunction ordering an end to a strike being conducted by the district's teachers. The Board alleged that the strike, then in its third day, was unlawful and was inflicting irreparable harm upon students and taxpayers. At a court hearing two days later the teachers' attorney challenged the Board's allegation of irreparable harm and the evidence given in support of it. In his summary of the hearing, the attorney told the court that the Board had presented "not one scintilla of evidence" of irreparable harm. Nonetheless, the court found that the strike was illegal and that:

...the plaintiff is suffering irreparable harm in that it has been unable to operate the school system and in that the students of the school district are being denied their educational opportunities which are guaranteed by the constitution of the state of Illinois (Order, Collinsville Community Unit District #10 v. Collinsville Education Association, September 6, 1978. Hereafter cited as Collinsville.)

An injunction was issued. Subsequent court-ordered negotiation sessions failed to produce a settlement. The teachers thereupon continued their strike. The Board filed contempt motions. However, before these motions were heard a settlement was reached. The contempt motions then were dismissed and the schools opened. The entire strike had lasted two weeks.

Detailed analysis of the Collinsville strike is warranted on a number of grounds. Illinois is one of the states where the legislature has not adopted any statute pertaining to teacher collective bargaining or strikes. Thus a school board, faced with a strike, is left to its own devices to ascertain whether injunctive relief should be sought. The courts, similarly, must act without statutory guidance. Collinsville also is interesting because of the casual manner in which the irreparable harm standard is treated; on this matter the Collinsville court proceedings offer strong contrast to those in Warren, Michigan (Graber, 1980a) and Butler, Pennsylvania (Graber, 1980b). Finally, the Collinsville strike provides a number of insights into the limitations of injunctive relief. In Collinsville those limitations were readily apparent.

The Legal Setting

Collective bargaining is widespread in Illinois school districts. About half of the state's districts operate with collectively negotiated teacher contracts (U.S. Department of Commerce, 1979:60). In contrast to many other states where collective bargaining is common however, teachers and school boards in Illinois must proceed without benefit of any statutory guidance on matters such as selection of representation units, scope of bargaining,

unfair labor practices, and impasse procedures. Efforts to secure adoption of a statute repeatedly have foundered--usually on the strike issue. For example, in 1967 legislation recommended by a Governor's Commission was defeated due to labor opposition to the bill's strong no-strike provisions (Clark, 1969; Derber). Four years later another Governor and another Commission recommended legislation modeled after Pennsylvania's limited-right-to-strike law; it too failed passage, largely because of the strike provisions (Goldstein, 1973).

Contemporary observers of the Illinois scene are ambivalent about the absence of a statute. On the other hand, legislative silence is blamed for some of the chaos in Illinois labor-management relations at the local level. On the other hand, it is acknowledged that no statute may be preferable to a bad one.

Note²--In a society grown increasingly skeptical of the law's capacity to resolve social problems, and weary of laws which often seem to be counterproductive, Illinois' inadvertent "experiment" in rule-less collective bargaining raises some interesting questions. Why have legislators in Illinois been unable or unwilling to disentangle the strike issue from the other issues of collective bargaining legislation? (In California and Washington the legislatures have "solved" the problem by adopting bargaining statutes which say nothing at all about strikes). Does the lack of rules about matters such as representation and good faith bargaining contribute to the high incidence of strikes in Illinois? (To answer this question we need to do more than count strikes. We need some measure of the predicted incidence of strikes, based on information about district size, population density, industrialization, and other common correlates of strike activity. Better yet, we need a strike-by-strike analysis of the causes of strikes in Illinois and other rule-less states, compared with similar analysis in states which have bargaining statutes. Such studies, though beyond the scope of the present investigation, would add to our understanding of the impact of legal rules on social conflict).

The courts have partially filled the statutory vacuum, particularly on the strike question. The leading case is Board of Education v. Redding 207 N.E.2d 427 (1965, Ill. Sup. Ct.). In 1964 the opening of the school year in a small mid-state district was accompanied by a strike and picketing conducted by all thirteen of the maintenance and custodial personnel. Schools were kept operating for several days, despite low attendance, refusal of deliverymen to supply the cafeterias, uncleaned rooms, and disrupted transportation. After a week of this, the Board of Education closed the schools and sought injunctive relief.

At a hearing on September 10 the trial court declined to issue an injunction. Instead the court issued a statement indicating that the parties had agreed that the schools ought to be reopened while efforts to reach a settlement were made. Peaceful picketing

could continue, but it was not to interfere with school operations. A new hearing date was set for September 24.

During the period from September 11-24, schools did operate. However, volunteer cleaning personnel left "below standard" cleanliness, the hot water system became inoperative, principals had to engage in duties other than their usual ones, some deliveries were disrupted, and a roofing crew refused to cross the lines with the result that a leak "became worse and plaster fell from the ceiling." Meanwhile, no settlement was reached.

At the September 24 hearing the trial court evidently took seriously the traditional equity standard requiring a finding of irreparable harm before issuance of an injunction. The court found that the Board had failed to show that the difficulties it was experiencing amounted to irreparable harm, and the Board's motion was dismissed. Thus, momentarily at least, it appeared that utilization of the irreparable harm standard might limit the issuance of injunctions in Illinois school strikes, or at least school custodian strikes.

However, the Board of Education appealed, contending that the strike and picketing interfered with its Constitutional duty to provide "a thorough and efficient system of free schools" (Redding, 1965:2407). The Illinois Supreme Court, noting that the "universal view" that "a strike of municipal employees for any purpose is illegal," ruled in favor of the Board (Redding, 1965:2408). Authority was cited from throughout the nation, from cases involving several categories of public employees. The court particularly cited City of Pawtucket v. Pawtucket Teacher's Alliance, 141 A.2d624 (1958, R.I. Sup. Ct.), which held that teachers were "agents of the state government and as such exercise a portion of the sovereign power.... It has been generally held that persons exercising a portion of the sovereign power have no right to strike against the government..." (Pawtucket cited in Redding, 1965:2409). The court went on to note that the Illinois Constitution demanded the provision of a thorough and efficient system of schools, that state employees had a duty to refrain from conduct which would render schools less thorough and efficient, and that strikes were a "direct contravention of such duty" (Redding, 1965:2409).

The Supreme Court also said that the custodians' strike had "impeded and obstructed (and)...adversely affected" the schools, in these terms:

The physical plant and its proper maintenance are important adjuncts in furnishing education. Heat, sanitation, proper building repair, the regular attendance of pupils, keeping within budgetary and tax limits, and keeping teachers and administrative personnel free from matters which distract them from their educational tasks, are all matters which are essential to the efficient operation of a school and to the fulfillment of its paramount purpose of educating the children of this State. Also, due to the very nature of the community unit district, providing

transportation and lunch for the pupils has become an integral part of the education scheme by which the commands of the constitution are met. The uncontroverted proof in the record here shows that the normal functioning of the plaintiffs' schools has been impeded and obstructed by the strike in all these respects, and serves to demonstrate the wisdom of the majority rule that a strike by public employees is illegal (Redding, 1965:2409).

The court then went on to foreclose a possible claim that it might be possible to distinguish "essential" services from others:

We detect in defendants' arguments a suggestion that legal sanction should be given to the strike in this case because the striking employees offered to perform essential sanitary services, because the union has given deliverymen permission to cross the picket line.... These circumstances can be of little consequence, for the fact remains that an important governmental function is nonetheless still being impeded and adversely affected as a result of the strike. What is more, to be thorough and efficient, school operations cannot depend upon the choice or whim of its employees, or their union, or others, but must necessarily be controlled only by duly constituted and qualified school officials. Accordingly, and in conformity with the vast weight of authority, it is our opinion that the trial court erred in its refusal to enjoin the strike (Redding, 1965:2409).

Redding has been severely criticized on both legal and practical grounds. One article blames the courts for "the mess in the public employment relations"; an "imperial judiciary" has employed "contrived and hollow legalisms" reminiscent of the private sector before New Deal legislation (Feldman, 1977:620). Feldman cites Redding as the prime example, and questions the "legalisms" on which the case rests. Equally vigorous criticism has come from attorneys engaged in labor-management relations. One labor attorney characterized the Redding decision as "unrealistic" for it failed to address the conditions precipitating strikes, limited the courts' use of equity powers to foster settlements and increased the prospect of discontent in the workplace (Leahy, 1967). Edward Miller (1969) likened the world of Illinois labor law to that of Alice in Wonderland, pointing out that injunction proceedings could lead to public disapproval of the employer, and that enforcing an injunction was a precarious enterprise at best. Said Miller (1969:229), "The strange dreamworld in which we are now living may well become a nightmare." Goldstein (1973:385), in a similar vein, noted that labor disputes tended to be determined by economic and organizational muscle, not rules of law.

A staff member of the Illinois Association of School Boards (reflecting his personal views rather than the official views of the I.A.S.B.) confirmed these analyses. He said that while injunctions clearly can be obtained by boards, it usually does not pay to

get them. A major problem, he said, is that the courts are likely to try to engineer a settlement. Another problem, he said, is that judges, as generalists do not understand the special circumstances of school labor disputes. (The generalist role became clear one day in a visit to the Madison County courthouse, where the judge who had presided over the Collinsville injunction proceedings was, on this occasion, dealing with traffic violations.) Furthermore, even with experienced judges, there are many ways that a teacher association can evade or delay the impact of an injunction. The teachers' position is enhanced by their access to labor law specialists associated with the statewide teacher association. Particularly in cases where local school boards depend upon local attorneys who do not specialize in labor law or school, the school board can "get burned" by seeking injunctive relief in a teacher strike. His advice to boards: do not seek an injunction. However, he acknowledged that school boards have a great deal of autonomy on such matters, and that to many of them injunctive relief is an attractive possibility (Interview, Board source.)

Redding, of course, is not the only precedent that structures injunction proceedings in Illinois. Other cases provide skilled defense counsel with justifications for delaying injunction proceedings; these cases can be used to bury an unsuspecting plaintiff in unanticipated procedural problems. There are, for example, cases which limit the availability of ex parte relief. Others address due process requirements regarding notice to adverse parties (Rendleman, 1973; Schiller, 1971): The problems associated with enforcing an injunctive order are exceedingly complex (Halligan, 1969). A comprehensive review of injunction practice is neither necessary nor practicable here; subsequent analysis of the Collinsville case will illustrate the point.

Note--In a sense, appellate cases have a misleading allure. A board member who hears about Redding may conclude that the road to injunctive relief is both straight and sure. But it is not. Scores of other cases have a bearing on the injunction proceedings, and may ensnare the action in unanticipated ways. Thus a factor in the limitations of the law may be that a client simply underestimates the difficulties of attaining an objective through litigation.

The Social Setting

"Metro-East"--the Illinois portion of metropolitan St. Louis--is a heavily industrialized area. Steel plants, refineries, railroad yards, chemical plants and other manufacturing enterprises provide employment for tens of thousands of workers. Pro-labor sentiment is strong and school districts in the Metro-East area have experienced numerous teacher strikes. For example, in the East St. Louis district there were five strikes in the period 1964-70; the 1970 strike lasted for 60 days (National Education Association, 1969; National Education Association, 1971). Striking teachers sometimes elicit community support. When a 1975 strike in Cahokia

lead to contempt findings against teachers, parents took up the teachers' picket signs, protesting the Board's failure to negotiate a settlement (St. Louis Post-Dispatch, October 27, 1975). In a 1978 strike in a district adjacent to Collinsville, a newspaper poll showed considerable ambivalence about the propriety of teacher strikes and about the desirability of efforts to enjoin them (Edwardsville Intelligencer, August 31, 1978). Thus school boards seeking injunctive relief may not find that the community environment provides a clear mandate for decisive action.

Collinsville, on the fringe of Metro East, is situated on the bluffs overlooking the Mississippi River flood plain. First settled in the mid-nineteenth century, the town developed as a commercial and residential center serving both the farmland to the north and east, and the manufacturing complexes to the south and west. In many respects Collinsville retains its identity as a small town (current population: 19,000), but it clearly is an integral part of a major metropolitan area (Southwestern Illinois Metropolitan Area Planning Commission, 1973). Main Street is lined with shops and stores--some reflecting the era when the town was largely self-contained, and others representing marketing enterprises common to the metropolis. One small building along Main Street houses, in the front, a notary public who dispenses licenses and other forms that state governments provide for their citizens. Behind the State Office is the office of attorney John Leskera. One of his many clients is the Board of Education of Community Unit District #10.

The school district serves Collinsville, another smaller town, and several square miles of unincorporated semi-rural land. An \$11 million annual school budget supports an educational program for 7200 students in grades K-12. The students are enrolled in 16 schools staffed by approximately 380 teachers (Madison County School Directory, 1977:12, 50-62). One of the teachers is Board attorney Leskera's wife. Her role as a striking teacher later caught the eye of the local media, and undoubtedly constrained dinner-time conversation in the Leskera household. But it had no apparent effect upon Leskera's enthusiastic pursuit of injunctive relief. Another of the certificated employees was, until the summer of 1978, the legendary Vergil Fletcher. In his 32-year career as a basketball coach he repeatedly took his teams to the state tournaments; the Collinsville "Kahoks" were known and respected throughout Illinois. Fletcher had officially retired at the end of the 1977-78 school year, but he was interested in returning as a part-time athletic director and coach. That created a problem for the Board. Part of the problem was that there was substantial community sentiment in favor of retaining Fletcher, but retention could create problems in treating similar requests from other retirees. Another part of the problem was that Vergil Fletcher's wife was a member of the School Board. The issue was to come to a head at the Board meeting of August 28, 1978--the same evening that the Board had to consider what to do about the teacher strike which started that day.

Included among the seven members of the 1978 School Board were a retired school Superintendent, a teacher formerly employed in Collinsville and currently teaching in a nearby district, a union official in a steel plant, a nursery school director, and an official in a defense agency. By all accounts, the Board was a highly contentious one. Elections had been hotly contested; recounts were demanded in 1976 and 1977. Votes were not unanimous. In fact, following the 1979 elections, the Board deadlocked on selecting its own officers. Some Board members were publicly and bitterly critical of the Board. During the strike, divisions within the Board frequently were apparent. Another feature of the Board, according to the local press, was its proclivity to get involved in the day-to-day management of the district. That too was apparent in the negotiations which preceded the strike and in the strike itself, for the Board declined to employ or designate a professional negotiator; the Board was its own negotiating team.

Facing the Board during bargaining sessions was the negotiating team selected by the Collinsville Education Association, which included more than 80% of the district's teachers. Like other affiliates of the Illinois Education Association, the C.E.A. had access to the substantial legal, organizational, and bargaining resources of the I.E.A.

The previous history of negotiations in Collinsville reflected a pattern of conflict. There had been a one-day strike in 1969 and a five-day strike in 1970 (National Education Association, 1969; National Education Association, 1971). A two-day strike in 1976 was accompanied by court action. Attorney Leskera filed a request for injunctive relief the moment the 1976 strike began--before the Board officially authorized the filing. Leskera later explained that he would have asked to have the petition dismissed had the Board not wanted injunctive relief. The court delayed a hearing on the request, but evidently the truncated court proceeding helped precipitate a settlement; for a contract was agreed upon before further court action was taken. The significance of the 1976 court action was seen in different ways by different parties. One Board source reported that he thought that the act of going to court had spurred a settlement. But another Board source was disturbed by what he said was the court's unwillingness to act decisively and promptly. And teachers reportedly resolved not to be intimidated by court action in the future (Interviews).

Prelude

Negotiations for a 1978-79 contract began in July, shortly after the voters rejected, for the second time, a proposed hike in school taxes. By the time the strike began, weekly negotiating sessions had resolved many issues, but the teachers and the Board were far apart on the financial package. The Board offered a total of \$227,000, including a \$500 per teacher raise from 1977-78. This

the teachers spurned, claiming that they would have received average increases of \$470 under the old contract, and that a \$30 per teacher increase was wholly unsatisfactory in view of increased costs of living. On August 27, after the Board refused to increase its offer, the teachers voted to strike.

On Monday morning, August 28, pickets were posted. Only 32 teachers reported for work. School bus runs were cancelled, and 6900 of the district's 7200 students did not go to school. The strike was on. That evening the Board met to consider what to do.

August 28: The Decision to Seek Injunctive Relief

The Board met in special session on Monday evening. The session was to consider the Fletcher issue, adopt the annual budget, and act upon a resolution authorizing injunctive relief. Violet Fletcher was absent. About 200 spectators were present at the meeting, plus mobile units from St. Louis' three major TV stations. Informal chatter in the crowd indicated that the Fletcher issue was as important as the strike.

Board members emerged from an executive session at 7:50 P.M. After a pointed comment about the amount allocated for teacher salaries, an annual budget was adopted. Then there was a 20-minute discussion about the resolution authorizing court action against the striking teachers. Attorney Leskera addressed the Board, noting that the decision to seek court relief was a policy decision. He said that the taxpayers had paid for services they were not receiving and that the strike was illegal. He expressed confidence that the court would enjoin the strike and compel the teachers to return to work. At the direction of the Superintendent he already had prepared papers for filing in court, and was prepared to file promptly and to press matters against any teacher violating the court's order.

Questions from the Board followed. Would the judge push negotiations? "No," said Leskera, "that isn't his function. The position of the judge is to enforce the law. The law says no strikes. He'll tell the violators to return to work. Violators will be penalized by fines or jailing." Must the suit be filed immediately? No, it could be done at the direction of the Superintendent. Would the court issue an injunction? Leskera acknowledged that there had been some doubt about it two years ago, but that now the law was clear: an injunction would be issued. If the teachers were acting illegally, why was it necessary to go to court? Leskera explained that the teachers had a duty vis-a-vis the taxpayers, and a court could order the teachers to perform their duty. Would the teachers return to work if ordered to do so? (Here there was muffled laughter from the spectators, most of whom appeared to be teachers.) Leskera, noting the laughter, commented about lack of respect for the law, and said that it might be easy to say that

"I don't have to live up to the law," but that levity would disappear in the face of an actual injunction. Leskera urged unanimity upon the Board, saying that would be important to show the court that the Board was united.

But the Board was not united. Following a reading of the resolution moving initiation of a suit against the C.E.A. officers, the C.E.A. itself, "and any or all others, acting with them," a roll call vote yielded four Ayes and two Nays.

Note--A fundamental precept of the literature on teacher-board bargaining is that the board must maintain a united front. However the literature says little about the significance of board unity concerning court action. Officially, a board speaks with but one voice, and hence it should not matter, legally, that there are dissenting voices. But the courts, as institutions, are particularly sensitive to matters of unanimity and dissent, and it would be surprising indeed if a court was unaffected by dissension among plaintiffs (or defendants). Unfortunately, we have no evidence on this point from Collinsville. But there are several indications that the Board also was divided on the contract issues. Evidently some members were willing to go further than others in meeting the teachers' demands: If the judge knew this, (and he surely would have been told by one attorney or the other), he knew he was confronted by a divided plaintiff party and by defendants who were displaying considerable solidarity. Under those circumstances, assuming judicial neutrality on the contractual issues in dispute, a very simple political calculation would indicate that the teachers expected an eventual breakthrough in negotiations. Indeed, the teachers were taking care to point out that "some progress" was being made at negotiation sessions. Thus, if the court used something akin to a "calculus of consent" it would have anticipated teacher defiance of an injunction which would deprive them of the negotiation breakthrough which they anticipated. Thus, it would have made political sense for the court to press negotiations and to delay enforcement of an injunction in order to reduce the probability of having to address the contempt issue.

There remains the question of why the Board divided on the decision to go to court. Available evidence points toward a variety of non-exclusive explanations. One emphasizes the personal backgrounds of Board members. One of the "Nay" votes was a teacher (in another district); the second was a labor union official. The use of a labor injunction could hardly have been palatable to these individuals. In addition sentiment may have been divided about the efficacy of seeking court relief. In the 1976 strike it had appeared that the court might not be too helpful, and there was the distressing experience of nearby Cahokia,

where contempt proceedings recently had produced parent demonstrations against the Board. There was another matter, suggested to us by a district administrator: it might be more profitable to take a strike than to seek to break it. Surely this proposition could have divided the Board. Finally, there were the negotiations themselves, which occasionally displayed some progress. As Board President Jenkins remarked after the August 28 meeting, the Board would delay filing court papers "if we're making progress. None of us really wants to use it" (St. Louis Post-Dispatch, August 28, 1978). The impression of a "reluctant plaintiff" is inescapable. Would a court be inspired to move swiftly and decisively in favor of such a plaintiff? Probably not.

The Board had one more chore to attend to. Would Coach Fletcher be re-appointed? An executive session was held, and the crowd waited in anticipation. Finally a spokesperson emerged. The Board was not united in its view, and so no action would be taken. That decision surely cost the Board some of the community support it would need in the midst of a teacher strike.

Note--Here the matter of "contextuality" is particularly apparent. Public relations efforts by school boards play a key role in the outcome of many strikes. In nearby Hazelwood, for example, Board success in holding out against teacher demands appears to have been attributable, at some measure, to the Board's public relations efforts. (Colton, 1980b). But Collinsville, which had to address the sensitive Fletcher issue at the same time as it addressed the teacher strike, lost ground with some segments of the community just as the strike began. While it is impossible to disentangle the interactions between the Fletcher issue and the strike, it is noteworthy that the Collinsville Board did not enjoy major community support, and that it yielded substantially on disputed issues in order to end the strike.

Getting to Court: August 28-31

Evidently the negotiating session following the August 28 Board meeting made some progress, for another session was scheduled for the next night. No request for injunctive relief was filed on Tuesday, August 29. However, the Tuesday evening negotiation session appears to have been unproductive. Spokespersons for both sides took hardline positions following the meeting. The Board reiterated its contention that it had no further money to offer, that the teachers' were unyielding in their demands, and that teachers who reported for work would be paid (and, implicitly, those on strike would have their pay docked). Thus, said the Board, it would go to court. For their part, the teachers indicated that the Board would have to boost its offer considerably and that the teachers would

duly consider what to do in the event that an injunction issued. No talks were scheduled for Wednesday.

Shortly after noon the Board's papers were filed, and a hearing was set for Friday at 1:00 P.M. Another long negotiating session was held on Thursday; teachers reported that some progress had been made. But again there was no settlement. Thus on Friday, the fifth day of the strike, the parties and their attorneys finally had their day in court.

Note--Historically, part of the reason for management's success in using labor injunctions has been the capacity to act swiftly and without prior notice. But in Collinsville the strike was five days old before an injunction was issued. Why? A previous Note indicated that the Board's own enthusiasm for injunctive relief was limited, and that probably contributed to a delay in the final decision to file papers. In addition the negotiation sessions were producing tantalizing signs of progress--not enough to achieve settlement, but just enough to suggest that an absolute impasse had not been reached. Some staff members believed that Board members felt that a few days without pay would add to the pressure on teachers. But delay is a mixed blessing. In an effectively-led teacher group, delay can increase the members' determination to get some sort of satisfactory settlement for their troubles. Further, a new settlement issue is introduced by delay--make-up days. Teachers also could use delay to try to mobilize community sentiment against the Board.

There was, in addition, a two-day delay caused by court procedures. Ex parte injunctions rarely are issued in Illinois. Although the Complaint, prepared by attorney Leskera requested ex parte relief, his informal inquiries had, by August 28, persuaded him that such relief would not be granted. Notice would be required. Moreover the teachers' attorney had taken the precaution of informing the Board's attorney of his office and home phone numbers, so that there could be no basis for holding a hearing without notice.

Whatever the cause--a hope that negotiations might yield settlement, a desire to avoid litigation, notice requirements--it is clear that delay greatly weakened the traditional bases for the effectiveness of labor injunctions. Surprise and precise timing permitted classic labor injunctions to disrupt strike planning at critical moments, and thereby disrupt strikes themselves. However in Collinsville, by the time the injunction request was heard in court, the strike was a week old, and the task of the court was to restore the pre-strike conditions, i.e. to change conditions, rather than to preserve conditions.

The Issues Before the Court: August 30 - September 1

In its Complaint the Collinsville Board named as defendants the Collinsville Education Association and six individuals--the C.E.A. President and five members of the negotiating team. These six, said the Complaint, adequately represented the teachers whose actions were to be enjoined. The text of the Complaint went further: it "joined as parties defendant hereto" (Complaint, Collinsville, 1978) all the members of the C.E.A. and persons acting in concert with them. The language went on to indicate that a class action was being undertaken by the Board. Subsequently, as we shall see, the class action approach contributed to a delay in proceedings.

The actions complained of were quite straightforward: the teachers were unlawfully striking and picketing instead of reporting to teach on properly scheduled school days. Consequently the education of pupils had been "interrupted, impeded and interfered with" (the language of Redding), and students and taxpayers were being irreparably harmed:

... (A)s a direct consequence of defendants' actions... the students of the school district are experiencing irreparable harm in that they are being denied the educational opportunities guaranteed by the Constitution to all children of the State of Illinois. Furthermore the taxpayers of the school district are experiencing irreparable harm in that the district is losing substantial sums in State Aid which the district would otherwise receive... (Complaint for Injunction, Collinsville, August 30, 1978).

Nothing further was alleged about irreparable harm, and there were no accompanying affidavits or exhibits supporting the allegation.

Not everyone shared the view set forth in the Complaint. The day before the court hearing the Collinsville Herald editorially criticized both parties for failing to reach a settlement. However the strike was hardly a disaster:

School opening isn't in the same class as police or fire protection, water, sewer or power service, or even telephones. If school doesn't open, Junior stays home. That's just the same as it was in July. There is a certain amount of inconvenience to the public and the child is deprived of some education. Perhaps deferred would be a better way to describe it. Still, it isn't a health or safety emergency. The town will go on (Collinsville Herald, August 31, 1978:2).

The Herald also thought that the financial harm was not too great. Under recently adopted rules for calculating the state aid apportionment, it appeared that the district would realize a net gain of about \$700 for each day not made up. Board President Tom Jenkins apparently

shared that view: according to the local press he indicated that lost days would not hurt the district very much on financial grounds. Such views were in marked contrast to those in the Board's petition.

In preparing his defense, teacher attorney Robert Deffenbaugh chose a strategy of delay. Thus virtually everything in the Board's Complaint was challenged. In addition to setting forth allegations of technical defects in the Complaint (e.g. improper service, improper authorization) the teachers' Answer asserted that a class action was not proper, that picketing was a constitutionally protected activity and hence not enjoinable, and that "the Plaintiff Board has failed to allege sufficient facts in its Complaint to show that it will suffer irreparable harm if a temporary restraining order...is not issued" (Answer, Collinsville, 1978).

Note--The contrast between trial and appellate proceedings is noticeable. The reader of appellate opinions enjoys the privilege of dealing with only a few issues--clearly focused, well-argued; and finally decided. At the trial court level there is great clutter and complexity. Plaintiffs are inclined to introduce as many arguments as possible in favor of their position, and the defendants' interest is served by maximizing the number of allegations disputed. In the Collinsville case, our untrained eyes detected at least these potential issues in the pre-trial documents:

1. Venue: was the court sufficiently unbiased to hear the case?
2. Notice: had the defendants received proper notice of their status?
3. Class Action: did the named defendants adequately represent the group of people whose actions the Board sought to enjoin?
4. Authorization: was the Superintendent permitted to file on behalf of the Board?
5. Irreparable Harm: was the strike causing irreparable harm?
6. Damages: were there damages, and if so, what were they?
7. Was the C.E.A. liable for damages, if any were awarded?
8. Was picketing a constitutionally protected activity?
9. Were there other legal remedies available to the Board?

In addition to these matters, there were implicit issues in the pleadings, e.g., the nature of the Constitutional guarantee

to students, and the presence or absence of good faith bargaining by either party. Still other issues would be brought up orally. Would binding arbitration be acceptable? Would the court order negotiations? The judge's decisions to ignore or treat such issues could--and did--decisively affect the course of the injunction proceeding. The question is: how does a judge decide?

The Hearing: September 1

The hearing was held before Circuit Court Judge P.J. O'Neill. O'Neill, a former Assistant State's Attorney, was elected to a judgeship in 1977, four years after entering the legal profession.

Note--Both sides agreed that the identity of the judge was all-important in an injunction proceeding. A representative of the district recalled the experience of 1976:

"(T)he judge who was involved was a judge who'd come up from representing a number of unions. And it was obvious that what he intended to do was to stall until (the strike) was settled. And with that, we saw the handwriting on the wall. I suppose that if (other districts) have failed to get...the injunctive orders, it is not so much that they have failed to do what they needed to do from the legal point of view, but rather have failed to get the kind of judge who's willing to enter the order....(The) problems that I've heard about in the state where school districts have been denied the injunction or where they've been put off unmercifully has to do not so much with the fact that the attorney for the board is not prosecuting it diligently, but rather the court just won't face up to it for one reason or another. There are so many reasons the court can give for putting (action) off, that you could be denied an injunction order almost never. (Interview, Board Source)

Evidently the teachers held a similar view of the importance of the judge. The teachers' attorney prepared a Change of Venue motion and then urged local C.E.A. personnel to learn what they could about the judge to whom the case had been assigned. C.E.A. inquiries evidently did not yield much information about Judge O'Neill and so the Motion to Change Venue was allowed to lapse.

The point here is that a judge apparently has a great deal of latitude in Illinois. With respect to labor injunctions, personality and philosophy and politics may be more salient than laws. Litigant's approach to the court, and their responses to the court's ruling, appear to be heavily influenced by their views of the judge.

The hearing began about 1:15 P.M., and lasted for two hours. Deffenbaugh's primary goal was to delay court action, for it was likely that the teachers sooner or later would lose on the main legal issues. His goal was to buy time which the teachers could use to negotiate a settlement. A further goal was to weaken the expected court Order as much as possible, and to attach to it conditions which would force resumption of negotiation. Leskera's goal was to secure an injunction as speedily as possible, without conditions. Thus the hearing had a somewhat odd character, for the attorneys seemed more interested in pursuing their own goals than in disputing each other's contentions. Positions were taken, but few issues were directly confronted.

At the inception of the hearing Deffenbaugh presented a Motion to Dismiss, and then addressed the court about the issues raised in the Motion. The class action aspect of the case drew the most comment. Deffenbaugh pointed out that the number of teachers involved was not large enough to justify a class action and that individual teachers were differently situated with respect to the strike: some were sick; some were not members of the bargaining unit; some were tenured. In any event rank and file teachers were not represented before the court, for he (Deffenbaugh), was representing only the six named defendants and the C.E.A. as an organization. Deffenbaugh then recited other objections to the Board's Complaint. The picketing which the Board sought to enjoin was a constitutionally protected activity. Facts to support an allegation of irreparable harm were not presented in the Complaint. There was a remedy at law, and hence injunctive relief was improper. Finally, he said, there were procedural issues concerning the form of the Complaint.

Leskera responded briefly. The hearing, he said, was a courtesy to the teachers; the strike could have been enjoined ex parte (a point which Deffenbaugh contested). The real matter before the court is a simple one: the teachers were striking illegally.

Deffenbaugh responded by noting that it was not enough to "cut through" by simply saying that a strike is illegal and hence enjoined. The plaintiff must demonstrate that irreparable harm will result if an injunction is not issued. All that the law required, he said, was 180 days of school; there was nothing sacred about the Board's calendar. It would be necessary to show that the change in calendar created irreparable harm. Deffenbaugh then referred to a prior case "in Champaign last year" where a court had withheld injunctive relief because the Board had not shown that a calendar change created irreparable harm.

Note--Our subsequent efforts to track down this case bore no fruit. Evidently no Order or Opinion was issued, and the case apparently occurred in a setting where there was no newspaper coverage. We were not able to obtain an exact identification of the parties in the case, or the name of

the judge involved. This is not, of course, to suggest that the case was fictitious; we do suggest that the legal system, despite its deserved reputation for easy retrieval of court decisions, does not always yield its secrets. We are unable to ascertain whether our inability to locate the case reflects our limited legal research skills, or the absence of a record which could be preserved, or, possibly, simple insignificance.

Judge O'Neill, unpersuaded by Deffenbaugh's arguments, denied the Motion to Dismiss. The hearing began. Through testimony elicited from his witnesses, Board attorney Leskera developed information necessary to satisfy the Redding standard. Superintendent Renfro stated that during the four preceding days the district had been unable to offer an educational program to the students, as previously scheduled through official adoption of a calendar. Moreover, without teachers the Board had no alternative way to provide education. And there was no evidence that the teachers would return at any time during the 1978-79 school year. C.E.A. Spokesperson Lynn Cicarelli admitted that she did not intend to resume her position until a settlement was reached. Other C.E.A. defendants called by Leskera testified to the same effect, and indicated their awareness that the strike was keeping the schools closed to children. The Assistant Superintendent for Personnel testified that the strike was adversely affecting morale among nonprofessional workers who were made uncomfortable by having to cross picket lines, and whose normal routines were being disrupted by parents calling to express their views and to obtain information. The final witness was the Business Manager, who testified that the district was having to pay about \$2700 per day to teachers who crossed the picket lines. Leskera's questions clearly were tailored to elicit testimony pertinent to the Redding decision.

During cross-examination Deffenbaugh repeatedly challenged the Board's basis for claiming irreparable harm. The Superintendent acknowledged that during the previous year the school calendar had been affected by school closings on 11 "snow days." Such days were not counted in computing state aid. The Superintendent also acknowledged that dismissal notices had not been sent to teachers-- a point whose significance did not become apparent until later when Deffenbaugh suggested to the court that the Board could have operated schools by hiring some of the 20,000 surplus teachers in Illinois. Under cross-examination Board witnesses also acknowledged that some of the people being paid during the strike were 12-month employees who would be paid under any circumstances. Moreover the decision to pay teachers who crossed the picket lines was made voluntarily by the Board (and, hence, implicitly not the fault of the striking teachers); in any case the working teachers were performing useful work during the days of the strike. As to the "morale" problem cited by the Assistant Superintendent, Deffenbaugh demanded specific names and events--which were not forthcoming. Finally, waxing eloquent, Deffenbaugh asked whether the callers who were disrupting the switch-

boards were not exercising their Constitutionally protected rights to free speech? At this the Board's attorney laughed outright, and the court cut the line of questions off.

When the testimony ended, Deffenbaugh renewed his request to dismiss the case. There was, he said, "not one scintilla of evidence" of irreparable harm. Maybe, he said, there would be harm later if the district's capacity to complete the school year was jeopardized. And there was no evidence that the taxpayers' money was being lost. Leskera responded that the community was not receiving the public education to which it was entitled, and that failure to enjoin the strike could allow the entire year to go by without schooling. Deffenbaugh seized upon this, saying that Leskera was admitting that the irreparable harm was in the future; injunctive relief was not warranted until there was actual harm, according to Deffenbaugh. Leskera responded by reiterating that the essential fact was perfectly obvious: there was an illegal strike. The court briefly reviewed the pleadings, and then again denied Deffenbaugh's Motion to Dismiss.

In his closing argument, Deffenbaugh reiterated his assertion that a class action was not warranted, and he reminded the court that it had the power to impose conditions on an injunction, if granted. Other courts in Illinois, said Deffenbaugh, had lent their good offices to settlement efforts, trying to fill the void left by legislative inaction. The court then asked Leskera for his views on (a) attaching conditions to an order, and (b) maintaining the suit as a class action. Leskera said that the conditions were not needed, and that he was willing to proceed against the named defendants only, without joining rank and file C.E.A. members. The court then recessed, two hours after the proceedings began.

The Court's Order: September 1

Twenty minutes later Judge O'Neill emerged from his chambers to announce his decision. He stated that the strike was unlawful and that the plaintiff was suffering irreparable harm in that it was unable to operate the school district and the children were being deprived of rights guaranteed by the Constitution. Further, the plaintiff had no adequate remedy at law. He then announced a three-part Order. First, the defendants were directed to return to work on Tuesday, following the three-day Labor Day weekend. Second, there was to be no picketing from 20 minutes before the opening of school until 20 minutes after closing. Third, citing the old equity maxim that "he who seeks equity must do equity" the judge ordered the parties to "continue to negotiate in good faith for not less than five hours per day." Attorneys for the two parties were to report back to the judge on Tuesday about the progress of the negotiations. Implicit in the Order was another decision of the court: only the named defendants were enjoined, i.e., the class action issue was left unresolved.

"Not bad, not bad at all," was Deffenbaugh's reaction. While he had lost on the main point--issuance of the back to work order--he had won some others. The class action was dropped. Hence, for the time being at least, rank and file C.E.A. members appeared to be beyond the court's reach. Moreover, and of particular significance, the Board had been ordered to engage in daily negotiations. And picketing could continue, albeit in a circumscribed manner.

Board attorney Leskera also expressed some satisfaction. In essence, the hearing and the Order convinced him that the court was prepared to "uphold the law" (Interview, Board Source). In contrast to the 1976 experience, where it appeared that the court would not act with alacrity, this court had done so. That was a victory. On the other hand, the order to negotiate was disappointing. The Board already had done a great deal of negotiating, and the point of further negotiations was not apparent. Nonetheless, Leskera encouraged the Board to comply with that part of the Order, maintaining that the negotiations were a test which the Board must pass in order to persuade the judge that the only way to reopen schools was to enforce the injunction (Interview, Board Source).

Note--In retrospect, it appears that the court weakened the position of the Board. The fact that rank and file teachers were not enjoined and the fact that the negotiations were ordered to continue, probably were not in keeping with the Board's hopes when it went to court. Indeed, at the August 28 meeting one Board member had specifically inquired about the possibility of court-ordered negotiations, and had been advised that such negotiations were outside the court's purview.

The Board's setback on the class action issue was based on legal technicalities. A formal class action, if pursued in strict adherence to class action procedure, is a cumbersome affair. Attorney Leskera apparently elected to take a simpler route, merely asserting a class action and hoping that he might prevail, rather than pursuing the alternatives of (a) following strict class action procedures, or (b) naming each teacher as a defendant. Either would have taken a great deal of time. Later, if necessary, the Order could be amended. But the effect of the strategy was further delay. Rank and file teachers would not be named as defendants until the following Wednesday--midway through the second week of the strike.

Leskera's apparent failure to anticipate the order to negotiate is somewhat surprising. Other Illinois courts, in similar circumstances, had intervened on behalf of negotiations. Possibly Leskera underestimated the extent to which the court might go beyond "applying the law" in order to maintain some degree of fairness. He may have underestimated the significance of Deffenbaugh's

plea to the court to impose conditions upon the plaintiff, or the significance of reports that negotiations were "making progress." There was, moreover, a clear record that the Board had been negotiating. Indeed, there had been a long session on the eve of the court hearing. Perhaps that was the crucial point: the Board's case could not establish that an absolute impasse had been reached. On practical grounds, it was not apparent to the court that injunctive relief was the Board's only recourse. In other states, where procedures for establishing that impasse exists are clearly set forth in statutes, it might have been easier for the Board to avoid creating the impression that negotiations still might work.

Court-Ordered Negotiations: September 1 - 4

The court-ordered five-hours-per-day negotiations did not proceed very well during the long Labor Day weekend, according to the lawyers' reports to the court, on Tuesday morning, September 5. Attorney Leskera reported very briefly. Despite the fact that Board members were unpaid public officials, he said, they met for 19 hours with the teachers during the weekend. ("Met" is a figure of speech here; the sessions were mediated, and face-to-face sessions occurred only briefly.) Positions had changed, but agreement was not reached. Leskera told the court that he was sure that the court's Order had been well-intentioned, but it had been interpreted by the teachers as a "lack of resolve to enforce the law," It was time to act against the teachers.

Deffenbaugh, reporting from notes handed him by a teacher, reported much more lengthily. "It's time," he said, "to make the court aware of what's happening." The Board's last offer was only \$55.20 per teacher. One Board member showed up with beer, and proceeded to drink it during the sessions. The Friday session included, said Deffenbaugh, a three-hour supper break which the Board took immediately after receiving a teacher counter-proposal. Thus there had not been five hours of negotiating, and the teachers felt that the Board was in contempt. At the Saturday session, said Deffenbaugh, the Board insisted it would cut back the school year, rather than schedule make-up days. Deffenbaugh reported that one Board member had said that "the judge ought to settle it, and the Board would resign." Money was available said Deffenbaugh; the Board appeared to be transferring funds among its accounts. Another Board member was reported to have said that "I can think of better things to do than be here negotiating." One day the Business Manager failed to show up, and so there was difficulty resolving a disputed figure in the budget. In short, said Deffenbaugh, the Board simply refused to negotiate in good faith, as ordered by the court. Perhaps binding arbitration should be ordered.

Leskera responded that he could not speak for the Board with respect to binding arbitration. But that was not the issue. The teachers were not at work and the schools were closed. Collinsville was a "beleaguered district" for tax referenda had twice failed in recent months, and the Board would not be representing the community if it yielded to the teachers.

Note--The court's Order to engage in daily negotiations appears to have rested upon a misapprehension of the bargaining process in schools. During the long Labor Day weekend neither party was experiencing the pressures which would be required to break through the apparent stalemate in negotiations. On the teachers' side, no paydays were lost during the weekend, and compliance with the back-to-work Order would not be an issue until Tuesday. Perhaps it would not even be an issue then, if the Order applied only to the six named defendants. And the six named defendants were committed to achieving a satisfactory settlement so long as the teachers backed them. On the Board side, the pressures remained stable too. Children were out of school anyway, and so parental pressure was not severe. To the Board, the negotiations were personally inconvenient. One of the members remarked, probably accurately, that the sessions on Friday, Saturday, and Sunday were a waste of time. In a fundamental sense, the court-ordered negotiations were premature. However in view of the court's lack of familiarity with the peculiarities of teacher-board bargaining, there probably would have been no way for the court to know this.

This is not to say that the negotiations were a total failure. The gap between the teachers' demands and the Board's offer was slightly narrowed during the negotiation sessions. In this respect, the court's Order produced progress. But the progress was very limited. There was, in short, compliance (to a degree) and progress (to a degree). But there was no settlement.

Evasion and Delay: September 4 - 6

On Monday evening, following a long negotiating session, Collinsville teachers met to hear a progress report and to determine their next action. They were not asked to vote on whether they would return to work, or whether the court's Order would be obeyed. Instead they simply voted to accept or reject the Board's last offer. On the advice of Attorney Deffenbaugh, the teachers voted as individuals, rather than as members of the C.E.A. Thus many non-members also voted. The procedure evidently was designed to circumvent the broadest interpretation of the court's Order of September 1. The general opinion among teachers was that the Order did not apply to

them; it applied only to the six named defendants. The local press voiced its editorial disapproval of "their lawyer's cute trick of having them disband their meeting and vote as individuals" but evidently the tactic worked, for the teachers voted overwhelmingly to reject the Board's last offer.

The court session on Tuesday morning included more than the report on weekend negotiations. Procedural matters also were in dispute. Leskera asked the court to direct Deffenbaugh to produce a list of C.E.A. members, that they too might be named as defendants. Deffenbaugh replied that the Board had access to the payroll deduction list, and should use that if it wanted to name individual defendants. Leskera said the list was not up to date. Finally Judge O'Neill ordered Deffenbaugh to provide the list by noon that day. Leskera then had a further request: he wanted the court to set a date for a show cause hearing based on the failure of the six named defendants to report for work that morning. Deffenbaugh noted that there was, at that moment, no evidence that the six in fact were not at their buildings. Acting on Leskera's request, the hearing was continued until the next day. Deffenbaugh then had a request: would the court comment on binding arbitration? It would not, but Judge O'Neill asked Leskera to ascertain the Board's position.

At the Wednesday hearing things went somewhat better for the Board. An amended Order was issued. Appended to it was a list of C.E.A. members, who now clearly became defendants. The amended Order also dropped all reference to negotiations, although Judge O'Neill, from the bench orally expressed the hope that they would continue. In addition the Judge orally admonished the teachers about compliance with his Order. If they did not like the law, there were procedures for seeking change in it, but defiance of a court order could lead to contempt proceedings. The teachers were to report for work the next day. (Thursday).

On another point, however, the Board again was faced with delay. Contrary to the expectations of Attorney Leskera, the September 6 court session did not result in a decision on his motion to find that the six initially-named defendants were in contempt by virtue of their failure to report for work. Deffenbaugh argued that the contempt charge was criminal in nature and that Supreme Court rulings required that defendants in criminal proceedings have five days in which to prepare their defense. Judge O'Neill, after some consideration, agreed. Tuesday, September 12, was set as the date for a hearing on the contempt charges against the initial six defendants and against others who might not comply with the amended Order of September 6. In the midst of these proceedings C.E.A. Spokesperson Lynn Cicarelli very nearly committed direct contempt--which is punishable on the spot--through her overly-candid responses to Leskera's questions about her position vis-a-vis the court's Order; Cicarelli was rescued through the intervention of Attorney Deffenbaugh (Interviews, Board and Teacher Sources).

Note--Again there was delay. The class action issue had effectively insulated rank and file C.E.A. members from the court's reach until Wednesday afternoon, September 6, when teachers could be served with copies of the Order. Contempt proceedings against the original six defendants had been put off until September 12. Thus while it was clear that the teachers were losing ground, they were losing it very slowly. Moreover, they simultaneously were gaining ground in the negotiation sessions. At the negotiation session on Wednesday evening (September 6), the Board raised its financial package offer to \$357,000--up 50% from the \$229,000 it had offered at the inception of the strike.

Toward Contempt: September 7

The Board of Education announced that it planned to open schools with a shortened session on Thursday, September 7--the day the teachers had been ordered to report to work. The teachers indicated their response at an early morning meeting. By a 10-1 margin they voted to continue their strike. Picketing continued--now carried out by teachers who were not C.E.A. members and hence presumably not bound by the injunction. Leskera filed a motion asking the court to hold the striking teachers in contempt.

Note--Utility theory seems directly applicable here. Utility theory suggests that compliance with a court directive is influenced by the balance of positive and negative gratifications perceived by the target of the court's order (Brown and Stover, 1977). Some of the factors affecting that balance can be identified. First, it was clear that negotiations were progressing in favor of the teachers; continuing the strike therefore offered the promise of a more favorable settlement. Second, teacher solidarity remained high. Utility theorists suggest that compliance is related to the size of the non-complying group: the larger the group, the less the probability of sanctions. Given that the teachers were unified, it was reasonable for them to believe that the Board would have a difficult time in applying sanctions to everyone (Brown and Stover, 1977:470). Third, utility theory also suggests that non-compliance is more likely if the number of possible plaintiffs (against the non-compliers) is kept small. Here some previous litigation in Illinois may have been important. In Allen v. Maurer, 81 LRRM 2237 (1972, Ill. App. 4th), the Supreme Court had ruled that parents may not initiate injunction action against striking teachers. Thus the only likely party to prosecute teachers was the School Board. And its lack of enthusiasm for such prosecution already was apparent. Indeed, a Friday newspaper story indicated that Board attorney Leskera had

said that the Board's main goal was to get the teachers back to school, not to prosecute them for contempt.

While the court's Order did not produce compliance, it may still have had effects in the intended direction. It probably increased the pressures on the C.E.A. negotiating team, which would be imperiled if no settlement was reached by the date scheduled for hearing contempt motions (September 12). Show cause papers served on rank and file teachers on Friday--the day after they failed to report for work as ordered by the court--undoubtedly increased the pressure on the negotiating team.

Settlement: September 8 - 9

On Friday afternoon the Collinsville Chamber of Commerce voted to endorse a plan of action. It wanted the schools open. To that end, the plan proposed to reopen schools on Monday, to seek dismissal of the contempt petition and to continue negotiations for two more weeks, at which point binding arbitration would be invoked.

A marathon negotiating session began Friday evening. Eighteen hours later settlement was announced. The final financial package amounted to \$397,000--roughly \$1000 per teacher, or 7% better than than 1977-78 salaries. Thus the strike brought the teachers \$170,000 more than the Board offered at the beginning of the strike. The Board obtained a two-year contract, with a second-year financial package valued at \$351,000. The teachers would make up seven of the nine strike days, but they would have to give up two personal leave days.

Aftermath

On September 11 Attorney Leskera informed the court that contempt proceedings were not needed, inasmuch as school had resumed. However, since the contempt was against the court, the Board would like to know the court's views. Judge O'Neill already had discussed the matter with the chief judge. They agreed that there was no need to press the contempt proceedings (Interview, Board Source).

Soon after the strike the Collinsville Herald had some editorial observations and advice. The Board, said the Herald, "ought to be more realistic in its offers." Further, the Board "ought to give thought to its style in dealing with teachers... When the board goes to dinner for three hours, leaving the teacher team waiting, it's a graceless lack of respect that retards a meeting of minds." The teachers also were advised to "be more realistic. It's silly to waste time talking about 27 percent increases." Further, "teachers ought to quit talking about increments in the existing salary schedule as

if they were not money....Board members' hackles raise when teachers try to say increments aren't raises. That doesn't help negotiations" (Collinsville Herald, September 11, 1978).

However the Herald's strongest criticism was levelled against parents.

If the parents were doing their job, teachers wouldn't be defying injunctions, in our opinion...If the students were courteous, respectful, diligent, easily directed, cooperative, the relatively low salaries would be easier to swallow...One reason teachers picket for more money, is that they want combat pay to face some of the drug-popping, beer-swilling, vulgar louts who show up to disrupt classes. The lack of help from the home produces a frustrated profession...If parents did their job, schools would run smoother. Teaching would be easier. Happy teachers would be less disposed to flout the court.

But it was a vicious circle, said the Herald. The strike "can be calculated to make teaching even more difficult...Today's kids, by all reports and by personal observation, are hard to handle, out of control" (Collinsville Herald, September 18, 1978).

The words were prophetic. On September 28 Collinsville students staged a strike of their own. Their walk-out was prompted by a School Board plan to schedule seven make-up days during the Christmas and Easter vacation periods. Carrying signs saying "Teachers Do It--Students Can Too," the students demanded restoration of their holidays.

At a heavily-attended Board meeting on October 2, the Board reconsidered. A reporter wrote that

students and parents maintained that the students had as much right to strike as teachers had to violate a court injunction to return to work. They also said students should not be penalized for striking because the teachers were not. (Superintendent) Renfro and (Attorney) Leskera again said that the hundreds of students who did not attend classes Friday and Monday would be considered truant and that regular board policies would apply.

The board may have difficulty enforcing rigid penalties against the bulk of striking students because many parents indicated strong support for their children's actions (Metro East Journal, October 3, 1978).

The Board, again embattled, again was divided. Lending her vocal support to the cause of the students and the protesting parents was Violet Fletcher. Several days earlier she had voted against the proposal to schedule make-up days during the vacation period. At

the October 2 Board meeting she reminded the audience of what her fellow Board members had "done to my husband," proposed to resign from the Board, and invited the other members of the Board to do likewise. Subsequently, by a vote of 4-2, the Board voted to reinstate the Christmas holidays. The students thereupon ended their boycott of classes (Metro East Journal, October 3, 1978).

Several weeks later a Board source reflected upon state of the law in Illinois:

I have the view that injunctive relief is inadequate. Some statutory change has to be made, where we have a collective bargaining law which requires some kind of mediation or arbitration or something... Injunctive relief is so slow, so tedious, and so much left to the discretion of the trial judge that the school board is effectively without a legal remedy (Interview, Board Source).

FOOTNOTES

¹This report was prepared by David Colton, with the assistance of Randal Lemke. Information on events in the Collinsville strike was gathered from formal interviews with key actors (who must remain anonymous); casual conversations with minor actors and observers; observation of the School Board meeting of August 28, 1978; observations of courtroom proceedings on September 1, and September 5, 1978; analysis of the court file developed during the injunction proceedings; and reports by the St. Louis Post-Dispatch, St. Louis Globe Democrat, Collinsville Herald, and Metro-East Journal. Information on the Illinois context was provided through interviews with officials in the Illinois Association of School Boards and the Illinois Education Association as well as from published sources. In the text of this report direct quotations are identified by source, except that interviewees will be identified only as "Board Source" or "Teacher Source." Where citations are not provided, the reader may assume that the source is found among those listed above. Any reader seeking specific documentation (except for interview sources) is invited to contact the principal author.

²Throughout this report "Note" sections—akin to the "interpretive asides" used by ethnographers—reflect analytical and conceptual ideas spawned by the events being studied. "Note" materials subsequently are utilized in a summary report drawing upon the materials developed in the several field studies conducted within the overall research project.

REFERENCES

- Appleton, Susan Frellich. "Appellate Review of Proceedings to Enjoin Teachers' Strikes: The Irreparable Harm Standard and Some Thoughts on the Perceived Benefits of Education." Center for the Study of Law in Education, Graduate Institute of Education, Washington University, St. Louis, Missouri, unpublished, 1980.
- Brown and Stover. "Court Directives and Compliance: A Utility Approach." American Politics Quarterly (October, 1977): 465-480.
- Clark, Jr., R. Theodore. "Public Employee Labor Legislation: A Study of the Unsuccessful Attempt to Enact a Public Employee Bargaining Statute in Illinois." Labor Law Journal 20 (1969): 164-173.
- Colton, David L. "Two Missouri Strikes: Hazelwood and St. Louis." Center for the Study of Law in Education, Graduate Institute of Education, Washington University, St. Louis, Missouri, unpublished, 1980b.
- Derber, Milton. "Labor-Management Policy for Public Employees in Illinois: The Experience of the Governor's Commission, 1966-1967." Industrial and Labor Relations Review 21 (1968): 541-558.
- Feldman, Gilbert. "The Illinois Judiciary and Public Employee Labor Disputes: A Return to an Imperial Judiciary?" Chicago-Kent Law Review 53 (1977): 619-658.
- Fletcher, James L. "Illinois Public School Employees' Right to Strike--Constitutional Considerations." DePaul Law Review 24 (1975): 532-544.
- Goldstein, Elliott H. "Current Trends in Public Employee Labor Law in Illinois: Alice-In-Wonderland Revisited?" DePaul Law Review 23 (1973): 382-401.
- Graber, Edith E. "Michigan: The Warren Consolidated Schools Strike." Center for the Study of Law in Education, Graduate Institute of Education, Washington University, St. Louis, Missouri, unpublished, 1980a.
- Graber, Edith E. "Pennsylvania: The Butler Area School District Strike." Center for the Study of Law in Education, Graduate Institute of Education, Washington University, St. Louis, Missouri, unpublished, 1980b.
- Halligan, Patrick D. "Enjoining Public Employees' Strikes: Dealing with Recalcitrant Defendants." DePaul Law Review 19 (1969): 298-317.
- Leahy, Mary Lee Cullen. "The Redding Decision and Reality." Illinois Bar Journal 55 (1967): 834-841.

Madison County School Directory, 1977-78. East St. Louis, Illinois,
1977.

Miller, Edward B. "The Alice-in-Wonderland-World of Public
Employee Bargaining." Chicago Bar Record 50 (1969):
223-229.

National Education Association. "Teacher Strikes and Work-
Stoppages." Research Memo 1969-27.

National Education Association. "Teacher Strikes, Work Stoppages
and Interruptions of Service, 1970-71." Research Memo 1971-28.

Rendleman, Doug. "Toward Due Process in Injunction Procedure."
University of Illinois Law Forum 2 (1970): 221-253.

Schiller, Donald C. "Injunctive Relief Without Notice--
Preliminary Injunction or Temporary Restraining Order."
Chicago Bar Record 52 (1971): 304-309.

Southwestern Illinois Metropolitan Area Planning Commission.
"Comprehensive Plan Update." Prepared for the City of
Collinsville, Illinois. May, 1973.

U.S. Department of Commerce, Bureau of the Census. "Labor-
Management in State and Local Governments: 1977 Census of
Governments." Vol. 3, no. 3, October, 1979.

Cases

Allen v. Maurer, 81 LRRM 2237 (1972) (Ill. App. Ct., 4th Dist.).

Board of Education of Community Unit School District No. 2 v.
Redding. 207 N.E.2d (1965) (Ill. Sup. Ct.).

Illinois: Circuit Court for the Third Judicial Circuit of Illinois.
"Order." Collinsville Community Unit District #10 v.
Collinsville Education Association (6 September 1978).

School City of Pawtucket v. Pawtucket Teachers Alliance, 221 A.2d
806 (1966) (R.I. Sup. Ct.).

220

TWO MISSOURI STRIKES: HAZELWOOD AND ST. LOUIS

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CONTENTS

THE LEGAL SETTING 1

HAZELWOOD 3

 The Setting 4

 Conditions in the District 4

 Teacher-Board Relations 5

 Impasse 8

 Settlement 13

ST. LOUIS 15

 The First Injunction 18

 The Second Injunction 20

 Aftermath 25

FOOTNOTES 26

REFERENCES 27

TWO MISSOURI STRIKES: HAZELWOOD AND ST. LOUIS¹

Two of Missouri's largest school districts (Hazelwood, 22,000 students and St. Louis, 72,000 students) experienced teacher strikes in the spring of 1979. In both strikes the school boards sought injunctive relief, albeit in quite different fashion. As the following accounts will indicate, the irreparable harm standard was virtually ignored in the labor injunction proceedings. The plaintiffs casually allege that irreparable harm was caused by teacher strikes, but no effort was made to specify the nature of the harm in complaints, supporting affidavits, or testimony during hearings. Thus the strikes tell us little about the principal concern of this study--the courts' use of the irreparable harm standard. However the strikes are very instructive on other grounds. Both strikes, and accompanying court actions, clearly revealed the difficulties which may accompany school board efforts to use labor injunctions to end strikes.

In the following account the Hazelwood and St. Louis strikes are described separately. An introductory section discusses the legal setting in which both strikes occurred.

THE LEGAL SETTING

Although the Missouri Constitution (Article I, Section 29) of 1945 gives employees the right to organize and to engage in collective bargaining, the Missouri Supreme Court has held that the Constitutional right does not extend to public employees (City of Springfield v. Clouse, 206 SW2d 539, Mo. Sup. Ct., 1947). In 1965 the legislature altered the situation somewhat by adopting a bill which permitted most public employees to form labor organizations and to "meet and confer" with employees. Strikes were expressly prohibited (Rev. Stat. Mo. 105.500-.530). Teachers were specifically excluded from coverage under the 1965 statute. Subsequent efforts to adopt a statute for teachers have foundered--a result largely attributable to the fragmentation of political power among the American Federation of Teachers (with strongholds in the state's two largest districts), the Missouri-NEA, which is strongest in suburban St. Louis and Kansas City, the Missouri State Teachers Association, which is rural in orientation, and the Missouri School Boards Association which regularly opposes all forms of collective bargaining legislation. However the absence of collective bargaining authorization for teachers is not indicative of a strong anti-labor climate in Missouri. Pro-labor sentiment is strong, as witnessed by the overwhelming defeat suffered by "right-to-work" backers in a 1978 referendum.

The absence of legislation has not stopped teachers' efforts to act collectively. A variety of de facto bargaining arrangements has been made. In the late 1960s these often were reflected in board "policy statements" which recognized a teacher organization for purposes of "discussing" salaries and other matters, which committed the board to engage in discussions, which often included non-binding fact-finding procedures

to be utilized in the event of teacher-board disagreement, and which always provided that the board retained its ultimate power of determination (Dial, 1967). Opinions issued by Democratic Attorneys General in the late 1960s appeared to validate these arrangements (see Opinion No. 373, October 17, 1967). However in 1970 such arrangements apparently were invalidated by a Republican Attorney General's Opinion (Opinion No. 57, June 1, 1970). The Opinion indicated that school boards had no authority to enter into agreements which obliged the board to engage in professional negotiations, even if the result of such negotiations was not binding upon the board. Then in 1974 the Attorney General's Opinion was superceded by a Supreme Court holding which found that board agreement to engage in discussions was not unlawful, so long as the agreement did not bind the board to accept the outcome of the discussions.. (Peters v. Board of Education, 506 SW2d 429, Mo. Sup. Ct., 1974.) (Soon thereafter, in a case involving the Hazelwood district a lower court judge characterized the decision as giving teachers the power of a "toothless tiger." The decision is discussed below, in the section on the 1979 Hazelwood strike.) Even this modest grant of power to teachers was somewhat attenuated by a decision in 1976, wherein the Missouri Supreme Court held that any agreement reached under the duress of a teacher strike was void (St. Louis Teachers Association v. Board of Education, 544 SW2d 573, Mo. Sup. Ct., 1976).

Missouri teachers' quest for representation rights, for bargaining rights, and for improved salaries and working conditions, coupled with school board resistance to such objectives, has resulted in more than 20 teacher strikes since 1966. Several of the strikes have been simple one-day "demonstrations" staged by teacher groups. But others, particularly in Kansas City and St. Louis, have been among the nation's longest. In 1973 there was a four-week strike in St. Louis. The next year Kansas City was hit by a six-week strike. Then in 1977 Kansas City experienced a strike which lasted for seven weeks before it finally was broken. The 1979 St. Louis strike (reported below) lasted for eight weeks.

Injunctive relief is readily available to Missouri school boards which are confronted by teacher strikes. The state's courts invariably have held that teacher strikes are prohibited by common law. Thus simple proof that a strike is imminent or underway suffices to obtain a temporary restraining order. No proof of irreparable harm is required. True, plaintiffs customarily allege that strikes cause irreparable harm, but the allegation is a mere formality. Even the clean hands doctrine receives short shrift in Missouri courts.

Despite the absence of legal impediments to the issuance of injunctive relief, the courts have not always been convenient or useful forums for strike-ending efforts. One district, in an excess of litigiousness, first secured an order directing teachers to return to work (which they did), and then returned to court seeking damages against each teacher. But that required that the schools be closed again so that teachers could appear in court to respond to the damage

claims (St. Louis Post-Dispatch, August 28, 30, 1975). In the 1973 St. Louis strike the Board found that teachers simply would not comply with a return-to-work order, despite contempt charges, fines, and jail sentences (Colton, 1977). In 1977, the Kansas City strike finally was ended when the circuit court ordered the Board to renew the employment of teachers dismissed during the strike (Kansas City School District v. Hudson, 95 LREM 2778, 1977). The order was subsequently invalidated by the Court of Appeals (see Kansas City School District v. Clymer, 554 SW2d 483, Mo. Ct. App. (K.C. Dist.) 1977) but it nonetheless indicates the extent to which a trial court may attempt to apply its equitable powers.

Some teachers' attorneys in Missouri are not greatly troubled by the ready availability of injunctive relief. Given the absence of any statutorily-prescribed procedures for resolving teacher-board disputes, the courts at least provide a forum where representatives of the two parties must meet, and there is always the possibility that a judge can be convinced to lend the court's powers to the goal of getting the two sides together to produce a strike-ending settlement. Moreover, to the extent that injunction proceedings can be protracted the courts provide settings which attract newspaper coverage of the teachers' view of events. Martyrs can be created in such settings, and martyrs often serve both to rally the striking teachers and to mobilize public opinion (particularly in labor-oriented communities). Elements of these aspects of labor injunctions will become apparent in the subsequent accounts of strikes in Hazelwood and St. Louis. However, as noted previously, the accounts will provide little clarification of the courts' use of the irreparable harm standard.

HAZELWOOD²

On April 2, 1979, Hazelwood's 1,100 teachers initiated a strike that was to last two weeks. The stakes were both procedural and substantive. At the procedural level, the Hazelwood Classroom Teachers Association was determined to assure that 1979-80 teachers' contracts would be determined bilaterally rather than through some sort of take-it-or-leave-it School Board decision. The School Board had no such commitment; indeed it had been resisting negotiations for years. Substantively, the main issues involved teacher salaries and benefits for the 1979-80 school year. The Board was determined to hold the line on salary increases and it wanted to rescind certain benefits; teachers were determined to preserve existing benefits and to achieve a salary increase which acknowledged the effects of inflation.

From the beginning of the strike it was apparent that both sides were well-organized and deeply entrenched. The Board adopted a hard-line position involving court action, threats of mass teacher dismissals, a strike-breaking plan, direct appeals to individual teachers and to the media (by-passing the teachers' negotiators), issuance of a "final" offer early in the strike, and a refusal to resume discussions before teachers returned to work. The Hazelwood Classroom

Teachers' Association (H.C.T.A.), which had prepared itself well for a strike, took an equally hard-line position. There would be no return to work without a resumption of negotiations, teacher dismissals would be met by prolonged litigation, and a court order would be resisted.

The stalemate was broken on April 12 when, after some elaborate maneuvers in courthouse chambers, a judge issued a temporary injunction against the strike and then "strongly suggested" that the parties confer in order to resolve their differences. The court's action had the effect of altering the identity and roles of the main actors in the dispute, and within 48 hours a framework for settlement was achieved. Thus, the significance of the court's role in the Hazelwood strike stemmed not from its disposition of the legal issues before it, but rather from its role as catalyst within a stalemate.

The Setting

Hazelwood clearly was a prime candidate for a teacher strike in the spring of 1979. Conditions in the district, coupled with aggressive postures on the part of both Board members and the teachers, pointed toward conflict.

Conditions in the District. The Hazelwood District sprawls across the northern portion of St. Louis County, encompassing portions of seven municipalities plus large unincorporated areas. Post-war suburban migration resulted in stupendous population growth. School enrollment soared from 1,413 in 1954 to 12,378 in 1964 to 25,712 in 1974 (St. Louis County Board of Education, 1955, 1965, 1975). The district grew accustomed to the problems of growth--frequent school tax campaigns, overcrowding, a constant search for new teachers. Late in 1971 a study projected that enrollment would grow by another 20% (to 30,700) by 1978, at which point it would level off (St. Louis County Planning Commission, 1971:85). More teachers and more buildings--particularly at the high school level--were required.

The planners' projections were woefully inaccurate. Enrollment leveled off in the mid-1970s and then it dropped. By 1979 enrollment was 6,000 students below the 1971 projections. The district was faced with the problems of teacher layoffs and rapidly-rising costs. There were other problems. In 1973 the U.S. Department of Justice brought suit against the district, alleging discrimination against black applicants for teaching positions. Late in 1977 the case was settled by an agreement wherein the district agreed to specified black-white hiring ratios each year through 1980-81 (St. Louis Post-Dispatch, December 12, 1977). Meanwhile other emotion-laden litigation was developing around issues of residential discrimination within the district's boundaries. School desegregation plans were cautiously discussed. Use of the national anthem at school events became an issue. There were some highly-publicized incidents with unruly students aboard school buses. While such problems were not unique to Hazelwood, they seemed to be uncommonly frequent there, and they

must have strained the patience of Board members and teachers alike.

Teacher-Board Relations. Although Missouri statutes impose no bargaining obligations upon school boards, Hazelwood teachers (who constitute the fifth-largest teaching corps in Missouri) became well-enough organized in the 1960s to induce the 1969 School Board to adopt a very significant policy statement which authorized bargaining-like activities (Hazelwood School District, 1969). While the policy clearly acknowledged the Board's ultimate responsibility for determining policies, it also recognized that

[t]he establishment of procedures to provide an orderly method for the Board and the Association to discuss matters concerning the improvement and development of the educational program, salary, welfare provision, and working conditions, and to reach mutually satisfactory understanding on those matters is in the best interests of public education.

The policy went on to recognize the H.C.T.A. as the teachers' representative, and outlined "discussion procedures" to be utilized by the Board and H.C.T.A. teams. Understandings reached by the discussion teams were to be submitted to the H.C.T.A. membership for ratification and then submitted by the discussion teams to the Board of Education "for action"--an arrangement which preserved the Board's ultimate authority. Disagreements were to be referred to three-person fact-finding teams which would render advisory opinions. A section on "discussion ethics" provided that there was to be "an atmosphere of mutual respect and courtesy." Further,

[n]either of the parties will take any action or condone any action leading to the cessation or interruption of professional services to children of the district while discussions are in progress under this Board policy.

While the 1969 policy statement--signed by both H.C.T.A. and Board representatives--fell far short of a genuine collective bargaining situation, it at least enunciated the rudiments of a bilateral process. But was the Board bound by its own policy?

On the strength of a 1970 Attorney General Opinion that "teacher group professional negotiations...are not legal," the Hazelwood Board evidently concluded that its policy was inoperative. In 1973 teachers threatened to strike unless the Board engaged in discussions; discussions ensued and a strike was averted (St. Louis Post-Dispatch, March 16, 20, 22, 1973). However in 1974 when an impasse over the 1974-75 salary schedule led teachers to invoke the fact-finding procedure outlined in the 1969 policy statement, the Board flatly refused. The teachers struck. Then, citing a recent Circuit Court decision, (Peters, 1974) superceding the Attorney General Opinion on which the Board had relied, the teachers sought a court order requiring the Board to follow the fact-finding procedure provided in the 1969 policy. The ensuing events produced an artful and witty display of judicial

discretion, which adds color to the generally drab and predictable annals of teacher strike litigation.

The teachers' petition came before Circuit Court Judge Orville Richardson--by all accounts a maverick and innovative judge. The H.C.T.A. had asked for a writ directing the Board to abide by its 1969 policy statement. Rather than granting the writ, Richardson issued an order directing the Board to show cause, five days later, why the writ should not be granted. However, he warned the teachers, their petition would be dismissed at the hearing if, in the meantime, they continued their strike. The teachers therefore resumed work and on June 3 Judge Richardson directed the parties to resume negotiations.

But still agreement proved impossible, and the H.C.T.A. renewed its quest for an order directing the Board to comply with the fact-finding procedures set forth in the 1969 agreement. On September 3, 1974, Judge Richardson issued his opinion and order. He found that the 1969 agreement was binding and enforceable unless terminated by the use of the procedures set forth in the agreement itself. Further, he found that the present stalemate warranted utilization of the fact-finding procedures set forth in the policy. After construing the 1969 policy as a type of "contract," Richardson ruminated upon the teachers' request to compel specific performance of the "contract's" provisions concerning fact-finding. The court acknowledged that the Board's prior reliance upon the Attorney General's Opinion was not unreasonable, but noted that a recent case required the Board to alter its position:

[A]fter the Peters case was decided, there was no legal excuse for the Board to persist in its course of action. [But] it elected to adopt a negative attitude and parry the plaintiff's thrusts. Plaintiffs lunged here and there, wildly assaulting the circumambient air with an illegal strike and mandamus actions. That the Board has been successful to this date in dodging these passes is more of a credit to the nimbleness and dexterity of its counsel than to the tenability of its legal position.... [M]eanwhile the community at large has been witnessing the running sword-play of the parties and their attorneys.

Even so, specific performance might not be compelled if the plaintiffs (H.C.T.A.) had unclean hands. The court was willing to assume the truth or near-truth of the Board's charges against the teachers:

The Board here utters its most bitter cries: it says that the teachers engaged in an illegal strike which lasted for seven days and disrupted the closing days of school in May, 1974. That is true. It says that the teachers were seeking to use that perfectly legal weapon of ordinary labor disputes, outlawed in the teachers' hands, to cudgel the Board into an unwilling acceptance of the teachers'

demands. That is probably true. It is then said that H.C.T.A. is covertly a labor union and fomented the strike for collective bargaining purposes. There is no evidence on this record that this is true, but let us assume it for the moment. Defendants say that they have been beleaguered and harassed by excessive demands and multiple suits, unjustly accused of bad faith, etc., etc. Partly true, perhaps: Let us assume that also as true.

The question, said Richardson,

is whether such conduct on the plaintiffs' part is so inequitable, unfair, or unconscionable that this court should turn its back to both parties and remit them to the back alleys to slug it out until one of them is broken, defeated and publicly humiliated.

The court acknowledged that the teachers were in a difficult position: unable to strike "like ordinary mortals"; "under-paid and hung up in an era of inflation"; subject to "insolence and even physical threat or violence at the hands of the pupils"; and frustrated by "two months of non-productive jawboning with the Board." Yet, concluded the court, "the plaintiffs stand guilty before us and reach up with dirty hands for the chalice of justice."

But that did not matter. The wrongs perpetrated by the teachers' unclean hands said the judge, were inflicted upon the community, not the Board.

The culpable act was a strike interrupting school activities, disturbing the pupils and their parents, and creating consternation and alarm abroad in the community. The Board suffered no direct injury and is in no position to call upon the court to apply the clean hands doctrine.

And with that remarkable observation the court came at last to its conclusion:

H.C.T.A. and the Board have publicly jostled long enough. It is now perfectly clear that the 1969 contract, including its fact-finding committee procedures, is valid, binding, and enforceable.... [The teachers] have not only a right to speak but a right to be heard. This may not seem much, but their avid persistence reminds us that even a toothless tiger can gum you to death.... (Opinion, State of Missouri ex rel. H.C.T.A., 1974).

Teachers viewed the court's decision as a major victory. But the victory was a short-lived one. The H.C.T.A.-appointed fact-finder and the Board-appointed fact-finder were unable to agree upon a third

fact-finder. Months of inaction followed Richardson's ruling. A third fact-finder finally was selected in January (St. Louis Post-Dispatch, October, 4, 1974; December 13, 27, 1974; January 3, 1975). The February report of the fact-finding body reported favorably to the teachers on many of the disputed issues. Although the 1969 agreement did not obligate the Board to accept the fact-finders' recommendations, several of their recommendations were adopted. However the Board, claiming that fact-finding was too time-consuming and costly, subsequently voted to revoke the fact-finding provisions of the 1969 agreement (St. Louis, Post-Dispatch, April 11, 1975). Again the teachers went to court, this time asserting that such an action could only be taken after a dispute on the fact-finding provisions had itself been submitted to a fact-finding body. Early in 1976 the Circuit Court again ruled in favor of the teachers (St. Louis Post-Dispatch, February 24, 1976).

In the next years teacher-Board relationships stumbled along in similar fashion, with the Board resisting bilateral relationships and the teachers insisting upon them. In 1978 teachers suffered a number of adverse developments pertaining to the 1978-79 contract. More than 100 teaching positions were eliminated by the Board. Support personnel were reduced, with the result (according to teachers) that paperwork and extra duties for elementary teachers were increased. The Board rejected a fact-finders' recommendation that it boost its salary offer to teachers; this action was seen by teachers as a clear sign of their impotence under the terms of the 1969 policy covering teacher-Board discussions. The H.C.T.A. attempted to mobilize public opinion against the Board's actions, but there were no visible results. A "day of concern" demonstration was threatened by the H.C.T.A. but it did not materialize (St. Louis Post-Dispatch, May 24, 1978). What the events seemed to demonstrate--both to the Board and to the teachers--was that it was possible for the Board to adhere to the terms of the 1969 agreement in a pro forma manner and yet, in the end, retain full power to unilaterally determine contractual terms. Strike threats, teacher public relations moves, and fact-finders' reports did not tie the hands of the Board. Furthermore, the St. Louis Teacher Association (1976) case appeared to mean that a strike would make it legally impossible for the Board to enter into discussions with teachers.

Impasse

The H.C.T.A. leadership determined that the process which had led to the unsatisfactory 1978-79 teachers' contracts must not be repeated. Two strategic decisions were made. First, April 1 was designated as the deadline for reaching agreement in discussions with the Board. The date was not entirely arbitrary. Missouri statutes require boards to issue teacher contracts by April 15, for the following year. Contracts must be signed and returned within 15 days. Once the contracts have been issued, a teacher bargaining unit loses substantial leverage in determining terms of the contracts, for individual members

of the teacher group inevitably will find the contract acceptable; teacher solidarity in such circumstances is almost impossible to achieve. Using the same logic, of course, it is in the interest of school boards to delay negotiations past the April 15 deadline, when it must mail contracts whether or not the teacher bargaining unit has agreed to terms.

The second strategic decision was to make preparations for a strike. H.C.T.A. calculated that a strike threat must be credible if it was to have any effect. NEA organizers provided substantial assistance in strike planning.

Discussions began in October 1978. Neither side employed professional negotiators, and available reports indicate that things went badly from the start. There were strong-willed and abrasive personalities on both sides. In addition there were difficult substantive issues to be resolved. The teachers calculated that the Board would have a sizeable year-end balance—enough to finance a salary increase that would place the Hazelwood teacher salary schedule among the county's top half-dozen districts. The Board maintained that the district's financial condition would not permit such an increase. There was no way to determine the "correctness" of the divergent views, not only because of differing perceptions about the amount of year-end reserves which would be needed by the district, but also because neither side could accurately calculate state and local revenues for 1979-80 until the school year was well under way. There were other issues too. One—sick leave and personal leave time for teachers—was of great symbolic significance to H.C.T.A. members. Board members indicated that they thought teachers were abusing sick leave and personal leave benefits and the Board proposed to reduce leave provisions in 1979-80. Teachers regarded this as a form of contract-stripping, and as one more indication of the Board's lack of support for its teachers.

As March neared an end, the teacher and Board teams were not far apart on salary matters. The Board offered a \$9800 starting salary, expecting acceptance. But the H.C.T.A., to the evident surprise of the Board, suddenly made a counterproposal in which they raised their demand from \$9961 to \$10,700—admittedly a negotiating figure and rallying point for H.C.T.A. members. Disputes over benefits and leaves still were unresolved. Moreover, the April 1 deadline had arrived. On Sunday evening, April 1, H.C.T.A. voted resoundingly to strike.

The School Board thereupon launched upon a series of moves designed to end the strike without further negotiations with the teachers. First the Board announced that it would keep schools open. However teacher picketing was so heavy and so successful that the schools were closed on Monday morning.

On the second day of the strike the Board announced that it would make a new and improved offer to teachers—if they returned to work

the next day. Teachers did not return, and the Board then announced the terms of the offer to the press. Outwardly the offer (a \$10,000 starting salary) appeared to exceed the last pre-strike demand of the teachers. But that demand subsequently had been raised to \$10,700. By this point it appeared that the main dispute was not about the details of the 1979-80 contract, (even though those details were most prominently discussed in the press, and were the ones used to rally teacher support for the strike); the main issue was whether or not the Board and the H.C.T.A. were going to negotiate.

On Tuesday coaches were told that they would be barred from after-school coaching (covered by separate contracts) unless they agreed to resume their school-day duties. This too-transparent effort at strike-breaking appears to have backfired, contributing to teacher solidarity and militancy.

By the end of the week polarization of the two sides was complete. The Board had publicly announced its "final" offer, had declared that it could not negotiate in the midst of an illegal strike, and had failed in its initial strike-breaking attempts. H.C.T.A. strike organizers had preserved teacher solidarity--partly by capitalizing upon the Board's efforts to break the strike and to avoid negotiations. Both sides had appealed to the public for support.

Evidently hard-liners on the School Board were in charge of Board strategy. They had further cards to play. On Friday, April 6--the fifth day of the strike and the last day of school before the scheduled spring vacation (April 9-16)--the Board's attorney filed a petition seeking a Temporary Restraining Order, Temporary Injunction, and Permanent Injunction. The petition alleged that the Board and teachers had been meeting since October, that the defendants had been "attempting to coerce the plaintiff into collective bargaining" (not permitted under Missouri statutes), that the defendants had authorized a strike before the Board had had an opportunity to consider the teachers' most recent pay demand, and that the defendants now were illegally preventing the plaintiffs from operating schools. The strike was illegal under Missouri law, and breached the 1969 written understanding between the Board and the teachers. Further, the strike deprived children "of their constitutional right to an education," and, if continued, would "irrevocably impair the educational opportunities of the pupils." The plaintiff was being "irreparably damaged" because the strike prevented the plaintiff from "performing its governmental duty," and would cause the plaintiff to "lose its eligibility to receive state aid for its educational program." The Board's petition had appended to it several documents attesting to the teachers' strike preparations and their alleged effort to coerce the Board to engage in bargaining. However there were no exhibits or affidavits supporting the Board's contentions about irreparable harm (Petition for Temporary Restraining Order, Board of Education v Debo, 1979).

The Circuit Court promptly issued an ex parte Temporary

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Restraining Order which required the defendants (H.C.T.A. leaders) to refrain from activities which would interfere with schooling or coerce the Board to bargain collectively. However since there was no school scheduled the following week, the Order's effectiveness could not be ascertained until school resumed on April 16. Meanwhile, the court scheduled a hearing for April 12; at that time issuance of a temporary injunction would be considered. The timing of the hearing gave the Board a certain tactical advantage, in that it permitted the Board to tell the public that it was taking every possible legal step to re-open the schools.

* The day after the Board secured its Temporary Restraining Order, a very tough letter was sent to all teachers. The letter began by referring to an enclosed contract for 1979-80, stating that it represented the "absolute maximum" the Board would offer. Teachers were directed to sign and return the enclosed contract within 15 days; otherwise "the Board will consider that you have rejected the... offer...and this offer will be withdrawn." The letter noted that schools would be re-opened on April 16. Further

...any teacher who persists in striking at that time, in violation of state law, court order, the association's agreement and each teacher's contract, is not a teacher that the District wishes to continue to employ. ...This Board is not willing to permit teachers to teach young people of this District that law and honesty need be observed only as one pleases.

...
Your teachers' association in its literature has assured you that if you stick together you can't all be dismissed. This is in error...

If you wish to continue as a teacher of the Hazelwood School District, the Board directs you to appear in your classroom at the usual time on April 16, 1979. If you persist in striking on that date, it is this Board's firm intention to terminate your employment and to replace you with someone who will abide by the law and will honor his/her contract. Your absence will be construed as insubordination and unreasonable absence, both justifying dismissal, which, if effected, will deprive you of your tenure with this school district. All legal remedies will also be pursued. This is not being stated as a threat, but in fairness to you it needs to be said now while you still have a choice to make (Hazelwood School District, April 7, 1979).

A few days later Hazelwood District administrators were making plans to open schools on Monday. News accounts suggest that a staged re-opening was anticipated, with classes for seniors to be resumed

immediately; and other classes would begin as administrators, returning teachers, and substitutes became available. An Assistant Superintendent re-affirmed the Board's intention to proceed with dismissals. Another announcement indicated that 26 of the striking teachers had signed and returned their 1979-80 contracts. The Board's attorney was directed to seek contempt citations against teachers who failed to report for work on Monday. Thus the hard-liners continued to play out their tactics.

H.C.T.A. leaders responded to all of this with some moves of their own. Rank-and-file members were urged to maintain solidarity. The daily flyers distributed to members noted that "that little proposal with the threat attached so that we couldn't refuse was refused." The teachers' action was cast in the patriotic tradition: "Where would America be if she gave in to threats or accepted dictatorial demands of a select few when it affects the life and livelihood of the masses?" Teachers were told that the contracts had been written before the strike began, when the Board's negotiators still were offering only \$9800, and that the contract sent in the mail was given to "us with no input or discussion by the teachers." Further, any teacher accepting the mailed contract would be a "Judas" who "will have to face those fellow teachers that they stab in the back...for a few pieces of silver" (H.C.T.A., April 10, 11, 1979).

As these group maintenance activities were under way, an important set of events was occurring in court. On Tuesday, April 10, the teachers filed a suit of their own. The teachers alleged that the Board's new salary schedule had been illegally adopted. The illegality arose from the Board's alleged violations of the Missouri "open meetings" law; H.C.T.A. maintained that on numerous occasions where the Board had met to devise and approve the salary schedule which had been announced on April 5, the Board had violated statutory prohibitions against closed meetings, closed votes, and closed records. Issuance of annual appointment letters based on this illegally adopted salary schedule would irreparably harm the plaintiffs, said the petition. (The nature of the harm was not specified.) The petition sought an injunction prohibiting the Board from issuing the contracts to teachers, or, if already issued, directing defendants to rescind them (Petition for Temporary Restraining Order, H.C.T.A. v. Board of Education, 1979).

Although the Circuit Court refused to grant an ex parte order based on the H.C.T.A. petition, the filing of the petition produced two other significant events. First, a hearing (on issuance of a temporary injunction) was scheduled to coincide with the hearing already scheduled on the Board's petition on Thursday, April 12. Second, during the course of filing the H.C.T.A. petition the attorneys for the Board and the teachers conferred. Apparently it was at that point that the teachers' attorney let it be known that the teachers were prepared to engage in protracted litigation on behalf of any teachers who were dismissed--litigation which would keep the district in turmoil for months or even years. Threat was met by counterthreat.

Settlement

The stage was set for major confrontation. But key actors on both sides evidently sensed great risks. The day before the hearings on the Board's and H.C.T.A.'s separate petitions, Superintendent Lawson and H.C.T.A. President Debo separately journeyed to Jefferson City. Hazelwood-area legislators (who were in Jefferson City participating in the General Assembly's regular legislative session) talked with Lawson and Debo in an effort to find some mutually-acceptable forum for bringing the two sides together. Evidently the efforts bore no fruit. The legislators had no leverage, and both sides were unyielding on the basic issue: the Board would not meet with the teachers in the face of an illegal strike, and the teachers would not return to work unless there was a meeting with the Board. The next step would be court action.

On the day of the hearing the H.C.T.A. attorney filed the Association's Answer to the Board's Petition for Injunctive Relief. The Answer denied all the crucial allegations pertaining to the proposals and counterproposals made just before the strike, the actions of the H.C.T.A. in fomenting the strike, and the illegality and effects of the strike. The H.C.T.A. maintained that their denials warranted dismissal of the Board's request. However the practical (and intended) effect was to signal to the court and to the Board that it would be necessary to hold a hearing on the disputed points, and that the hearing might be long and complicated.

The teachers also filed a Counterclaim. The Counterclaim alleged that the Board, since April 1, had refused to meet with the H.C.T.A. to discuss salary and working conditions; such failure was alleged to violate the state and federal constitutions and was irreparably harming the teachers. Thus the teachers asked the court to order the defendant Board "to forthwith meet with H.C.T.A./MEA, its officers and representatives to discuss educational programs, salary, welfare provisions, and working conditions..." (Answer and Counterclaim, Board of Education v. Debo, 1979). All of this, of course, echoed the events of 1974, when the teachers also had gone to court and won an order directing the Board to meet with the teachers' representatives.

This time there was no hearing. At the time scheduled for the hearing the attorneys for the two sides, the President of the H.C.T.A. and the Hazelwood Superintendent, closeted themselves in the judge's chambers. For two hours they conferred, while courtroom spectators murmured and fidgeted. Finally the judge appeared and made a series of brief announcements. The teachers, said the judge, were not going to contest the Board's request for a temporary injunction, and it would be issued forthwith. The hearing on the teachers' own request for injunctive relief was to be postponed. Then Judge Litz said, "The court strongly suggests to both parties that they confer and resolve all matters between them."

The observed events seemed quite innocuous--and perhaps a major

defeat for the H.C.T.A. However fragmentary comments about the proceedings in the judge's chambers, and reports of events during the next several hours, suggest that the chambers were the scene for some major procedural decisions which broke the impasse between the Hazelwood Board and its teachers. With respect to its request for injunctive relief, the Board entered court in a strong position; based on past experience with labor injunctions in Missouri teacher strikes the Board could reasonably expect to receive the relief sought, although there was the possibility of some delay and some airing of issues and events which would not normally be publicly viewed. On the other hand, the teachers had thrown up some strong legal responses: in addition to the Counterclaim filed along with their Answer to the Board's request for injunctive relief, there was the suit alleging that the Board had violated the Open Meetings Law, and there had been notice that the teachers intended to fully resist any dismissals of teachers. Further, there were signs that a back-to-work order might not be obeyed. Thus there was the possibility of protracted and unpleasant litigation.

The court entered the discussions with some agendas of its own, independent of the legal issues presented by the parties. For one thing, there was the court's own calendar; it would be disrupted by lengthy courtroom proceedings. In addition, the court must have been aware that the parties were not meeting to resolve their basic dispute. Courts are accustomed to fostering settlements which avert the need for hearings or trials. Then there were the events of the previous day in Jefferson City, which seemed to demonstrate that there was some hope of contact between the contending parties. Finally, there were the actors themselves. Before the court were two officers of the court--the attorneys for the two sides. Also in chambers were two key actors (the Superintendent and the H.C.T.A. President) who had vested interests in avoiding ultimate confrontation, and who were not representative of the negotiating teams which failed to avoid the problem in the first place. These new actors might be able to work out a settlement, particularly if urged by the court to do so. The teachers, whose principal objective from the outset had been a negotiated settlement, obviously would not resist the court's desire to engage in talks. The Board, which was before the court seeking the court's assistance and which might return seeking more assistance, could hardly afford to ignore advice from the bench.

In the afternoon, following the court session, attorneys for the two sides met with the Superintendent and H.C.T.A. President, plus one Board member and one member of the teachers' negotiating team. This was the first direct contact between the two sides since several days before the strike began. New personnel were involved, and the court's "suggestion" served as a constant prod to work out a settlement. Results were described as "positive." But that evening, when a larger number of Board members met with H.C.T.A. President Debo, talks reportedly degenerated into name-calling, and the prospect of settlement once again faded. Evidently the Board's hard-liners were not yet convinced that the court's suggestion was

to be taken seriously.

There were no meetings the next day, but district administrators called teachers in order to ascertain their readiness to return to work on Monday. Results of the calls are not known (to us), but subsequently the Board agreed to participate in a new meeting of representatives of both sides on Saturday. That day, after a long session, a "framework for discussion" was agreed upon. (The language is an artifact of the Missouri legal milieu, in which "agreements" which are reached as a result of striking are void.)

At first glance, the teachers appear to have fared badly by the terms of the framework, for the 1979-80 beginning salary was the same ~~one that~~ the Board had offered two days after the beginning of the strike (\$10,000) and had mailed to teachers. Moreover, the framework was for two years (including a \$10,700 starting salary for 1980-81) whereas H.C.T.A. initially said it wanted a one-year contract. However there was a crucial provision for a mid-year distribution to teachers of certain revenues which were in excess of those projected by the Board; hence there might be a "bonus" payment. Moreover the Board yielded on several issues related to personal leaves. Further, lost days were to be made up, and there were to be no reprisals against striking teachers (Proposed Framework for Discussions, April 15, 1979). For the H.C.T.A. leadership, perhaps the most important thing about the framework was the fact that it existed at all; with it the leaders were able to report to teachers that a return to work under the framework would be a result of a bilateral process rather than Board fiat. True, the agreement was unsigned, had not been ratified by the Board, and had been reached by the Association's leaders rather than by the negotiating team. But there was a preliminary agreement. Teachers could vote on the issue of whether it would be accepted (albeit under the threat of dismissal and contempt proceedings by the Board).

From the Board's perspective, it had held to its "final" salary offer, and it could claim that its willingness to talk with the teachers was a result of outside (court) pressures--a considerable face-saving device. Concessions on personal leave did little more than retain the status quo.

On Sunday evening, April 15, at the urging of their President, the H.C.T.A. membership reluctantly voted to accept the "framework for discussion" which had been devised the previous day. School resumed on Monday morning. There was evidence of bitterness on both sides. The "framework for discussions" appeared to be more a truce than a settlement.

ST. LOUIS³

The St. Louis Public Schools did not experience a teacher strike until 1973. At that time teachers' loyalties were about evenly divided between NEA and AFT affiliates. For many years neither group

had deemed it prudent to engage in militant action. Late in 1972, however, the two groups formed an uneasy alliance aimed at provoking a showdown which would force the Board to engage in some sort of informal bargaining (despite the absence of legislation authorizing such bargaining) and, in addition, produce improvements in wages and working conditions. Talks with Board representatives collapsed, and a four-week strike occurred in January and February 1973. The Board of Education sought and obtained injunctive relief, but found, to its considerable surprise, that court orders, fines against individuals and against the teachers' organizations, and even jail sentences failed to break the strike (Colton, 1977). Eventually a settlement was reached. It provided for salary increases (made possible through some budgetary juggling by the city government and the Board of Education). More importantly, the settlement provided for a representation election, an informal negotiations process, and a form of grievance resolution. (See St. Louis Teachers Association v. Board of Education, 544 S.W.2d 573, Mo. Sup. Ct., 1976, Appendix).

While the 1973 strike set the stage for more formalized relations between the School Board and its teachers, it did not bring labor peace in the schools. Quite the contrary. Talk of strikes surfaced almost every year after 1973. One source of trouble was the continuation of AFT-NEA rivalry for teacher allegiance. The representation election provided for in the 1973 strike agreement was held in February 1974. It resulted in a narrow (2,101 to 1,622) AFT victory (St. Louis Post-Dispatch, February 16, 1974). SLTA leaders immediately warned that they would watch events closely and would seek another election before long. Late in 1974, claiming that the AFT had "sold out" in agreeing to the 1974-75 contract terms, SLTA leaders took steps to hold another election (St. Louis Post-Dispatch, October 9, 1974). But the procedures were contested, and SLTA finally went to court on the matter (St. Louis Post-Dispatch, June 24, 1975). A procedural agreement then was reached and a new election was held in December 1975. The contest was sufficiently important that both NIE President Ryor and AFT President Shanker came to St. Louis to rally support for their respective organizations (St. Louis Post-Dispatch, December 2, 1975). The AFT again won, but again the margin of victory was one vote (St. Louis Post-Dispatch, December 18, 1975). Hence the rivalry continued, and in 1978 still another election was held. This time the AFT won by about 300 votes (St. Louis Globe Democrat, March 3, 1978). This result, coupled with a disastrous 1977 strike by the Kansas City AFT (the Federation's other Missouri stronghold) may have convinced union leaders that some form of dramatic and successful effort was needed in St. Louis if AFT was to retain any power in Missouri. Salary improvements were promptly announced as a top priority of Local 420.

There were other forces pressing toward teacher-Board confrontation. A fundamental problem, of course, concerned resource allocation. The Board wanted to regain the AAA-rating which it had lost in 1974; to do so would take resources for specialized personnel and for reducing pupil-teacher ratios. The physical plant was deteriorating. Test scores were declining. A desegregation suit was pending. Such demands diverted resources that might have been used to improve teacher salaries. A perennial bone of contention was the year-end budget surplus. The Board insisted that the year-end balance was needed in order to avoid cash-flow

problems the subsequent year; teachers argued that the Board invariably underestimated the size of its year-end balance. Neither party would accept the other's view. During the period 1974-76 there was the additional problem of repeated voter defeats of levy increase proposals. By the time that problem was resolved another had materialized: in a consent decree growing out of desegregation litigation the Board accepted a staff balancing policy that would result in the involuntary transfer of hundreds of teachers during the next three years. Added to these difficulties were the familiar ailments of urban schools-- violence, sharply declining enrollment, sharp inflation-driven cost increases, and a surfeit of rules and regulations and other accouterments of large bureaucracies. It is understandable that teachers might support a strike, if not to solve their problems, then at least to provide an opportunity to draw attention to them.

A strike was threatened in August 1974, but was averted by a tentative two-year pact which was made contingent upon the outcome of a pending tax levy (St. Louis Post-Dispatch, October 9, 1974). The levy failed, and a strike was threatened for early 1975, but then teachers voted not to strike (St. Louis Post-Dispatch, March 17, 1975). In the fall of 1975 a strike was authorized for early January, but in early January the teachers rescinded that authorization (St. Louis Post-Dispatch, January 13, 1976). In the summer of 1976 another strike was threatened, but teachers, against the recommendation of their leaders, voted to accept the Board's terms for the 1976-77 year (St. Louis Globe Democrat, September 7, 1976). A similar pattern materialized at the beginning of the 1977-78 year when teachers "reluctantly" voted to accept the Board's proposed salary schedule (St. Louis Post-Dispatch, September 8, 1977).

For a time it appeared that the 1978-79 contract would follow the same pattern. Discussions had begun in April 1978. By summer there was deadlock. Strike talk developed. The Board, in order to proceed with payrolls, unilaterally adopted a new salary schedule which incorporated improvements over that of the previous year. To the surprise of many, in September teachers voted to reject the Board's contract. Another vote in November produced the same result. Serious strike preparations got under way. In early January a last-minute Board offer was rejected by the teachers.

On Sunday evening, January 14, the teachers voted to strike. The ensuing strike lasted eight weeks. It was marked by some of the most unusual strike-related events of 1978-79. For example the School Board immediately obtained injunctive relief, but two weeks later returned to court asking for dismissal of its injunction suit. A parent group sought and obtained standing to seek injunctive relief. A civic organization pledged \$600,000 to cover any deficit that the final settlement might cause. A student group formed and persuaded Reverend Jesse Jackson to come to town to lend his efforts toward settlement. After six long weeks on the picket lines a Board attempt to re-open schools was an abject failure. Detailed documentation of these and related events is beyond the scope of this paper, and is

provided elsewhere (Lenke, 1979). Here attention will be directed to the two injunction suits precipitated by the strike.

The First Injunction

The day after teachers took their strike vote was a school holiday. That day the Board's attorneys sought injunctive relief. In its petition the Board alleged that it had been meeting and conferring with the teachers since the previous April, that the teachers had just voted to strike, that a strike would be illegal under Missouri law and would violate the terms of a Temporary-Restraining Order issued in 1973, and that the Board would be irreparably harmed in that (a) the Board would be "unable to perform its governmental duty and function of educating students," (b) the educational program (including end-of-semester exams scheduled for the next day) would be "seriously disrupted," and (c) state aid would be jeopardized if the 180-day requirement could not be met. Appended exhibits supported the assertion that the teachers had voted to strike, but there was no effort to back up the claims about irreparable harm. A supplemental brief cited cases demonstrating that a strike would be illegal and that the plaintiff was entitled to injunctive relief (Petition for Temporary Restraining Order, Board of Education of St. Louis v. Battle et al., 1979).

City Circuit Court Judge Ivan Holt promptly issued, on an ex parte basis, a Temporary Restraining Order. The Order barred the officers of the teachers' union "and all persons acting in concert with them or in their behalf" from striking, from engaging in acts which would cause employees to be absent, or from attempting to force the plaintiff to bargain collectively. A show cause hearing was set for the 24th of January.

The prohibition against seeking to force the Board to bargain collectively seemed, on its face, to preclude the possibility of negotiating a settlement which would end the strike. Board spokespersons publicized this point repeatedly. However attorneys indicated that the prohibition's symbolic and public relations aspects did not necessarily preclude "conversations," meetings, or discussions. Formal collective bargaining would be illegal under any circumstances; related activities such as meeting and conferring were still permissible. Nonetheless, at least one Board member later expressed fear of personal legal liability in the event that a settlement was reached while the court Order was in force.

On Tuesday and Wednesday mornings teacher pickets were out in force. Teachers clearly had anticipated the injunction, and equally clearly had determined to ignore it. Board efforts to keep the schools open were unsuccessful and on Wednesday, citing "violence," the Superintendent announced that the schools would be closed indefinitely. For the next week the battle between the Board and the teachers was waged largely in the media. Each side seemed convinced of its own rectitude, and there were no signs of behind-the-scenes efforts to reach a settlement which might end the strike. The next

test, evidently, would be in court.

Preparatory to the hearing teachers' attorneys prepared their responses to the Board's petition for injunctive relief. The responses took a variety of forms. The teachers denied all the allegations set forth in the Board's initial complaint--a signal that the teachers were prepared to prolong the hearing. The teachers specifically asserted that they had a right to discuss terms and conditions of employment and to withhold services. In addition the teachers contended that the Board had no right to equitable relief, for it was the Board's own unclean hands which had led to the strike. Further, the Board's petition was so broad that it infringed upon the teachers' constitutional rights. Thus, said the teachers, the petitioners' request should be denied and the petition dismissed. The teachers further alleged that the Board's petition was defective on procedural and jurisdictional grounds. That is, the class action aspects of the petition were improper, and AFT representative Robert Jensen was improperly included as a defendant (Motion to Dismiss, Board of Education of St. Louis v. Battle et al., 1979). The implicit message in all of this was that the teachers' attorneys were prepared to protract the hearing for as long as possible, using as many devices as possible.

At the show cause hearing on January 24 (the 10th day of the strike), the judge and counsel for the two sides conferred at length. Finally, after nearly two hours they emerged from chambers whereupon Judge Holt made a terse announcement: the hearing would be resumed the following Monday (January 29), and "counsel for both sides are asked to furnish the court with information clarifying the issues in the case." No explanation for the delay was forthcoming.

On the 29th it suddenly became apparent that the Board had drastically altered its strategy. The Board's attorney addressed the court, noting that the Board had offered the best that it could, but that the teachers then "took to the streets to force the Board to... give them what they want." He noted that the teachers had stated their willingness to go to jail. "I suppose," he said, "that means no matter what the Court orders them to do, if they disagree they will not comply. It is the teachers' position that if there are enough people who resist or defy the law, that law enforcement procedures seem to be ineffective to resolve the dispute. In other words, if you don't like the law, simply don't bother about it and if there are enough of you, you will win. These...are the teachers to whom we entrust our children to learn how to live in this society, in this time, as law abiding citizens..." But the Board wished to have its case dismissed. The request was motivated, he said, by the Board's desire to "bring reason, rationality and responsibility to the case." Rather than pursuing court action, the Board would schedule public discussions. The Board proposed that auditing firms examine the Board's financial position (Transcript, Board of Education of St. Louis v. Battle et al., January 29, 1979).

Judge Holt promptly dismissed the case, and attorney Lashly then addressed reporters outside the courtroom. The public forums, he said, would provide an opportunity for the Board and teachers to exchange views—which they could not do privately, he said, in view of the court decision voiding agreements reached during a strike. He noted that the Board had had a "long agonizing session" in which it concluded that punitive measures would not be helpful. "The Board," he said, "wanted to voluntarily relieve the pressure from the judicial process, to see if this will not lead to an acknowledgement by the teachers that the Board had done everything it could do." Shortly thereafter a Board press release explained that

The Board felt that a dismissal of the case against the striking teachers would be an act of good faith towards resolving the dispute.... We also felt that it would be counterproductive to continue legal proceedings. The courtroom may not be the appropriate forum to resolve a strike by teachers at the present time. Moreover, Local 420 has repeatedly stated publicly that it would not abide by any court orders and Union leaders would be willing to go to jail for their cause; putting teachers in jail would not be a positive step toward our immediate goal of providing services to the young people of St. Louis (Public Affairs Division, St. Louis Public Schools, "Teachers' Strike—Questions and Answers", January 31, 1979).

Subsequent interviews confirmed that the Board's prior discussion was indeed, as the attorney said, "agonizing." There appear to have been two keys to the Board's decision to withdraw from court. First, the 1979 court action already had demonstrated its inefficacy, as the same strategy had done in 1973. Courtroom delays, the judge's request to learn about the positions of both sides, and the teachers' defiance of the Temporary Restraining Order, plus the prospect of contempt proceedings, seemed to be getting nowhere. Some Board members, nonetheless held out for a continuation of the injunction-based strategy. Second however, labor relations specialist Ted Clark was retained to advise the Board. Clark has strong reservations about the desirability of injunctions as strike weapons (Clark, 1976). Evidently Clark's views were accepted by a majority of the Board members.

The Second Injunction

The Board's decision to remove the strike from the court's purview confronted St. Louis parents and students with the probability of an interminable strike. Missouri law provides no impasse procedures. The Board had been claiming that it could not settle under the duress of a strike. The teachers steadfastly maintained that they would not end their strike until a satisfactory settlement was obtained. And public officials stated that they were powerless. Thus

the prospects for resumption of schooling seemed remote.

In these circumstances several third-party efforts were mounted. A semi-official group known as the Citizen's Educational Task Force sought mediation. The Governor offered his assistance. A student group formed, and it sought (and obtained) the involvement of Reverend Jesse Jackson. Eventually the city's civic leaders offered to help. A parent group also was coalesced, and its effort brought the strike back to court (Lemke, 1979).

The net effect of these third-party efforts is difficult to assess. On the one hand, they may have prolonged the strike, for most started with the premise that some sort of settlement would be necessary if the schools were to reopen. Settlement presumed that resources could be found to satisfy the teachers. That presumption, of course, was heartily endorsed by teachers, and it undoubtedly reinforced their resolve to continue the strike. On the other hand, it is not at all certain that the Board's decision to outlast the teachers ever would have been successful, as evidenced by the utter failure of the school reopening effort which the Board made on February 28. Thus some sort of third-party intervention clearly was necessary in order to alter the stalemate. In the end the efforts of the Governor, the business community, and federal mediators were instrumental in effecting a settlement. The impact of another third-party--the parent group which sought injunctive relief--is more problematic, but it is the focus of our inquiry.

On the same day that the court accepted the Board's motion to dismiss its own injunction petition, a group of parents got together to discuss the situation. The group, which eventually became known as School Options for City Parents and Students (SOCPS), was led by Reverend Robert McNamara. McNamara was a well-known activist; recently he had been active in a parent group which intervened in the school desegregation suit, arguing that desegregation was both unnecessary and unwise.

However well-intentioned the efforts of McNamara et al. in the teacher strike, it is apparent that those efforts failed to perceive the significance of racial considerations in the St. Louis strike. Students in the schools were predominantly (75%) black. A majority of AFT members, and most of its leaders, were black. But the School Board was predominantly white. AFT President Evelyn Battle was black; School Superintendent Robert Wentz was white--and he was an outsider who had been hired in preference to the leading local candidate, who was black. At the time of the strike, there were two other race-related issues which were very much on the minds of city residents and public officials. One was the proposed closing of Homer Phillips Hospital--a long-time and very important fixture in the black community. The other was a school desegregation suit which recently had been heard, but was awaiting judgment in the court of Federal District Judge James Meredith. During the course of the strike, surprisingly little was said about its racial aspects. However McNamara and SOCPS,

despite protestations of interest in the students, not racial politics, were viewed with great wariness by all parties. Although some members of the School Board privately welcomed the efforts of McNamara and others of like mind, it was clear that any public alliance between the Board and SOCPS would exacerbate an already delicate racial situation. Churches and parents in the city's black community were similarly disinclined to ally themselves with McNamara and SOCPS-- particularly in view of the AFT's insistence that it would not return to work until a settlement had been reached. Any effort to bludgeon the teachers to return to work would, in effect, support the predominantly white School Board at the expense of the predominantly black AFT group. The upshot of all this was that McNamara and the SOCPS group had no chance of forming a viable political base from which to pressure a settlement.

After an initial meeting of the parents group, McNamara reported that "The kids are being hurt, and the parents have agreed that they aren't going to stand around and see this drag on and on." (St. Louis Post-Dispatch, February 3, 1979). Conversations with members of the group indicate that there was genuine concern about the welfare of students. Hot lunches were not being served--a major problem in large segments of the community. Summer jobs were jeopardized; in a city with many families making very marginal livings, loss of summer income was a severe problem. Students were idle, and some parents believed that a consequence was increased use of drugs, increased pregnancies, and petty theft through shoplifting (Interviews).

It quickly became apparent to the SOCPS group that it would be unable to mobilize intervention by public officials. Local, state, and federal officials were contacted, but all declined to become involved, and several advised the parents that legal action was their only legal recourse (Interviews). But the SOCPS group quickly found that legal action was problematic. First, there were no precedents, as clearly as they could tell, justifying such action. Second, it was not clear what form an action should take. Several possibilities were explored. One was to seek a refund of the taxpayers' money. A second was to take some action against the Board. Removal of Board members was abandoned as not feasible, but perhaps they could be forced to perform their duty of operating schools. A third possibility was some sort of injunction action. But who was to be enjoined? And from what? And were the plaintiffs acting as taxpayers or as parents? For a time there was talk of naming both the teachers and the Board as defendants in an injunction action; this would preserve parent "neutrality" on the dispute. But finally it was determined that only the teachers would be named as defendants. An attorney was asked to take the case, and fund-raising efforts were undertaken.

On February 21, in the sixth week of the strike, 12 parents acting on behalf of their children and all other children and parents, sought and obtained a Temporary Restraining Order against the teachers. A show cause hearing was set for February 26. The period from February 26 until March 9, when an injunction finally was issued,

brought forth some exceptionally complicated legal maneuvering.

Understanding of the court action requires a review of the position of the parties. The teachers, who had expected the Board's initial injunction request, were in a much different position when the parent suit was filed. There were signs that negotiations were proceeding and the main litigation task was to delay and postpone court action (Interviews, teacher sources). The parents' main objective, of course, was to get the schools open as quickly as possible, but they did not fully trust the Board to do so and hence were unwilling to defer to the Board on legal matters (Interview). The Board, which already had demonstrated its ambivalence on the matter of injunctive relief, was for political reasons unable to welcome the parents' suit, but also could not resist it, even though the mere fact of the suit was a bit of an embarrassment for the Board. And the court, caught in the middle of all of this, must have been hoping for some settlement of the strike which would preclude having to resolve an extraordinarily complex set of problems.

While the details of the legal proceedings need not concern us here, some of the main events warrant attention, for they illuminate the difficulties associated with parent-initiated suits, and also reveal the possibilities open to teacher-group defendants who are skillfully represented and who seek to delay final court action.

At the February 26 show cause hearing the teachers' attorneys moved to dissolve the Temporary Restraining Order and to dismiss the parents' suit. One reason was that the defendants were improperly identified. Another was that the duty of operating schools was, by Constitutional mandate and by statute, laid upon the Board rather than the teachers, and the Board already had asked that a similar suit be dismissed. The plaintiffs had failed to name the Board of Education as a defendant, and the Board was a necessary party in the suit. On these pleadings the court dissolved the Temporary Restraining Order. But rather than dismissing the complaint, the parents were given permission to amend it. A new show cause hearing was scheduled for March 1.

On March 1, a Thursday, the hearing resumed. The plaintiffs had made some adjustments in their pleadings, and the Board of Education had refiled its previous request for injunctive relief as well as a motion seeking intervention in the parents' suit. The latter motion was granted. Immediately the teacher defendants protested, contending that the parents had no capacity to bring suit against the teachers, and that the Board should be a defendant in the case. The judge, said the teachers, had exceeded his authority. The teachers requested permission to seek (from the Court of Appeals) a writ nullifying the lower court's action. Defendants were given one day to secure the writ. On Friday afternoon the Court of Appeals denied the teachers' request. But by that point it was too late to resume the hearing (first sought by the parents on February 21). The hearing was rescheduled for Monday, March 5.

The hearing lasted for four more days--thanks to the legal complexities inherent in the case, the dexterity of the defense attorneys, and the frequently uncoordinated efforts of the parents and Board, now uneasily joined as petitioners against the teachers. The parents' attorneys began the hearings by bringing to the stand each of the named plaintiffs, who testified as to their interest in the case, and about the nature of SOCPs. Though examination and cross-examination rarely took more than ten minutes per parent, the process was not completed on the first day. Defendants, of course, made no effort to expedite matters, and employed obvious delaying tactics wherever feasible. (For example they refused to admit that the defendants had been properly served, thereby requiring the plaintiffs to furnish proof of service--a matter which required locating papers which had become buried in the mass of papers now present in the courtroom. The process took only five minutes, but illustrates how delaying tactics were used.) On the second day more parents testified, and then Superintendent Wentz was called to testify as to the existence of the strike and to describe the negotiations preceding it. At times attorneys for the Board and the parents--nominal allies--appeared to be working at cross purposes, occasionally even objecting to questions raised by each other. Disputes arose as to the authenticity of documents which had been requested from the AFT by the Board and the parents. The plaintiffs sought to authenticate the documents by calling upon AFT leaders. But these individuals, invoking the Fifth Amendment, refused to answer all questions. At this the parents' attorneys expressed much displeasure, but the AFT counsel pointed out that the plaintiffs had alleged that the teachers were violating a Permanent Injunction issued in the 1973 strike; thus their testimony might affect criminal contempt actions and therefore could not be required. On the second day the class action aspects of the case came to the fore when it became apparent that the teachers were prepared to challenge the named plaintiffs' capacity to represent all parents. Indeed, the defendants had assembled a group of parents to testify that SOCPs did not represent their views. However that portion of the testimony was aborted when the parents withdrew the class action component of their suit. That move clearly removed an opportunity for more delay by the teachers. But the teachers then obtained a half-day delay in the proceedings, ostensibly because of "the changed posture" of the case.

Finally, on the fourth day, the testimony came to an end, after the teachers made a modest effort to develop testimony about bad-faith bargaining on the part of the Board. The testimony was disallowed. And so, at last, a new Injunction was issued on Friday, March 9. It ordered the teachers to refrain from striking, ordering the AFT leaders to meet with union members on March 13 to direct them to report to their classrooms on the 14th, ordered the union leaders to report to the court on their compliance with the order, and directed the Board of Education to send each member of the union a copy of the order (Temporary Injunction; Walter Abell at al., v. St. Louis Teachers Union, 1979).

The order was a strong one. As it happened however, negotiations

had been under way during the preceding days, and settlement was imminent. On Sunday, March 11, mediators announced that a tentative settlement had been reached, thanks in part to availability of some disputed funds which the Governor promised to release, and in part to a business community pledge of some \$600,000 to cover a deficit, should it arise. (It did not.) Interviews with attorneys indicated that the courtroom proceedings had virtually no effect upon the timing or substance of the negotiated settlement.

Aftermath

Among the strikes we studied intensively during 1978-79, the one in St. Louis was, by far, the longest one. In addition it affected the largest number of students and teachers. As far as we know, no systematic efforts are under way to assess the long-term consequences (if any) of the strike; insofar as it affected students, the staff, or the community.

Initial reports indicate that student attendance was down during make-up days scheduled during spring Saturdays and during the re-scheduled days in June. Teachers blamed management for the low attendance, and vice-versa.

Shortly after the strike the Board, reversing its historic opposition to collective negotiations legislation for teachers, voted to endorse the concept. Late in 1979 the Board, advised by Ted Clark, whom it had hired to manage its strike strategy, filed a bill in the legislature. As this report is written the Board is lobbying vigorously for its bill. Nor surprisingly, the bill includes tough anti-strike measures, including injunctive relief. A district faced with a teacher strike is required to seek injunctive relief. Further, "it shall not be a defense to a suit to enjoin a strike that there is no showing of substantial or irreparable harm...nor shall the lack of a showing of substantial and irreparable harm...bar the obtaining of a temporary restraining order or injunction restraining or prohibiting a strike" (Missouri 80th General Assembly, 2nd Session, House Bill 1748).

FOOTNOTES

¹This report was prepared by David Colton with the assistance of Jo Ann Campione Donovan (Hazelwood portion) and Randal Lemke (St. Louis portion). Donovan and Lemke provided invaluable assistance in data collection and initial data analysis.

²Data on the Hazelwood strike were obtained from the following sources: interviews with major actors on both the teachers and the district side of the dispute (anonymity was guaranteed, and hence we cannot publicly express our appreciation to the many individuals who generously shared their time, their records, and observations with us); the courthouse files assembled in connection with the two legal proceedings precipitated by the strike; newspaper accounts in the St. Louis Post-Dispatch; St. Louis Globe Democrat, and North County Journal; an observation (by Edith Graber) of courtroom proceedings on April 12, 1979; and informal conversations with actors and observers familiar with the Hazelwood events.

³Data on the St. Louis strike were obtained from the following sources: interviews with the major actors on the teachers' side, the Board's side, the parents' side, and the students' side of the struggle (as in Hazelwood, anonymity was guaranteed, and hence we cannot publicly express our appreciation to the many individuals who generously shared their time, their records, and their observations with us); the courthouse files assembled in connection with both injunction proceedings; newspaper accounts in the St. Louis Post-Dispatch and St. Louis Globe Democrat; observations of courtroom proceedings by Edith Graber, Randal Lemke, and David Colton; and informal conversations with actors and observers familiar with events in St. Louis. The St. Louis strike was an extraordinarily complicated and interesting one: a much fuller account is being prepared by Randal Lemke and it should appear as a doctoral dissertation in the near future.

REFERENCES

- Clark, Jr., R. Theodore. "Injunctive Relief: Some Practical Considerations." Public Management, February 1976, pp. 12-13.
- Colton, David L. "The Influence of an Anti-Strike Injunction." Educational Administration Quarterly XIII (Winter 1977): 47-70.
- Dial, David E. "Status of Professional Negotiations in Missouri." School and Community 53 (April 1967).
- Hazelwood Classroom Teachers Association/M-NEA. "On the Line." April 10 and April 11, 1979.
- Hazelwood School District. "Dear Teacher" (letter). April 7, 1979.
- Hazelwood School District. "Policy of the Hazelwood School District in Regard to Professional Discussion and Understanding." August 21, 1969.
- Lemke, Randal A. "A Case Study of the 1979 Teachers' Strike." unpublished Ph.D. dissertation, Washington University, in progress.
- Missouri, Attorney General's Office, Opinion No. 373, October 17, 1967.
- Missouri, Attorney General's Office, Opinion No. 57, June 1, 1970.
- Missouri 80th General Assembly, 2nd Session, House Bill 1748.
- n.a. "Proposed HCTA/MNEA and Board of Education Framework for Discussions." April 15, 1979.
- St. Louis Board of Education, Public Affairs Division. "Teachers' Strike--Questions and Answers." January 31, 1979.
- St. Louis County Board of Education, 4th Annual Report (1954-55), 14th Annual Report (1964-65), 24th Annual Report (1974-75).
- St. Louis County Department of Planning. "Hazelwood School District: Requirements for the Seventies." 1971.

Cases

- Board of Education of the City of St. Louis v. Evelyn Battle, et al., Circuit Court of St. Louis, State of Missouri, No. 794-0015, 1979.
- Board of Education of the Hazelwood School District v. Geri Debo et al., Circuit Court of St. Louis County, State of Missouri, No. 421581, 1979.
- City of Springfield v. Clouse, 206 S.W.2d 539, Mo. Sup. Ct., 1947.

Hazelwood Community Teachers Association/M-NEA et al. v. Hazelwood School District, et al., Circuit Court of St. Louis County, State of Missouri, No. 421756, 1979.

Kansas City School District v. Clymer, 554 S.W.2d 483, Mo. Ct. App. (K.C. Dist.) 1977.

Kansas City School District v. Hudson, 95 LRRM 2778, 1977.

Peters v. Board of Education, 506 S.W.2d 429, Mo. Sup. Ct., 1974.

St. Louis Teachers Association v. Board of Education, 544 S.W.2d 573, Mo. Sup. Ct., 1976.

State of Missouri, ex rel. Hazelwood Community Teachers Association et al. v. Robert Bischof, President, et al., Circuit Court of St. Louis County, State of Missouri, No. 657387, 1974.

Walter E. Abell, et al, and Board of Education of the City of St. Louis vs. St. Louis Teachers Union, Local 420, Circuit Court of St. Louis, State of Missouri, No. 792-0048, 1979.

STATE OF WASHINGTON: FOUR COURTS

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CONTENTS

I. THE STRIKES 1

 Setting 1

 Legal Context 1

 Financial Context 4

 The Organizational Context 5

 The Strikes 6

 Strikes Without Court Action 6

 Strikes Involving Labor Injunctions 7

 Central Kitsap 7

 Everett 12

 Seattle 16

 Tacoma 20

 Variations Among Settings 21

 Going to Court 22

 The View from the Bench 26

 The Oral Opinions 26

 Observers' Opinions 29

 Teacher Compliance and Non-Compliance 32

 A Summing Up 35

II. THE IRREPARABLE HARM STANDARD 36

 Is the Irreparable Harm Standard Applicable? 38

 The Plaintiffs' Arguments: Per Se Harm 38

 The Defendants Arguments: Per Se Harm 41

 Additional Defendants' Arguments: Everett 43

 Defining the Standard 45

 Plaintiff's Definition of Harm 45

Defining Harm: Defendants' Position	47
Evidence on Irreparable Harm	48
The Seattle Plaintiffs' Showing	49
• The Complaint and Memoranda	49
Seattle's Affidavits	51
Intervenors' Evidence of Harm	53
Seattle Defendants: There is No Evidence of Irreparable Harm	55
Irreparable Harm: The View from the Bench	60
A Different View: Everett	63

STATE OF WASHINGTON: FOUR COURTS¹

In Washington the opening of the 1978-79 school year was accompanied by ten teacher strikes. Four of the ten struck districts sought injunctions. In one case relief was denied, in one it was delayed, and in two relief was granted promptly. In one case the court chose to get involved in the bargaining process; in two cases the courts stayed detached from the process. In the three districts where injunctions were granted, teachers complied with two of the orders and defied one.

It is this variety which provides the principal focus of Part I of this report. Other reports in this series concentrate upon single strikes in different states. From those reports one might infer that variations among strikes and injunctions reflect differences in state laws. But such differences do not explain the great contrasts we found among strikes within Washington, for all the strikes occurred in a common legal context. Comparative analysis of the Washington strikes helps provide a basis for identifying local determinants of labor injunction activities.

Part II of the report presents a more thorough analysis of the use of the irreparable harm standard in Washington strikes.

I. THE STRIKES²

Setting

In Washington teacher strikes and labor injunctions appear to have been affected by certain features of state labor law, by a school finance reform movement, and by the organizational views of the Washington Education Association (WEA) and the Washington State School Directors Association (WSSDA). Analysis of these three background factors provides a basis for understanding similarities and variations observed among strikes and labor injunctions in specific districts in Washington.

Legal Context. Collective bargaining for public employees in Washington is governed by five statutes and an executive order--each pertaining to a different category of public employee. One of the five statutes is the Educational Employees Relations Act (EERA). EERA is a collective bargaining law applying to teachers and school boards. Despite its general comprehensiveness however, EERA is noticeably silent on the matter of strikes. Evidently proponents and opponents of teacher-board bargaining were unable to agree on language pertaining to strikes, and so EERA, in contrast to the laws governing other public employees in Washington, left a statutory vacuum.

When ten teacher strikes broke out at the beginning of the 1978-79 school year--just a few weeks before a general election--statements by state officials reflected the political sensitivity of the teacher strike

question. Governor Dixie Lee Ray voiced opposition to strikes, but stressed that resolution of them was a local matter, not a state problem. The Senate Majority Leader said that he was "not sure...that they are illegal at this point," and that the legislature might take up the issue if the courts ruled one way or the other. The House Speaker said that he planned to check with his attorney about the legality of teacher strikes. The Attorney General noted that "the Legislature has studiously avoided (dealing with the legality of teacher strikes) because it's so controversial" (Bremerton Sun, September 5, 1978). In Everett--site of one of the fall 1978 strikes as well as another strike two years previously--powerful state Senator August Mardesich voiced his opposition to teacher strikes; a strong campaign by labor groups (including the WEA) contributed to Mardesich's subsequent defeat in a primary election campaign.

Washington's appellate courts have provided as little guidance as the legislature. The leading case governing the use of labor injunctions in public employee strikes grew out of a strike by municipal dock workers in 1957. The strike was immediately enjoined, and the Washington Supreme Court later reviewed the propriety of the lower court's action in issuing the injunction. The Court's opinion, rendered in Port of Seattle v. International Longshoremen's and Warehousemen's Union, (1958; hereafter Port of Seattle) can hardly be classified as an exemplar of judicial lucidity. The Supreme Court, after noting with approval the governmental immunity doctrine set forth in Norwalk Teachers' Association v. Board of Education (1951), and after further noting that the legislature was better equipped than the courts to determine "the public policy of this state in this evolving field of conflicting interests and social regulation and control," held that

Absent legislation under the circumstances here involved, we feel compelled to hold that the right to strike is subordinate to the port's immunity therefrom. It logically follows that the strike in this case was inappropriate. The resultant damage to the port being substantial, the trial judge did not abuse his discretion in granting the injunction (Port of Seattle, 1958: 1103).

In subsequent years, when school boards and other public employers sought to enjoin teacher strikes, management attorneys asserted that Port of Seattle had held that governmental employers were immune from strikes, that the immunity could only be changed by direct legislative action, and that strikes were per se harmful. Teacher attorneys interpreted Port of Seattle narrowly, noting that it applied specifically to municipal dockworkers (not teachers), that the legislature in subsequent years implicitly approved teacher strikes by considering but declining to adopt bills prohibiting such strikes, and that trial courts were required by Port of Seattle to find (rather than assume) that a strike was harmful.

A case directly involving teacher strikes reached the state

Supreme Court in 1975. The Court reversed a lower court decision to issue an injunction, holding that the Mead School District had violated the state's Open Public Meetings Act when it voted in executive session to seek injunctive relief. The Court's opinion rested on the observation that a teacher strike did not constitute the sort of "emergency" which warranted the Board's failure to act in open meeting (see Mead School District v. Mead Education Association, 1975). Teachers tend to view the case as supportive of their claim that strikes are not automatically harmful; boards assert that the decision has no bearing upon the availability of injunctive relief.

Statutory silence, coupled with the ambiguities of Port of Seattle and Mead, has created a litigious environment for Washington teacher strikes. School boards usually seek injunctive relief when faced with strikes. Of the 36 strikes which occurred during the period 1971-78, 22 resulted in requests for injunctions. With few exceptions the plaintiffs won; injunctions were issued in 20 of the 22 cases. Usually Washington courts find that the strikes are illegal and harmful; the latter finding is based on affidavits rather than strict evidence. Typical, perhaps, is the language supporting a Temporary Restraining Order in a 1977 case:

The Court has examined the file herein, heard argument of counsel, is fully informed, and finds and concludes (that) plaintiff has a legal right to be free of strikes by its employees; defendants are engaged in an illegal strike against plaintiff; the strike and actions in furtherance thereof by defendants have caused and, unless restrained, will continue to cause substantial, immediate, and irreparable injury and damage to plaintiff (Temporary Restraining Order, Aberdeen School District v. Aberdeen Education Association, October 31, 1977).

But teachers do not always lose in court. In Clover Park School District 400 v. Clover Park Education Association (1975) a trial court declined to issue an injunction. The court said a plaintiff must demonstrate "that the public health and safety is being seriously threatened, that the district would be irreparably harmed and that the district was not a contributor to the cause of the strike, i.e., had 'clean hands'" (Alcorn, 1975: 203). The decision is in the tradition of Michigan's School District for the City of Holland v. Holland Education Association (1968) which held that an illegal strike need not be enjoined. While Clover Park was not binding on other lower courts in Washington, it must have encouraged teacher attorneys' efforts, and it provided ammunition for strike organizers' rhetoric about the uncertainties of labor injunctions regarding teacher strikes.

The ambiguities of Port of Seattle, the Educational Employee Relations Act's silence regarding teacher strikes, and the example of judicial discretion exhibited in Clover Park have resulted in a pattern of complex legal arguments in labor injunction proceedings. The

question of the legality of strikes is contested. The applicability of traditional restraints on the issuance of injunctive relief is argued. (Boards argue that an illegal strike is automatically enjoined; teachers respond that even an illegal strike cannot be enjoined if there are alternative remedies, or if the board has unclean hands, or if the strike is not creating irreparable harm.) Sometimes the "balance of equities" is argued, and occasionally questions about the enforceability of the court's orders are raised. While the teachers' arguments rarely prevail in court, they nourish the morale and determination of teacher association members, and they provide a basis for dragging out the litigation. In addition they may result in differing court treatment of petitions for injunctions. Several of these effects will become evident in our subsequent account of the 1978 Washington teacher strikes.

Financial Context. Another factor influencing the course of teacher strikes and labor injunctions has been reform of the state's system for financing public schools. Until very recently Washington, like most other states, relied upon a combination of state and local school taxes in order to provide school district revenues. In 1975, perhaps inspired by the nationwide school finance reform movement (and perhaps unaware that the movement has not always improved the lot of urban school districts), the Seattle School District initiated a suit contending that local districts should not be dependent upon voter-approved tax levies in view of the state's constitutionally mandated duty to provide education. The plaintiffs prevailed (Seattle School District v. State of Washington, 1978). In 1977 the legislature adopted laws revamping the system for financing schools. The new laws provided that after a three-year transitional period ending in 1981 the state would assume the full cost of legislatively-defined "basic" educational programs. State aid would be based on a formula involving student-staff ratios (instead of number of students) and upon a statewide salary factor. A "lid" was clamped on local annual school tax levies, and guidelines were established limiting the amount of funds that could be used for teacher salaries. Another law appeared to support management rights in controlling programs and hours of instruction.

The new laws virtually guaranteed labor-management conflict in large high-spending districts. Among the state's large districts, four of the five highest-spending districts--Tacoma, Seattle, Bellevue, and Everett--experienced teacher strikes in 1978. In these districts school managers anticipated that staffs and programs would have to be trimmed in order to comply with the new finance laws; the damage to programs and teacher-student ratios could be mitigated only by holding the line on teacher salaries. But the teachers in these districts, already plagued by inflation, anticipated that the interim period between 1977 and 1981, when the new finance system would be fully implemented, was a crucial period that would affect salary levels for years to come. Thus the teachers were determined to hold out for major increases as contracts expired or as re-opener clauses became operative in 1978. In an important

sense, the great length of the strikes in Seattle and Tacoma--the state's highest spending large districts--can be attributed to the forces set in motion by the state's efforts to reform school finance. As one board source put it, "the strike was against the legislature" (Interview, board source). In the byzantine world of school politics, urban teachers and urban school districts created an odd alliance which used strikes as devices to pressure the legislature to modify its school finance reforms. In smaller, poorer districts the stakes were not so high, and the dynamics of strikes were different.

The Organizational Context. As in other states (e.g., Pennsylvania, Michigan) the Washington strikes represented, in some ways, skirmishes waged by local battalions in a statewide battle between interest groups. While neither the Washington State School Directors Association (WSSDA) nor the Washington Education Association (WEA) is much more than a confederation of local units which themselves do not always agree upon goals and tactics, there are clear organizational differences on such matters as the desirability of collective bargaining, the legitimacy of strikes by teachers, and the locus of fault in the event of bargaining impasses.

In WSSDA the prevailing view is that collective bargaining is a struggle for power to control district finances and educational programs. Teacher strikes ought to be illegal (Washington State School Directors' Association, 1978a: 2). WSSDA favors a strike management strategy which utilizes substitute teachers to keep schools open in the event of a strike; by keeping schools open the striking teachers are penalized through loss of pay. WSSDA publications indicate that strikes are readily enjoined and that injunctive relief, if properly timed, is a useful tool in fighting teacher strikes. Injunctions not only help force teachers back to work; they also induce pressures toward settlement. Some boards also appear to view injunctions as devices for securing the necessary legal basis for dismissal procedures, and for maintaining eligibility for state aid (WSSDA, 1978b: 8-17). WSSDA places great emphasis upon the importance of using the media to develop and sustain public support for the board's position in the event of a strike (WSSDA, 1978c).

The WEA, of course, holds different views. Collective bargaining is viewed as a necessary device for helping to secure equitable wages and working conditions. For the bargaining process to work, the strike weapon must be available. Thus labor injunctions interfere with the legislature's expressed preference for collective bargaining. Further, when used to force teachers back to work without contracts, labor injunctions can do more harm than good. At the same time, there is a sub rosa view that labor injunctions are not an unmitigated evil. Under certain circumstances they help maintain teacher solidarity, and they can provide a face-saving rationale for ending a walkout (Interview, teacher source).

Both WSSDA and WEA maintain networks of attorneys who are retained

by local affiliates. Legal strategies are coordinated. Teacher association attorneys, like their counterparts employed by school boards, quickly share information about legal developments which may affect strike-related litigation (Interviews, board sources and teacher sources). We found that legal briefs were very similar from strike to strike; indeed large portions of them were identical. Further, attorneys who won favorable court decisions quickly secured transcripts of the court's views and then shared the transcript with other attorneys who might make use of it.

* * * * *

These background variables help account for some of the similarities and differences we observed in the labor injunctions employed in Washington teacher strikes in 1978. The courts' views of the law, the determinants of those views, the desire by both sides to minimize the damage wrought by newly adopted school financing laws, and the special dynamics of interest group efforts to exert influence all had their effects.

The Strikes

Six of the Washington strikes were not accompanied by court action; four were. While we did not collect extensive data about the six, summary descriptions will help provide a basis for comparing strikes that invoked court relief and those that did not.

Strikes Without Court Action. Four of the six strikes were one- and two-day affairs which were settled before students were scheduled to return to school. In Lower Snoqualmie teachers picketed instead of reporting for an inservice day just prior to the Labor Day weekend. However, a contract was agreed upon during the weekend, and students reported for school as scheduled. In Raymond teacher pickets protesting failure to reach contract agreement blocked the first day of pre-school football practice. A contract was approved that night. In Bellevue, a much larger district, a strike produced even faster agreement; within a half-day a settlement was reached. In Lake Washington teachers were on strike for two days prior to the Labor Day weekend; settlement was reached during the long weekend.

In the 5300-student Oak Harbor district a four-day strike by teachers involved one inservice day and three days initially scheduled for students. At the beginning of the strike the Superintendent threatened court action and employment of substitute teachers unless settlement was reached promptly. On the third day of the strike the teachers rejected a Board offer, and the Board responded that it would open schools two days later, using substitutes. Substitutes were brought in for orientation sessions on the fourth day, amidst high tensions on the picket lines. Negotiations continued, however, and a settlement was reached and ratified in the early morning hours of the fifth day, enabling the regular teachers to return

to work immediately.

A two-week strike in University Place included seven days initially scheduled for student attendance by the district's 4000 students. In this district the Board delayed the scheduled opening date, but finally declared that school would begin on September 20, with substitute teachers if necessary. Mediated negotiation sessions went right down to the wire, but on the eve of the 20th a settlement was reached and ratified.

Strikes Involving Labor Injunctions. Four strikes were accompanied by requests for injunctive relief. The results were remarkably varied. In Central Kitsap relief was denied. In Everett the court delayed issuing relief until satisfied that certain traditional standards of equitable relief had been met. Everett teachers thereupon complied with the court's order. In Seattle and Tacoma the courts virtually ignored traditional standards of injunctive relief, adhering to the Washington pattern of near-automatic issuance of injunctions. In Seattle the teachers complied with the court's order, but in Tacoma the teachers defied it.

Central Kitsap

On Labor Day teachers in the 7700-student Central Kitsap district narrowly voted to strike, after several months of negotiations had failed to resolve disputed issues such as salaries and limitations on class size. The district quickly employed substitute teachers. Newspaper reports indicate that there were not enough substitutes, and that the state's required student-teacher ratios were exceeded--a factor which may have prompted the district's immediate effort to seek injunctive relief. Students expressed mixed opinions about the use of substitutes: some students maintained that they were wasting their time because the substitutes were not teaching, whereas others said they were glad schools were open because that meant the school year would not have to be extended.

In its hastily-filed request for injunctive relief the district stated its case straightforwardly. The strike was unlawful according to the common law tradition and on the basis of the Port of Seattle decision. Moreover Port of Seattle had indicated that any change in the common law tradition was up to the legislature, and in EERA the legislature clearly had not changed the tradition. State education agency rules that conditioned state aid upon the issuance of injunctive relief, and decisions in other states, supported the issuance of injunctive relief in the face of an unlawful strike. Citing Board of Education v. Redding (1965) the Board went on to assert that irreparable harm could be presumed without an actual showing of harm. Anyway, harm could be shown in the strike's potential effects on state subsidies to the district, in its potential disruption of the educational program of the students, in its implications for extending the school year with attendant disruption of summer work and college plans, in the increased costs resulting from make-up days, and in its

danger to the health, safety, and welfare of the students and non-striking employees. Accompanying affidavits purported to substantiate these threatened forms of harm. The Board asked that the strike be declared illegal, and that a temporary restraining order be issued "forthwith" (Plaintiff's Memorandum, Central Kitsap School District v. Central Kitsap Education Association, 1978 (hereafter Central Kitsap)).

Note³—The Board's legal posture is a near-perfect illustration of the classic use of labor injunctions. Legal papers were filed immediately after the teachers voted to strike. The language in the Board's legal Memorandum was of the "boiler-plate" variety; that is, it was suitable for use in any teacher strike, and not tailored to the specifics of the Kitsap situation. (Indeed, we found identical language in portions of the legal memoranda submitted in Seattle and Tacoma.) Because the request for injunctive relief was filed before school resumed, the allegations of harm necessarily were anticipatory in nature; no showing of actual harm was possible. The shortest possible notice was given; a hearing was scheduled for the day following filing of the Board's complaint. Moreover, the hearing would be dependent upon the affidavits; no testimony could be taken.

In a Memorandum opposing the Board's contentions the teachers' attorney developed an elaborate array of arguments. First, a long list of "facts" was set forth as "evidence of bad faith negotiations" (Memorandum of Authorities in Opposition to Plaintiff's Motion for Temporary Restraining Order, Central Kitsap, p. 3). Second, the language of the controlling teacher-Board contract (the strike was caused by unresolved disputes about re-opener clauses, rather than disputes over a new contract) indicated that the contract's "no strike" clause was waived in the event of impasse over the re-opener items; thus language adopted by the Board itself indicated that the strike was not unlawful. In addition the Board had not exhausted other avenues of legal recourse. Moreover the legislature, in EERA, clearly had expressed a desire for meaningful teacher-Board bargaining; court intervention would impede the bargaining process.

The most elaborate portion of the defendants' Memorandum dealt with the legality of teacher strikes in Washington. The distinction between the state's Public Employee Collective Bargaining Act and the Educational Employment Relations Act (EERA) was stressed: the former banned strikes but the latter did not. Thus the legislature had had an opportunity to ban teacher strikes, but it had not done so. And in the absence of legislative action, it was not for the courts to formulate policy. In an accompanying affidavit a teacher association official stated that she did not think the strike was illegal; she supported her contention with a recent newspaper clipping indicating that the Senate Majority Leader and the House Speaker had doubts that teachers strikes were clearly illegal (Affidavit of Sheryl Graham, Central Kitsap).

The Memorandum went on to review the basic standards for issuance of injunctive relief, invasion of a clear legal right, a showing of irreparable harm, a balancing of the equities, and clean hands. The latter argument was buttressed by citations from Michigan's Holland (1968) case, Rhode Island's Westerly (1973) case, New Hampshire's Timberlane (1974) case and the Clover Park (1975) injunction case from Washington. Finally the Mead (1975) case was cited to support the contention that mere delay in the opening of school was not a sufficient "emergency" to waive the state Open Meetings Law; surely then, said the teachers, a strike could not be presumed to be harmful, absent a showing to the contrary. Injunctive relief should be denied.

Note--Although the teachers' Memorandum, like the Board's, contained a goodly amount of "boiler-plate" language that was not specific to the situation in Central Kitsap--and which was exactly the same as language which appeared in teachers' memoranda in Seattle and Everett, the initial recitation of events leading to impasse indicated that at least some specific attention was being paid to local facts.

At a hearing on September 6 Judge Robert J. Bryan evidently thought the teachers had the better case. In a rambling oral opinion he echoed many of the teachers' arguments. He noted that neither the legislature nor the appellate courts in Washington provided clear guidance. Then, focusing on Washington's Injunction Statute, Bryan noted that injunctions "should be very carefully considered and should not be lightly granted" (Oral Decision of the Court, Central Kitsap, p. 4). Under the statute, a plaintiff's first burden was to make a clear showing of entitlement to the relief requested. Taking note of two "separate and distinct lines of authority in the State and in this country," Judge Bryan said that "it is unclear in this State which line of authority an Appellate Court might adopt if and when faced squarely with the issue now before this Court." The legislature had chosen not to act on the issue of teachers strikes. But the Administrative Code as well as the Central Kitsap bargaining agreement evidently contemplated teacher strikes. Summarizing, the Judge said:

...Where this leads me is to the conclusion that I at this point cannot find based on the law any clear legal or equitable right on the part of the School District who is here as the moving party to enjoin a strike. There may be such a right; there may not be such a right....The law is at least a close enough balance in my judgment that the School District simply has failed in its burden in showing that it is in fact entitled to (injunctive relief) (Oral Decision, Central Kitsap, p. 7).

In passing, the Court took note of the newspaper article submitted with an affidavit:

The fact of the matter is that it is a debateable issue. I guess you would say that newspaper article gives support on this conclusion although I don't get my law out of newspaper articles. But it is a close and debated question by Legislators, by Attorney Generals, by School Districts, by Education Associations, and by teachers, and it's not a sufficiently clear point of law upon which to base an injunction. Now, for that reason it appears to me that the motion for a Temporary Injunction Order restraining the strike should be denied (Oral Decision, Central Kitsap, pp. 7-8)

Two days later the Court issued a formal Order denying the Board's request; the Order recited the Court's determination that

the plaintiff must establish that there is a clear legal right to the issuance of an order restraining a strike by the defendants; that the law is in a state of flux and it is not now clear that it is illegal for educational employees of a school district to strike; that the legislature is aware of the problem of strikes by public school teachers and has failed to act by spelling out in statute whether or not educational employees have a right to strike; that the collective bargaining agreement between the parties contemplates the possibility of strikes by teachers and the Washington Administrative Code contemplates strikes by teachers; and that there is no clear legal or equitable right to enjoin a strike (Order Denying Temporary Restraining Order and Temporary Injunction, Central Kitsap, pp. 1-2).

Note - Judge Bryan's decision stands as a clear exception to the prevailing pattern in which Washington plaintiffs routinely are granted injunctive relief. One possible explanation for the decision is that Judge Bryan apparently did not distinguish between legal precedents concerning the right to strike, on the one hand, and the right to equitable relief on the other. Confusion easily could have arisen from the legal memoranda and oral arguments of the opposing attorneys. The plaintiffs, in their desire to suppress utilization of the irreparable harm and clean hands doctrines, had clouded the illegality-enjoinability distinction by arguing that illegal strikes are automatically enjoined. And the defendants, in their complex argumentation, did not make a point of distinguishing between the Holland line of cases (which indicates that illegal strikes are not automatically enjoined) and the question of illegality itself. Some evidence of confusion arose in an interchange between the Board's attorney and the Judge:

Attorney: May it please the Court, I don't want to reargue the case. I do want to point out to the Court that there has been no case cited by either counsel wherein a Court has ruled that a strike by public employees was not illegal. There

have been cases where the Court did not grant an injunction, but never on the basis that the law was that a strike by public employees was permissible....I understood the Court to say that there were cases going both ways on that issue.

The Court: Well, what I was referring to is the authorities as I understand them basically. So I'm not talking about specific cases, only that there are two lines of authority based on the interpretation of existing cases that could lead...an Appellate Court to the conclusion that teachers may strike or to the conclusion that they may not (Oral Decision, Central Kitsap, pp. 12-13).

Some of the attorneys we interviewed indicated that they felt that Judge Bryan simply may have been too rushed, and failed to give close attention to all the legal questions before him. Here it should be noted that the rush was not of the Judge's own making; it was urged upon him by the plaintiff's request for immediate relief. In Collingsville we noted that delay seemed to work to the advantage of teachers; here teachers may have benefited from hasty court action (Colton, 1980a). It is interesting to note that Seattle Board attorneys, who paid close attention to the Central Kitsap affair, made quite a point of proceeding at a more leisurely pace.

A second possible explanation for Judge Bryan's decision is that it may have reflected his view of the role of the court. Early in his oral opinion he castigated the legislature for failing to act on the question of teacher strikes, noting that "Judges get burned in the press and by the public all the time on these public issues" and that "I'm not responsible for (the law I have to apply)." Subsequently the Judge criticized the parties for having failed to reach a settlement:

You know, it's hard for me to understand why this has not been resolved through the negotiation process, the mediation process, the fact-finding process, long before it got to this stage of the game. This is like the Arabs and the Israelis who keep going to war and we keep telling them they should be able to settle their dispute....The time to have resolved this matter was at least two days ago, and the parties while they are sitting in Court today could have better spent their time by negotiation (Oral Decision, Central Kitsap, pp. 8-9).

Perhaps the words were inspired by the recent Camp David sessions involving Israel's Begin and Egypt's Sadat. While the argument hardly qualifies as an outstanding rationale for judicial abstention, Judge Bryan's reluctance to get involved seems quite apparent, and may have affected his disposition of the Board's request for injunctive relief. Judges, particularly elected ones,

such as Judge Bryan, are not averse to ducking controversial issues.

Following Judge Bryan's ruling, the Central Kitsap teachers and Board resumed negotiations.. Meanwhile picketing continued, and the Board operated schools using substitute teachers. Mediation and a marathon bargaining session finally produced a settlement on the fourth day of the strike.

Everett

Everett teachers struck (for the second time in three years) on September 6, following unsuccessful efforts to resolve issues which teachers defined as "contract stripping by the Board," and which the Board defined in terms of "restoring and protecting management rights." Following the strike vote the Board announced that it would open schools with substitutes paid at a rate of \$105 per day. When last-minute negotiations failed to produce a settlement the Board implemented its plan by deploying more than 300 substitutes-- enough to staff classes for the 6000-8000 students (of 11,600) who reported for school. Emotions on the picket lines were high, and miscellaneous incidents resulted in the arrest of several Everett teachers. After three days of operation with substitute teachers, as student daily attendance dwindled and threatened to reduce state aid, the Board of Education sought injunctive relief.

The teachers' response included several long memoranda. The first began by reminding the court of the 1976 Everett strike. "As in 1976," said the teachers, "the Association believes the District is only attempting to use this court as a lever in the course of its unfair labor practices" (Defendants' Memorandum of Authorities in Opposition to Motion for Temporary Relief, Everett School District v. Everett Education Association, 1978, p. 2. Hereafter Everett.) The unfair labor practice theme was spun out at great length, particularly through detailed affidavits which cataloged events allegedly showing evidence of bad faith negotiations by the Board. The Memorandum also included a lesson on labor injunctions. Government plaintiffs are not privileged, said the teachers, and must make the same showings required of private plaintiffs; history showed that the public sector was simply repeating the errors demonstrated decades earlier in the private sector. Moreover, an injunction would interfere with the likelihood that the legislature's intention--good faith bargaining--would settle the dispute between the teachers and Board. In addition the Board had failed to exhaust its administrative remedies, and had not established a clear showing of irreparable harm. Then, echoing the arguments set forth in the Central Kitsap case, the teachers set forth their view that teacher strikes were not illegal in Washington, and that even illegal strikes should not be enjoined without court adherence to traditional equitable standards. A Supplemental Memorandum developed the proposition that blanket prohibitions of teacher strikes violated protections granted by the U.S. Constitution (Defendants' First Supplemental Memorandum of Authorities in Opposition to Motion

for Injunctive Relief, Everett, 1978).

In his oral opinion following a hearing on September 15, Judge Robert C. Bibb took careful note of the teachers' arguments, and then adopted a Solomonian stance that sent both sides away with partial victories. Regarding the constitutional argument, and the argument that teacher strikes were not illegal in Washington, the court held that "the case law in this state still holds these strikes illegal" (Oral Ruling, Everett, September 15, 1978). Moreover, the court ruled that the violence on the picket lines merited an injunction, and he issued an order severely restricting picketing. However on other matters the teachers won partial victories. Apparently adopting the teachers' contention that illegal strikes are not automatically enjoined, Judge Bibb enunciated two lines of reasoning for withholding an order enjoining the strike itself. First there was the clean hands argument. The judge did not quite adopt the clean hands argument as a precondition for injunctive relief, but he came close. He indicated that the argument's roots probably were associated with those of the old sovereignty doctrine (which he already had sustained by ruling the strike illegal). But, he noted, he was not sure who the sovereign was, and whose hands were supposed to be clean:

Who is the sovereign in this case? I think we have to look at that because I think that then depends on whose clean hands we are talking about. Is it the school board, its members, the staff? I think the case law, and again I say I haven't had the opportunity to find citations on this due to the brief time that I have had to consider the record, is that the people are the sovereign. The people are the sovereign under the constitution. Can their rights be jeopardized by the intransigence or bad faith of their agents, in this case the school directors, if in fact that was the case? I don't think so. I am holding that at least in a situation of this kind where we are dealing with public education, whether schools are running, the absence of clean hands on the part of the school board, if that's the case, should not take away from the public the right to have the laws enforced. However, I do think it is a proper thing to consider in what kind of an order to enter (Oral Ruling, Everett, September 15, 1978, p. 6).

In that roundabout fashion, he set the stage for an order that directed the parties to engage in at least ten hours of negotiations over the next two days, and directed the federal mediator to report privately to the court as to whether the bargaining was in good faith. The judge then went further, observing, without ruling, that the teachers had insisted that a plaintiff must show irreparable harm before a strike could be enjoined:

We have a situation where it is now almost through the first five scheduled days of school, going into next week. We are

talking about something more than just a brief interlude which could easily be made up at the end of a term or by cutting a vacation. It has the appearance anyway at this point of lasting a considerable period of time and that is a matter of weighing the amount of harm sufficient to persuade the court that irreparable harm will result if something isn't done (Oral Ruling, Everett, September 15, 1978, pp. 7-8).

Again there was ambiguity in the judge's remarks, but the apparent import was that (1) the irreparable harm standard was applicable--a notable victory for the teachers--and (2) the length of the strike might be the standard for ascertaining irreparable harm. But the judge made no ruling for the moment.

Another teacher victory, of sorts, occurred when Judge Bibb acknowledged the teachers' argument that injunctions were an 'extraordinary form of relief, not to be lightly granted.' Referring back to the previous Everett strike, where the plaintiff party evidently had not sought judicial enforcement of a restraining order, the judge said he would not consider granting a back-to-work order until he was satisfied that there would be some enforcement:

I will consider entering...an injunction next week, but as a condition to my consideration of that, it will be necessary for the district to submit to the court a plan as to how this injunction is to be served and become effective; how it is to be monitored as to compliance, and what position the plaintiff will take with respect to an attempt to bargain away any violations of the injunction in the process of negotiations with the association. To do less than that in my view will result in the same type of situation that occurred with (the previous strike injunction) and other court orders in the past that have been disregarded. In this particular context that can do nothing more than breed a contempt of the law already rampant in our society (Oral Ruling, Everett, September 15, 1978, pp. 9-10).

In one sense, the judge's words were a victory for teachers, for they played a part in the court's decision to delay issuance of an injunction. Yet, a few days later, when an injunction was finally issued, it had real teeth in it.

Note--Viewed politically, Judge Bibb's oral opinion is a masterpiece. It had something for everybody. The Board got its declaration that the strike was illegal, and it obtained an order restraining picketing, thus facilitating continued operation with substitutes. But the Board also had its knuckles rapped on the clean hands issue, and was directed to come in with an enforcement plan as a measure of its good faith vis-a-vis the court. The teachers, while they lost on the question of the legality of the strike, and

were restrained in picketing, won a legal victory when the court seemingly adopted the teacher's contention that traditional standards governing injunctive relief were applicable. The clean hands argument evidently helped achieve a delay in the granting of injunctive relief, and the court did direct good faith bargaining--another victory for the teachers. On the other hand, it appeared that the court was prepared to say that the strike was approaching the point where irreparable harm would occur, and it also was clear that the court expected to have its orders enforced. Even the general public got something: an acknowledgement that it was sovereign, and could legitimately expect that labor-management disputes should not interfere with the availability of schooling. As a newspaper put it, the judge "walked a thin line," and both sides emerged from the initial hearing with small victories (Seattle Times, September 16, 1978). But the strike was not ended and court proceedings resumed on the following Monday.

As the hearing resumed, teachers complied with the order limiting picketing, and the federal mediator made his report to the judge. The court then held that there was no evidence of bad faith bargaining, but again declined to issue a back-to-work order. The hearing was continued until the next day.

Finally, on the third day, the court issued a somewhat unusual back-to-work order. In addition to directing the teachers to report for work on September 20, district officials were ordered to appear before the court at 1:00 p.m. on September 20 to seek a show cause hearing against each teacher who violated the back-to-work order. Further, the court ordered the school board not to interfere "with the Court's jurisdiction to punish any person who has violated the terms of this Order." Moreover, the plaintiff was prohibited from making any agreement with the teachers "having the effect of waiving the penalties." Finally, "(finding) it probable that at least some of the defendants may intend to disregard" the back-to-work order, the judge cited the court's "inherent power to coerce the parties into compliance," and declared that each individual violating the Order would be fined \$100 per day and the Association would be fined \$1000 per day (Temporary Restraining Order and Order to Show Cause, Everett, 1978).

In an oral ruling preceding issuance of the formal Order, the court made a further commitment:

I am convinced more and more as I listen to argument...that I should in a supplemental order involve the court in some degree to a monitoring of bargaining where the issues of bad faith or good faith can be reviewed by the court and where the court may have more ability to--I don't want to use the word "force"--but at least have some ability to accomplish a settlement of some of the issues between the parties. While the court is not particularly anxious to engage in that kind

of work, I may find myself forced to, and I will be willing to, and I'll certainly consider any order that either party should propose along that line, whether we call it a settlement conference or something else (Oral Ruling, Everett, September 19, 1978, p. 6).

Everett teachers complied with the back-to-work order, returning without a contract. The Everett Education Association (EEA) President said that lost wages and mandatory fines simply were more than teachers could afford (Seattle Times, September 26, 1978). A week later the teachers' association asked the court to re-enter the picture, and the court appointed a fact-finder. The fact-finder's report in late October provided the basis for a settlement which the teachers adopted reluctantly (Washington Education Association, 1978a: 5).

Seattle

Seattle, with an enrollment of 55,000 students, is Washington's largest school district. The 1978-79 school year was to have begun with the implementation of a voluntary desegregation plan. However there was a salary re-opener clause in the teachers' contract, and last-minute negotiations failed to produce a settlement. Some observers maintained that the strike could have been averted if the two sides had taken the negotiation process more seriously. Possibly the teachers failed to comprehend the Board's determination to hold the line on salaries, with a view to the impending pressures of the state's "reform" financial assistance laws. And the Board probably failed to recognize the extent to which teachers worried that the new laws would inhibit salary improvements in years ahead. The situation was further complicated by the strong and apparently conflicting personalities of the Superintendent and the Seattle Teachers Association (STA) President. Whatever the cause, there was no settlement on Labor Day, and teachers voted to strike.

In contrast to other striking districts, Seattle was not in a position to try to re-open schools with substitute teachers. Logistically, the problem was formidable in such a large district, and in any case such a tactic would disrupt the district's planned desegregation effort. Given the Board's determination not to yield on salary issues, it quickly became apparent that the strike would be a long one. The Board's strategy was to wear down the teachers, gain maximum mileage from a massive public relations effort, and, at the right moment, seek injunctive relief.

At the outset of the strike Board attorney Gary Little announced that he was preparing to seek court action, and would do so whenever the Board directed. But for two weeks the injunction request was not filed. The Board regularly maintained that too-prompt court action might inhibit the effectiveness of a court action, and that it hoped that continuing negotiations would produce a settlement. In any event, said the Board, all school days would be made up. As the Board played its waiting game, signs of dissension within the STA occasionally

surfaced. At one point, for example, STA President Neuschwander removed the chief negotiator.

Finally, at the beginning of the third week of the strike, the Board filed for injunctive relief. A teacher source wryly remarked that even here the Board played the public relations game to the hilt. "Gary Little...called up the television cameras and stations and said, 'Well, I'm going down to the courthouse to file my papers.' And sure enough, that night on television you have him stamping the papers and passing them through the slot" (Interview, teacher source).

With two exceptions, the Seattle plaintiffs' legal position was much like that of other Washington districts. Indeed, the language in the Board's legal memorandum was in many sections identical to that used in other districts. (Plaintiff's Memorandum in Support of Injunctive Relief, Seattle School District v. Seattle Teachers Association, 1978. Hereafter Seattle.) Port of Seattle was cited as authority for the proposition that public employee strikes were illegal. The legislature had not changed the law. An unlawful strike is per se harmful, and hence harm need not be shown. However, even if harm needed to be shown, there was abundant evidence that the strike was causing harm; supplemental affidavits filed by the Board President, the Superintendent, and four central staff members attested to that. The affidavits also described the Board's efforts at the bargaining table, evidently in an effort to head off expected teacher allegations of bad faith bargaining (Plaintiff's Affidavits, Seattle, 1978).

One of the special features of the Seattle argument was the claim that teachers were striking in violation of a no-strike clause of the contract between the teachers and the Board--a point repeatedly emphasized in Board comments to the press. A second unusual feature was that the Board sought a preliminary injunction, rather than a temporary restraining order. The effect was to delay the date of a hearing for a full week, on the supposition that such delay would give the court an opportunity to consider the situation more carefully--a particular concern of the Board's attorney in view of the hasty and unfavorable decision reached earlier in Central Kitsap (Interview, Board source). In Seattle a hearing was set for September 25 before Superior Court Judge Carolyn Dimmick.

STA attorney Harold Green, not knowing when to expect the Board to initiate court action, prepared his legal memorandum and supporting affidavits at the inception of the strike, but then had to await further developments. Following the Board's filing, some revisions were made in the teachers' documents, particularly with respect to claims and affidavits attesting to bad faith bargaining on the part of the Board. Green argued not only that there had been bad faith by the Board, but also that the matter properly belonged before the State Public Employment Relations Commission (PERC) rather than the Superior Court. Extensive legal authority from throughout the nation was cited

on behalf of this argument. The rest of the teachers' legal argument was similar to that used in other strike situations (Defendant's Brief in Opposition to Motion for Preliminary Injunction, Seattle, 1978). Teacher strikes had not been made illegal by the legislature, despite that body's many opportunities to outlaw such strikes. The Board was not entitled to injunctive relief because administrative remedies had not been exhausted. Further, in considering injunctive relief, the court must require a clear showing that the defendants were invading a clear legal right of the Board, that there was consequent irreparable harm, that there was a favorable balance of the equities, and that the Board had clean hands. The final phases of the teachers' legal memorandum set forth a complex legal argument showing why the Association was not in violation of the no-strike clause in the contract between the district and the STA (see Defendants' Brief in Opposition to Motion for Preliminary Injunction, Seattle, 1978).

In addition to their legal Memorandum, the teachers submitted a large number of Affidavits. Several of them were quite long, and set forth in detail the events that, in the teachers' eyes, manifested bad faith bargaining by the Board. Another group of Affidavits, prepared by several of the most experienced teachers in the district, maintained that the experience of a strike in 1976 had shown that strikes do not cause irreparable harm, that other types of events were just as disruptive as strikes, and that in any event the strike simply was a delay, rather than a denial, of schooling (Defendants' Affidavits, Seattle, 1978).

As the scheduled hearing date approached several legal maneuvers took place. A group of concerned citizens and parents filed papers seeking to intervene in the case; the main thrust of their argument was that they were being irreparably harmed by the strike (Petition of Intervenors for an Order Requiring Reopening of School and Resumption of Classes, Intervenors' Affidavits, Seattle, 1978).

STA attorney Green filed a request to present oral testimony at the hearing. Green maintained that oral examination would be required in order to elucidate the facts underlying the teachers' accusations of bad faith bargaining, to secure access to information in the possession of the plaintiffs, and to rebut the Board's affidavits, which included "hearsay, opinion, and conclusory allegations" (Affidavit of Harold H. Green, Seattle, 1978). Green pointed out that the district had waited two weeks before seeking court action, that it had argued for a "cautious, careful approach," that the taking of testimony would be consistent with such an approach, and that "Defendant will be severely prejudiced if the motion is determined summarily, without opportunity for Defendant to present the Court evidence through oral testimony which is unavailable to it by affidavit." The request was denied.

Moments before the hearing, both sides presented supplemental memoranda which responded to previous filings. The Board maintained

that the Superior Court (rather than PERC) indeed did have jurisdiction, and that the exhaustion of administrative remedies was not a precondition for the award of injunctive relief. Further, the Board had met all the requirements of injunctive relief. In addition to the harm cited in its initial filings, the Board now took note of the harm to the public, as identified in the affidavits supplied by the intervenors. As to the teachers' affidavits on harm, they showed only that a short strike was not harmful; the present strike now exceeded in length the 1976 strike on which some of the teachers' affidavits were based. On the clean hands argument, the Board now maintained that the doctrine was not a restraint on the award of injunctive relief where the public was suffering harm. Appended to the Board's Supplemental Memoranda were copies of Judge Bibb's final oral decision and order in the Everett case (Plaintiff's Supplemental Memorandum in Support of Injunctive Relief, Seattle, 1978).

In their Supplemental Memorandum the teachers renewed and elaborated on their assertions of bad faith bargaining by the Board, reciting numerous instances where, in their view, the Board had violated the tenets of good faith collective bargaining (see Defendants' Supplemental Memorandum of Law, Seattle, 1978).

At the hearing on September 26, the attorneys for the Board, the teachers, and the intervenors simply recapitulated the arguments already set forth in the voluminous papers they had filed. Judge Dimmick granted the intervening group amicus curiae status, and permitted the Board to adopt the intervenors' affidavits. Moments later the Judge, before a packed courtroom and television cameras, rendered her oral decision. Speaking to the question of the court's jurisdiction, she declared that whereas PERC was the body to hear charges of unfair labor practices, the court had jurisdiction of the strike issue. Noting that the legislature had declined to change the common law prohibiting public employee strikes, she found the Seattle strike illegal. She further went on to say that it was not necessary to prove irreparable harm, for an unlawful strike was presumed to cause such harm. In any event, she said, "the affidavits that I have read have convinced the Court...that there is evidence of great injury about to be perpetrated because there is no end of the strike in sight" (Oral Decision, Seattle, 1978). An order directing the teachers to return to work would be issued the next day, following a conference with attorneys Little and Green.

The order was much simpler than the one in Everett. Judge Dimmick directed the teachers to return to work, but no penalties for non-compliance were specified. However the order did state that teachers who did not discharge their contractual obligations could "waive any present or future claim to continued district employment" (Preliminary Injunction, Seattle, 1978).

Note—Informed sources attached considerable significance to the things that Judge Dimmick did not say. Her silence regarding

the disputed no-strike clause in the teachers' contract was a public relations victory, of sorts, for the teachers, much as her silence regarding the teachers' allegations of bad faith bargaining represented a sort of victory for the Board. The Judge's decision to zero in on a single question--the illegality of the strike--probably affected the teachers' response to the court's order. Further discussion of this matter will appear below.

Despite the recommendations of their executive board that the strike be continued, 57% of the Seattle teachers voted to comply with the court's order. The teachers held a mock funeral, but then returned to work for a preparation day on September 28th. Students began their programs the next day after a delay of 17 school days (which subsequently were re-scheduled). Two weeks later an agreement was reached between Board and teacher negotiators and ratified by both parties. Superintendent Moberly maintained that the settlement was "fair." The teachers had a different view. Said STA President Neuschwander, "We lost." The same sentiment was echoed by the Washington Education Association, which described the settlement as a "setback." The WEA wryly spoke of Seattle's "voluntary desegregation and court-ordered teachers" (WEA, 1978a: 4).

Tacoma

Tacoma, like Seattle, experienced a four-week strike. From the outset it appeared that both sides were prepared to wait things out indefinitely. Teachers, bolstered by a recent and favorable arbitration award resulting from a previous strike, were convinced that the Board was bargaining in bad faith, and that eventually the Board would increase its financial offer. The teachers filed charges of unfair labor practices with the State Public Employee Relations Commission. The Board, as convinced as Seattle's that the line on teacher salaries must be held in view of the new state finance laws, maintained that it simply could not boost its offer.

In the third week of the strike, in a move that attracted notice in the national media, some students ("The Tacoma 8") sought injunctive relief from their role as "hostages"; both the teachers and the Board were named as defendants in the students' suit. A hearing on the students' request was set for September 29. Meanwhile the Board finalized plans to try to end the strike. The Board announced that it might utilize "replacement" teachers paid at \$105 per day, and on September 27 authorized its attorney to seek a temporary restraining order. Papers were filed promptly, and a hearing was scheduled concurrently with the one already scheduled in response to the students' petition. The Board then announced that it would open schools on Tuesday, October 3, using replacement teachers in the event that court relief was not granted, or if striking teachers refused to abide by a court order.

On the day of the hearing, the court first dismissed the students'

suit, but then allowed the students to join the Board in its action against the teachers. Following oral argument on the Board's motion for relief, the court ruled that the strike was illegal, and ordered teachers to report for work when the Board opened the schools for a "staff day" the following Monday. As in Seattle, no penalties were specified in the order. A hearing on the Board's request for a preliminary injunction was set for October 5. The court also ordered that representatives from the Public Employee Relations Commission be present at future negotiation sessions--evidently in response to mutual charges of unfair bargaining practices.

The Tacoma teachers promptly and overwhelmingly (77%) voted to continue their strike, despite the court order. The Board, which reported that it had made no final decision on the use of substitutes, evidently decided to wait until Monday--the scheduled staff day--before deciding its next move. Meanwhile, negotiations were continued. On Monday there was massive picketing. Only about one-eighth of the district's regular teachers reported for work. Substitute teachers thereupon were mobilized for the scheduled return of students the next day. The Board attorney said he would seek contempt orders at the court hearing scheduled for October 5.

On Tuesday approximately 500 teachers reported (about 200 regulars and 300 "replacements") along with a majority of the district's 30,000 students. There apparently was considerable confusion in the schools, and the student-staff ratio was high. Picketing continued, but there were no reports of incidents on the picket lines. Show cause orders were filed against some teachers. That evening negotiations for the Board and the teachers met with mediators and reached a three-year settlement which was approved the next day. The settlement involved \$500,000 not previously available, reinstatement of some teachers whose positions had been eliminated, and new procedures governing teacher transfers. The teachers reportedly gave up on their demands for an agency shop clause. The Board withdrew its contempt citations. Thus, on October 4, the last of the Washington strikes came to an end.

Variations Among Settings

To the casual observer teacher strikes may appear to be rather undifferentiated. True, they last longer in some places than in others, but the dominant social fact is that children are out of school--evidently because there is a dispute between the board of education and its professional employees. However, as our review of Washington strikes has shown, beneath the outward similarities there are widely different forces at work, and these forces give each strike a unique character.

Our inquiry does not focus on differences among teacher strikes, per se, but rather upon differences in the use and the effects of

labor injunctions in teacher strikes. In Washington, four districts chose to seek injunctive relief; six did not. Among the four districts two (Central Kitsap, Everett) acted promptly; two delayed action (Seattle, Tacoma). Two (Seattle, Tacoma) received the requested relief; one (Everett) received relief only after a three-day hearing; and one district (Central Kitsap) was denied relief. Among the three districts that received relief one (Everett) also experienced judicial intervention that went well beyond mere issuance of a labor injunction. Two districts (Everett and Seattle) found that their teachers complied with back-to-work orders, whereas in Tacoma the court's order was defied by teachers. It is tempting to say that such differences occur because every strike occurs in a unique context. That is true, of course, but it is no more helpful than the observation that strikes are pretty much alike. The function of policy research is to see regularities and to identify factors which make some phenomena more significant than others. Once these are identified and understood, the knowledge can be used to anticipate the course of subsequent events.

There appear to be three decision-points which warrant examination. Each, as we shall see, has several sub-parts. The first decision is in the hands of the board of education: Shall injunctive relief be sought? In the event of an affirmative answer another question arises: When should the relief be sought? The second main decision is in the hands of the court: Shall injunctive relief be granted? Here too an affirmative answer demands answers to certain sub-questions. What type of relief is warranted? Should the court intervene in an effort to settle the underlying dispute? Are penalties to be invoked? Assuming that the court does issue a labor injunction, the third main decision point is reached. It lies with the teachers: Shall the court's order be obeyed? Whatever the answer, other decisions must follow. If there is to be defiance, can teachers be protected from fines or jail sentences? If there is to be compliance, how can a settlement be reached?

Going to Court. The Washington data suggest two perspectives that may influence board decisions about seeking injunctive relief. One emphasizes ideological and political considerations; the other rests on strategic and situational analysis.

The ideological view was enunciated in these terms:

I don't think you can generalize about school boards. There is a philosophy extant in (the Washington School Directors Association). That is the "beat 'em with a stick and kill 'em" philosophy. And there is a countervailing philosophy that sooner or later when the bargaining process begins to work, teacher strikes will abate just by the nature of the process. And those are two very different opinions. There is a substantial body of belief that what you ought to do in response to negotiations is stonewall it, and then force the teachers out on strike, go running into court, get injunctive relief, have the strike declared illegal, fire all

your teachers because they engaged in illegal activities, and then replace them....And then you find a more sophisticated approach to labor relations....A more sophisticated approach (is) that, (an) injunction is a no-win situation for a school board, because even though there's a good chance that they can get the teachers back to work through injunctive relief, it ruins labor relations and it tends to have a lasting impact on teacher morale....Bellevue probably is a good example. The Bellevue School District has hired a professional negotiator who, although he bargains hard, tries to bargain in such a way as to make the bargaining process work, to avoid strikes (Interview, teacher source).

In the 1978 strikes we did not find much direct evidence of the "beat 'em with a stick and kill 'em" philosophy, although it was clearly voiced by a school board member who, in a WSSDA publication, reflected on an earlier strike:

Once there is a strike, go to court immediately for the purpose of proving the strike is illegal, but don't order them back to work. Once it is declared illegal and they refuse to return to work, issue notices of discharge on the grounds of participation in illegal activity and hire teachers more interested in the education of kids. Ask yourself--if you give in, who's going to make the rules? (WSSDA, 1978b: 16).

Perhaps a trace of this philosophy also was evident in the Tacoma strike, where the Board eventually embarked on a course of action which combined injunctive relief with the employment of "replacement" (not substitute) teachers. Central Kitsap also may have been influenced by philosophic considerations; it rushed into court within hours of the beginning of its strike. For the most part, however, we found that board sources voiced distinct awareness of the limitations of injunctions. One attorney acknowledged that he sometimes advised boards not to seek injunctive relief. Seattle Board spokespersons repeatedly indicated that the district viewed injunctive relief as a last resort rather than as an immediate reaction to a strike. Thus, among four districts that went to court in the fall of 1978, only one (Central Kitsap) appears to have viewed injunctive relief as an appropriate immediate response to a strike; elsewhere resort to the courts was treated as one component of a complex mix of strike-fighting tactics.

An alternate view of the decision to seek injunctive relief emphasizes politics more than ideology. A teacher source put it this way: "(There may be) a political analysis by the school board that they function in a labor community and that it would not be received well in the community to go to court." Some support for this view came from a board source who analyzed the speed and the delay with which Central Kitsap and Tacoma, respectively, went to court:

Tacoma is a strong union town. And you do not easily secure the allegiance of the average citizen if you are in the management position in a labor dispute....That's one of the problems in Tacoma. In Central Kitsap you are in an enclave of federal employees who aren't striking anyway. They know they can't strike and they react differently. They have pretty fixed incomes. Their attitudes about teachers are different than the average attitude in Tacoma (Interview, Board source).

A Board source commenting on Seattle's delayed approach to the courts also emphasized the political underpinnings of the Board's approach:

It was the Board's feeling...that (it) wanted to bring the court into the situation only if all other avenues of solving the problem failed....With two or three other school districts in court and having some difficulty with the judges (the Board) wanted to make very sure that not only had (it) tried all other avenues of solving the underlying problem, but that it was apparent to all that (it) had tried and that it would ultimately be apparent to the judge. So (the Board) deliberately set out a very paced schedule. It began by simply saying it was too soon, and by constantly referring matters back to the collective bargaining table, calling upon the mediator, calling upon the teachers to go back to the table, etc. And then when (the Board) finally determined that it was not going to be able to be successful that way... (it) decided to simply file its motion for a temporary injunction rather than seek immediate relief. And that gave the teachers in effect ten days to respond, and by the time (the Board) got into the courtroom and before a judge, everything had been briefed, all of the paperwork had been turned in,...the court had had a chance to read everything. The press had repeatedly printed the various moves of the parties, and in my opinion, by (the time of the hearing) the majority of the participants were prepared to accept what the court said. And that was the purpose (Interview, Board source).

In most respects the foregoing analysis is quite consistent with observed events. While Seattle waited, two other districts indeed were having difficulties with the courts; Central Kitsap's request had been denied, and in Everett the court had delayed granting relief, and then had become involved in the dispute. In both cases the bench opinions had included observations to the effect that perhaps the respective boards had not fully exhausted non-judicial avenues of solution. Moreover, several board observers reported that they believed that the Kitsap judge had been rushed, and might have reached a different opinion if he had had more time to consider.

Note—In our total sample of strikes we have a very mixed view of the significance of public opinion. From the board side,

there were some cases (e.g., Collinsville, see Colton, 1980a) where the prevailing view was that public opinion would turn against the board in the event of a long strike. In Seattle, in contrast, the Board made continuous efforts to influence public opinion, and indicated that public opinion might swing toward Board support in a long strike. Teacher association views also were inconsistent. In St. Louis most teacher energy appears to have been allocated to the maintenance of teacher solidarity rather than toward public relations efforts. In Seattle however, a teacher source lamented the fact that the Board seemed to have upstaged the teachers in terms of developing a good public relations campaign to accompany the strike.

An alternate view, and one which seems to go furthest toward explaining the decisions we observed, emphasizes situational factors and tactical considerations. In four cases (Lower Snoqualmie, Raymond, Bellevue, Port Washington) teachers struck before children were scheduled to return to school. Thus, technically, the teachers were not refusing to teach. They were not disrupting children's education. They simply were refusing to report to work on "preparation" days. In all four cases, furthermore, settlements were reached within a day or two, and before school opened for children. Under these circumstances requests for injunctive relief would virtually invite judicial delay, denial, or intervention. Further, the short duration of the strikes effectively precluded court action simply because there was not time to file papers and schedule hearings. Thus in four of the six cases where no court action was involved, the fact situation, rather than ideology or politics, seems to have been determinative.

These considerations however, are not very helpful in explaining the absence of court action in Oak Harbor and University Place, where the strikes were longer and where they forced delays in the opening of schools. Both of those districts adopted the somewhat risky strategy of trying to re-open schools with substitute teachers. The attraction of the strategy, of course is that it puts great pressure on the striking teachers--partly because they are losing days of pay (which is not the case where schools are closed and make-up days are subsequently scheduled), and partly because it strains the solidarity of teacher organizations. The risk comes from (a) the possibility of violence on picket lines, (b) the likelihood that an improvised instructional program and temporary staff may result in parental and student pressure on the board to settle or to close schools, and (c) the possible loss of state aid. In Washington the latter factor is particularly important. State administrative rules provide that a district must maintain certain staffing ratios (and other quality standards) in order to qualify for aid. If an insufficient number of strike-breakers is recruited, or if pickets effectively block the substitutes, the use of substitutes may not only lead to forfeiture of state aid, but also increased daily operating costs because of the premium typically paid to substitutes under these circumstances. (Washington districts were recruiting substitutes on the promise of upwards of \$100 per day in pay; normally substitutes obtain \$24-40 per day.) Another adminis-

trative rule, however, provides an "out" under such circumstances: a district that has obtained injunctive relief retains its eligibility for state aid even if quality standards cannot be met. It appears to us that in Washington the preferred strike-breaking strategy of boards is to open schools with substitute teachers, using injunctive relief only to supplement that strategy, or when the strategy appears to be failing. Oak Harbor and University Place succeeded with their threats to use substitute teachers; settlements were obtained moments before schools were to be opened with substitute staffs. No court relief was needed. However, in Central Kitsap and Everett and Tacoma, where the substitute-teacher strategy also was invoked, the subsequent stage of supplemental court action was invoked because the use of substitutes did not break the strike or bring settlement. In Seattle local circumstances (e.g., the large size of the district) effectively precluded the district's use of substitutes. What we have then, is this: (1) In four districts the strikes were too short and too early to warrant labor injunctions. (2) Among the other six districts five adopted strategies depending upon use of substitutes. Three of the five then found that injunctions also were needed and they went to court. (3) In the sixth district (Seattle) the labor injunction strategy was treated as an alternative to the use of substitutes, rather than as a supplemental tactic. Obviously the foregoing analysis oversimplifies things, but we believe it does set forth the basic strategic considerations distinguishing the six districts that did not go to court from the four that did.

The View from the Bench. Superior Court Judges Bryan (Central Kitsap), Bibb (Everett), Dimmick (Seattle), and Swayze (Tacoma) responded in rather different ways to the injunction requests that they received from school boards in the fall of 1978. As noted earlier, Bryan denied relief; Bibb delayed it and later intervened in order to facilitate settlement; and Dimmick and Swayze issued simple return-to-work orders. We have two sources of information which may help explain how these different results came about. First, there are the oral opinions issued by the judges; within these opinions are several indications of differences in judicial approach. Second, the observations of informed observers included a number of explanatory possibilities.

The Oral Opinions

One of the main areas in which the judges differed was in their view of the nature of the applicable law in Washington. Judge Bryan saw the law as being too ambiguous to provide a warrant for issuing an injunction:

The square issue of whether school teachers should have the right to strike has not been squarely met in this State so far as I know...by either the Legislature or...by the Appellate Courts...The School District claims that they are entitled to this relief because there is frequently law to

the effect that it is illegal for Public Employees including school teachers to strike. The (Teachers Association) takes the opposite view and says that that's not the case at all; that school teachers do in fact have the right to strike.... As I have reviewed the Briefs and the cases cited and so forth, it appears to me that there are two separate and distinct lines of authority in this State and in this Country....It also appears to me that the law is in a state of fluxion in this area, and that...it is unclear in this State which line of authority an Appellate Court might adopt....The fact of the matter is that it is a debateable issue....It is a close and debated question by Legislators, by Attorney Generals, by School Districts, by Education Associations, and by teachers, and it's not a sufficiently clear point of law on which to base an injunction (Oral Decision, Central Kitsap, pp. 3, 5-6, 7).

Judges Bibb, Dimmick, and Swayze disagreed:

(Judge Bibb:) (I)n my view, despite some contrary authority, the common law in this state still obtains, and that is that strikes by public employees are illegal (Oral Ruling, Everett, September 19, 1978, pp. 2-3).

(Judge Dimmick:) The narrow issue before this Court is whether or not the strike is unlawful. I find that it is unlawful. The common law against public employee strikes in Washington has never been changed. The legislature has declined to do so. And, of course, the philosophy is still sound today, because a strike against the District is a strike against (a) ... constitutionally required duty to make provisions for education for all of the children and for which the people as a whole pay. The requirement for a temporary injunction has been met in this case. The District has a clear right; it is being invaded (Oral Decision, Seattle, pp. 2-3).

(Judge Swayze:) While the legislature has never spoken directly ...in the opinion of this Court it has, nevertheless, clearly acted. I reach that conclusion under two very important legal rules: Number one, a legislative body is presumed to know what judicial enactments are in force at the time it passes a law.... Number two, if it remains silent on the exact matter spoken to by the Courts, in its legislative enactment in that same area, it is presumed to have ratified the judicial enactment. ...This Court, therefore must adhere to the line of decisions, and what it believes to be the law of this State, as ratified by the actions of the Washington State Legislature. I rule that this strike by teachers against the Tacoma School District Number Ten is illegal (Oral Decision, Tacoma, pp. 8-10).

Note—Judge Bryan in Central Kitsap, and Judge Kiester in Butler, Pennsylvania appear to have much in common (see Graber: 1980b)

Both exhibited considerable frustration with the law as they found it. Both, in their opinions, appeared to invite appellate review. As is so often the case ambiguity in the higher reaches of government leaves the lower officials in uncomfortable and perhaps untenable positions.

A second area of judicial disagreement concerned the propriety of court involvement in resolving the dispute. Judge Bibb clearly anticipated further court involvement:

I am convinced more and more as I listen to argument... that, I should in a supplemental order involve the court to some degree to a monitoring or bargaining where the issues of bad faith or good faith can be reviewed by the court and where the court may have more ability to--I don't want to use the word "force"--but at least have some ability to accomplish a settlement of some of the issues between the parties. While the court is not particularly anxious to engage in that kind of work, I may find myself forced to (Oral Ruling, Everett, September 19, 1978, p. 6).

Ten days later, and rather pointedly, Tacoma's Judge Swayze enunciated a rather different view of court involvement:

It has been urged upon this Court that it intervene directly in the negotiating process. This Court is not unmindful of what has been done in other jurisdictions of this State with regard to the injection of the Court or persons appointed by it, directly into the negotiating process. In my opinion however, at this point in time to have this Court involve itself or persons appointed by it directly into the negotiating process would simply insert new and additional parties into that process...who would have to be brought up to date to such an extent about the issues involved and all of the facts surrounding those issues and the positions of the parties, that it would not enhance negotiations but would, in fact, tend to impede or delay them (Oral Decision, Tacoma, pp. 12-13).

The Judges also differed among themselves as to the extent to which they should take notice of allegations of unfair bargaining. Judge Dimpick asserted that matters of unfair bargaining belonged before the Public Employee Relations Commission:

I do specifically find that that organization, PERC, does have the power, authority and duty to determine which side, if either or both, may be guilty of unfair labor practices. That is an adequate, effective remedy (Oral Decision, Seattle, p. 2).

However, in Everett, where the teachers had pressed the unfair bargaining issue very hard, Judge Bibb felt that such matters should be considered by the court:

There is certainly enough before the court...that the district has been perhaps intransigent, not acting in good faith, not conforming with the spirit if not the letter of the negotiations law. Should this then result in the court finding that the district does not have clean hands...? I don't think so. I am holding that at least in a situation of this kind where we are dealing with public education...the absence of clean hands on the part of the board, if that's the case, should not take away from the public the right to have the laws enforced. However I do think it is a proper thing to consider in what kind of an order to enter (Oral Ruling, Everett, September 15, 1978, pp. 5-6, emphasis added).

Note—A number of intriguing but unanswered questions about "precedent" arise in the Washington setting. Both teacher and board attorneys made a point of drawing the courts' attention to (a) trial court decisions in Washington, and (b) appellate court decisions in other states. (In addition, of course, great attention was paid to appellate opinions in Washington.) Does an in-state trial court opinion carry more weight than an out-of-state appellate court opinion? Where out-of-state appellate opinion is inconsistent (as it is in the matter of the enjoinder of illegal teacher strikes), do the courts pay any attention to the out-of-state opinions? How do the judges decide which line of opinion to embrace? From a reading of the oral opinions issued in Everett, Tacoma, and Seattle, it is clear that the judges were well aware of each others' opinions. However it also is clear that they did not feel bound by them--particularly where the opinion seemed unusual (as in the Central Kitsap strike). However, even where similar results were reached, as in Tacoma and Seattle, the judges sometimes took pains to separate themselves from their colleagues, as when Tacoma's Judge Swayze said that "Judge Dimmick's ruling with regard to whether the parties are coming into court with clean hands, or bargaining in good faith...would not be determinative of this Court's decision in this case" (Oral Decision, Tacoma, p. 3). In Everett it appears that Judge Bibb was much intrigued by an Idaho court opinion regarding judicial cognizance of clean hands; the Judge quoted from the opinion and commented on it at some length (Oral Ruling, Everett September 15, 1978, p. 6). Why Idaho? Did the judge decide what to do, and then seek appellate support for his decision? Did the appellate decisions merely instruct the judges with respect to the range of options open? We do not know. For a discussion of the use of out-of-state cases in labor law, see Jascourt (1977).

Observers' Opinions

Attorneys and others offered a number of explanations for the variations in action by the four judges. A board-source, commenting on judges' decisions to get involved in settlement, had this to say:

They are people. Judges are human beings, and sometimes judges take a very active role. They want to take an active role instead of ruling as judges. They want to become mediators, fact-finders, all these other things they are not, in reality, entitled to be (Interview, board source).

However, another board source felt that the likelihood of judicial intervention was more closely related to the type of setting in which the dispute arose:

(In Everett) the judge did appoint a referee who then brought the parties together and required some bargaining to take place....To some degree I think that is more a phenomenon of small towns and small counties where the judge...knows parties, and probably feels that to live in this community he's going to have to do something other than just issue an order. That has not happened in King County (Seattle). It's a metropolitan area; we have 36 Superior Court Judges. If the lawyers do their work...the courts will not involve themselves in the underlying labor problems. (Interview, board source).

History also played a part. A peculiarity of the Everett case, it will be recalled, was that Judge Bibb delayed issuance of an injunction partly because he demanded assurances from the Board that enforcement would be sought. A teacher source traced this back to an earlier strike in Everett:

Everett went out on strike two years ago and the School District went facing in to get an injunction. And the judge gave them the injunction and then the strike continued and the School District didn't come back for contempt. And the judge got very upset...But the School District...didn't go back for contempt because the bargaining process began to move. And so there was a rumor...among the judges up there that the Everett School Board was going to have a hard time getting injunctive relief again because it was obvious that they really weren't interested in an injunction; they were interested in getting some tool in negotiations, because if they'd been interested...in getting the teachers back to work then they would have come back in for contempt. And the court let it be known...that they were not receptive to having injunctive relief used as a weapon at the bargaining table (Interview, teacher source).

The analysis was substantially confirmed in Judge Bibb's oral decision, when he noted that:

I will consider entering an injunction next week, but as a condition to my consideration...it will be necessary for the district to submit to the court a plan as to how this injunction is to be served and become effective; how it is to be

monitored as to compliance, and what position the plaintiff will take with respect to an attempt to bargain away any violations of the injunction in the process of negotiations with the association. To do less than that in my view will result in the same type of situation that occurred with Judge McCrea's order (in the 1976 Everett strike) and other court orders in the past that have been disregarded. In this particular context that can do nothing more than breed a contempt of the law, already rampant in our society (Oral Ruling, Tacoma, September 15, 1978, pp. 9-10).

Note--The similarity to the San Diego situation is noteworthy. There the judge, on his own motion, initiated contempt proceedings, and the matter ultimately was appealed all the way to the California Supreme Court (see Graber, 1980c).

Several sources noted that the judges are not averse to taking note of the political implications of their decisions.

My impression is that the judge wants to be a hero. And they analyze the political wind, and if the political wind is that the citizenry wants the teachers back in the classroom, they will take the risk that the teachers might be able to mobilize against them (Interview, teacher source).

The public reaction I think is a factor that would naturally influence any human being including any judge. Judges... have to run for re-election every four years on the Superior Court. The judge who issued the injunction in the prior Tacoma strike was defeated when he ran for re-election. (The injunction) was a very strong issue. And the judge who defeated him was involved in a school strike later and refused to grant an injunction for a period of ten days or so and castigated the school board for their attitudes and everything. The whole thing had an element of...politics (Interview, board source).

Attorneys also felt that they themselves influenced court rulings:

...The reason (a penalty isn't) in the order is I didn't put it there. And I didn't put it there because if we went up on appeal on this case, I wanted to win. And I did not want the Supreme Court ducking the issue by saying the court prejudged the penalty in this case, and therefore he exceeded his jurisdiction, or something like that....When I get to the Supreme Court on a case in a strike, I want to have the record the best I can have to win, so we can get a determination of these issues....If I were a judge,...I would never enter an order prejudging or predetermining the penalty based on the assumption that people are going to violate my order (Interview, board source).

Another attorney commented on the relationship between judge and lawyer:

You've got to hold a judge back if you see he's coming down too much for you. And the school district's got to do the same thing. If a judge gets too angry at the teachers, the board's got to hold him back because they know that the action is going to be just the reverse of what's expected. Sure, they'll get an order to return to work, but they're going to have teachers so solid against them that they'll never do it. They'll never settle. So you sometimes have to tone things down (Interview, teacher source).

Note—The foregoing comments reflect a phenomenon which we were somewhat surprised to find. In Washington attorneys for both sides typically drafted proposed court orders which then were discussed in conferences with the judge. Often the court's final orders appear on the stationery of the firm which submitted the winning order, with occasional handwritten editorial changes. Here is an area where the "in chambers" aspects of injunctions may be very consequential. Unfortunately we have little knowledge of the processes—the negotiating, the persuasion, and the decisionmaking—which determines the specific content of the court's final order. Perhaps the best available evidence is found in studies of plea-bargaining.

Teacher Compliance and Non-Compliance. Of the three back-to-work orders issued, two elicited teacher compliance (Everett and Seattle) and one (Tacoma) did not. It is the former cases, not Tacoma, which are exceptional in Washington. Thirteen of the 16 injunctions issued before 1978-79 were not obeyed by teachers—a fact which helps explain one attorney's surprised reaction to the Seattle teachers' decision to return to work:

I was absolutely amazed at what happened in Seattle, just couldn't believe it... You know there have been enough strikes in Washington and I've been involved in enough of them to pretty well assume that when a restraining order is... granted... the teachers are probably going to defy it... And that one really surprised me—that Seattle deal (Interview, teacher source).

Turning first to Tacoma, sources cited several factors which help explain why the injunction, by itself, did not force teachers back to work. One board source said

it failed for the same reason that almost every temporary restraining order has failed. And that is, the teachers, the leadership of the teacher's convinced the teachers that they do not have to obey it. That striking is legal and therefore this order is of no validity and you don't have to pay any attention to it... You know, if you were a teacher and your organization stood up and said it had no binding effect at all, you might be willing to buy that. And you would be particularly willing to buy it I suppose if that's what they tell you every time. You know, that's what has gone on every time. And you read

in the newspapers, and the newspapers always say there's a dispute about whether you have a right to strike in Washington....And they want to believe it (Interview, board source).

Another board source reported that the Tacoma teachers met in five separate locations to discuss how to respond to the order—a strategy likened to a "divide and conquer" theme in which each group competed with the others in terms of militancy. Teachers, unsurprisingly, had a somewhat different view of their non-compliance in Tacoma. Our sources reported that the Tacoma teachers had a particularly long set of frustrations—partially vindicated through a recent arbitration award favoring the teachers' organization. That victory may have spurred teacher determination to persist. Our own observations suggest some additional factors. One was that, in contrast to Seattle, where the personalities of the superintendent and the president of the teachers' organization were rallying points in the strike, the Tacoma strike was more issue-oriented and power-oriented; the latter orientation may more effectively sustain teacher solidarity in a long strike and also promote non-compliance with court orders.

Some of the reasons for compliance in Seattle already have been suggested. For example, in an earlier section we quoted a board source who suggested that the deliberate pace of the injunction process was designed to assure maximum credibility of the court's order. In addition, we have suggested, there were signs of division within the ranks of the teacher organization; such division made solidarity in the face of an injunction considerably more difficult. Moreover, in Seattle there appears to have been substantial sentiment to "get on with it," where "it" was the voluntary desegregation plan that was scheduled to go into effect with the opening of school. In Seattle, it may be that the mildness of the court's order also helped induce compliance. A teacher source explained that one of the most emotion-laden aspects of the Seattle strike was a no-strike clause that appeared in the teachers' contract. Throughout the strike teacher spokespersons maintained that the clause did not apply to the special circumstances of this particular strike, but Board announcements repeatedly emphasized that teachers were violating the no-strike clause of their contract, and asked the court to make a finding to this effect. The court refused to do so; silence on this point may have made it easier for teachers to accept a back-to-work order. A teacher source also credited the unequivocal language of the court's order:

Two years ago the judge had made remarks that enabled the school board attorney to go on television and say this judge said that strikes are illegal, but allowed us to go on and say that he had not said they were illegal and in fact had denied a back-to-work order. So it was very confusing to the public to have the lawyer from each side claiming victory. There wasn't any room for that this time. The judge said, "Look, strikes are illegal. Everybody's going to be ordered

back to work" (Interview, teacher source).

Another distinction between Seattle and Tacoma--a subtle one, perhaps--lay in the nature of the coercion. While in neither case the court spoke of fines or other judicially-imposed sanctions, the Seattle Board had consistently maintained that it needed its regular teachers to operate the schools, and would not attempt to open with substitutes. Tacoma, in contrast, threatened to employ "replacement" teachers in the event the regular teachers failed to report for work. Such efforts usually backfire, particularly where the coercion is applied by the board, i.e., the nominal enemy. In Everett, in contrast, the injunction sanctions were new (fines), and came from a non-Board source (the court); in that case the coercion seems to have worked.

Our knowledge of the Everett teachers' decision to return to work--to comply with the injunction--is very scanty. However, two bits of data appear to be highly salient. One teacher source indicated that the injunction provided a face-saving device permitting teachers to return to work in the face of weakening teacher solidarity. The failure of teacher resolve undoubtedly was prompted, in part, by persistent suspicions that some of the substitute teachers employed in Everett in fact were striking Seattle teachers. While available evidence later indicated that the rumor was unfounded, it must have had profound debilitating effects on Everett picket lines. A second factor evidently was the severe coercion built into Judge Bibb's order. The Everett teacher association president indicated that while teachers might be willing to go to jail, the prospect of \$100 per day fines, on top of the wages already being lost by virtue of the district's success in keeping schools open, was simply too great a burden for teachers (WEA, 1978a: 5).

Note--The traditional concepts of "compliance" and "non-compliance" are particularly troublesome in connection with labor injunctions. Part of the problem lies in the fact that the operational distinction may simply lie in the margin of a few votes in a teacher election. That is, a 60-40 vote to comply could go the other way if only 10% of the teachers switched their votes. Thus, in speaking of "the teachers' decision to comply (or defy)" an injunction, we utilize a real unit of analysis. A second problem is that the real issue in a teacher strike usually is a contract dispute, not an injunction. It is conceivable that in Tacoma, where the teachers defied an injunction, the issuance of that injunction and the teachers' defiance of it both contributed to the development of pressures which fostered a prompt settlement. When the parties reached the precipice, they found that they could agree on previously-contested issues. In Everett and Seattle, where the teachers returned to work without contracts, it is quite possible that the boards' victories--measured by teacher "compliance" with the injunctions--were somewhat hollow. Teacher spokespersons in both districts maintained that they were hardly motivated to outstanding performance when working without contracts.

It would be interesting to assess evidence about teacher productivity under conditions in which teachers were forced back to work by injunctions, and where they were back at work with new contracts.

A Summing Up

Our analysis of events in Washington suggests several factors that result in differences among labor injunction proceedings within a common legal context. First, Washington law itself was susceptible to different interpretations. Second, trial court judges operating in this ambiguous legal context exercised their own discretion, and responded idiosyncratically to local events--with the result that they treated injunction requests in quite different ways. Third, situational factors such as teacher solidarity, board determination, and community opinion evidently affected the course of judicial events. Fourth, tactical decisions made by the two sides affected injunction proceedings and outcomes. These decisions, involving such matters as the timing of injunction requests, the nature of the relief sought, and the decision to comply or defy the court, contributed to the Washington strikes' evident dissimilarities.

Note--There is a tendency to exaggerate the significance of differences among state laws. It is true of course, that statutes vary from state to state; to an even greater extent the "leading cases" vary among states. However it appears to us that the differences more often reflect procedure than substance. When attorneys talked about the social and political dimensions of labor injunctions, and about the strategic or tactical meaning of these differences, their analytical frameworks were quite similar from state to state. To test the relative significance of interstate and intrastate differences regarding labor injunctions, it would be helpful to examine the activities of attorneys such as Ted Clark, management consultants such as Myron Lieberman, and teacher strategists such as the American Federation of Teachers' Robert Bates. These individuals are involved in strikes in many states; knowledge of the manner in which they adapt their activities and recommendations to different state laws would provide indications of the significance of differences among such laws. Unfortunately our study did not get into these interesting matters. We recommend such study, partly because it would help illuminate the workings of our federal system, and partly because it would facilitate communication across state lines. Undue attention to the legal peculiarities of states can lead to a provincialism that blocks opportunities to learn from the experience of others. The problem is hardly unique to teacher strike phenomena, of course, but it seems to be particularly mischievous there. For a similar view see Jascourt, (1977).

II. THE IRREPARABLE HARM STANDARD

The irreparable harm standard received more attention in Washington than in Collinsville (Colton, 1980a) or St. Louis (Colton, 1980b), but less than in Butler (Graber, 1980b) or Warren (Graber, 1980a). In the Illinois and Missouri cases the standard was formally acknowledged in the pleadings, but the school boards' showing of harm and the teachers' defenses against the showing were virtually non-existent in Missouri and were merely perfunctory in Illinois. In Butler and Warren, in contrast, the parties invested substantial efforts--including the examination and cross-examination of expert witnesses--in order to persuade (or dissuade) the court that irreparable harm was present. In Washington we found an ambivalent position on irreparable harm. Boards contended that no showing of irreparable harm was required, as strikes are per se harmful. But then the boards proceeded as if they had to show harm. Teachers insisted that the board must show harm, and prepared defenses against such a showing--knowing full well that the courts were unlikely to pay attention. The courts asserted that they need not find harm in order to enjoin a strike, but then found it anyway.

Before proceeding with detailed scrutiny of the treatment of the irreparable harm standard in Washington, it is necessary to consider several preliminary matters. First, by highlighting the harm standard we risk distorting the labor injunction proceedings we studied in Washington (hence our decision to relegate the analysis to an appendix). In Central Kitsap, Everett, Seattle, and Tacoma the principal litigation questions involved the lawfulness of strikes and matters of good faith bargaining. All the attorneys whom we interviewed indicated that the irreparable harm standard was not one of their central concerns in labor injunction proceedings. Board attorneys acknowledged that the standard could receive judicial attention, and teacher attorneys insisted that it should, but neither side expected that it would. The fact that boards, teachers, and judges did give some consideration to the harm standard reflects strategic and political considerations more than genuine adherence to a traditional standard of equitable proceedings. In this Appendix we give major attention to a minor matter.

Second, certain features of Washington's legal procedure and language need to be set forth. (a) Plaintiffs may seek either a temporary restraining order or a preliminary injunction. The decision evidently is based on tactical considerations. Neither type of proceeding occurs on an ex parte basis. The former simply permits a shorter interval of time between filing a request for relief and the holding of a hearing. Because a preliminary injunction proceeding occurs at a more deliberate pace, more legal documents tend to be submitted to the court, and the court's opinion presumably carries more weight. Functionally, however, the

proceedings are very similar. (b) Although witnesses occasionally have been called in teacher strike injunction cases in Washington, the typical procedure (evident in all four of the cases we studied) is for the courts to rely on motions, legal memoranda, affidavits, and oral argument by attorneys. Thus the hearings tend to be short. (c) The products of the hearings usually are an oral decision which is reported in the press and then is transcribed and circulated among attorneys, and an order which is printed and served upon defendants. Both provide indications of court treatment of the harm standard.

A third preliminary matter concerns affidavits. "Evidence" in most Washington labor injunction proceedings is developed through affidavits. Affidavits are sworn statements purporting to be factual. In the legal community affidavits are widely regarded as one of the "weakest" forms of evidence. Opposing attorneys are not present when the affidavits are prepared (in contrast to depositions), and of course the affidavits are not subject to cross-examination, since the affiants do not appear on the witness stand. Affidavits prepared by interested parties are particularly suspect. In Washington, plaintiffs' affidavits typically are prepared by members of the school administration, and defendants' affidavits typically are prepared by striking teachers, and so the affidavits are especially suspect as sources of "evidence." They are, in effect, arguments based on carefully selected facts, rather than disinterested reports of events and realities.

Fourth, we will concentrate on the Seattle case--partly because it is the one for which we have the most data, and partly because it seems to differ little (with respect to treatment of the irreparable harm standard) from the cases in Central Kitsap, Tacoma, and Everett. Our data sources from Seattle include a nearly-complete set of the documents filed in court, interviews with well-informed sources on both the board and the teacher side of the strike, an interview with the judge, a contracted-observer's first-hand account of courtroom proceedings, and a massive file of newspaper clippings. Our focus on Seattle however, will not be at the expense of useful data or insights obtained from documents and interviews from other settings. Documents will be clearly identified by type of source. However, in keeping with the procedure adopted in the main body of this report, quotations from "board sources" and "teacher sources" may be from actors in the Seattle events, or they may be from actors in other settings, where these actors had insights illuminating events in Seattle.

There is a final preliminary matter. For analytical purposes it is convenient to make distinctions which often were blurred in the "real world" we examined. Three distinguishable issues developed around the use of the irreparable harm standard. The first concerned the propriety of using the standard at all. The second, which assumes an affirmative disposition of the first, involved the conception

or definition of harm that should be used. These two questions are "legal" questions, i.e., questions ostensibly based on law, not facts. The third question falls in the realm of social facts; what was the evidence pertaining to irreparable harm? The first three sections below examine these three questions. A concluding section discusses Judge Dimmick's treatment of the harm standard.

Is the Irreparable Harm Standard Applicable?

It will be recalled that the leading Washington case, Port of Seattle, had characterized lower court action in these terms:

In its order granting the temporary injunction, the trial court concluded that the strike and picketing was unlawful; that, by reason thereof, the port was suffering "immediate, substantial and irreparable loss and damage" (Port of Seattle, p. 1101).

In sustaining the lower court, the Supreme Court said,

... We feel compelled to hold that the right to strike is subordinate to the port's immunity therefrom. It logically follows that the strike in this case was inappropriate. The resultant damage to the port being substantial, the trial court did not abuse its discretion in granting the injunction. (Port of Seattle, p. 1103).

School board plaintiffs in Washington labor injunction cases contend that Port of Seattle means that public employee strikes are per se harmful, and hence no showing of harm is needed. Teacher defendants in Washington labor injunctions insist that Port of Seattle did not preclude the necessity of a showing of harm. In view of the ambiguities of Port of Seattle, both sides turn to outside authorities to buttress their positions.

The Plaintiffs' Arguments: Per Se Harm. In a legal Memorandum the Seattle School District asserted that "unlawful strikes by teachers and other public employees are presumed to cause substantial and irreparable harm and are enjoined simply because they are unlawful" (Plaintiff's Memorandum in Support of Injunctive Relief, Seattle, p. 12). Claiming that this position had been held "with few exceptions," the Memorandum first extensively quoted from two Illinois cases: Board of Education v. Redding (1965) and City of Pana v. Crowe (1974). A case involving striking New Jersey firemen then was cited and quoted (Township of Teaneck v. Local No. 42, Firemen's Mutual Association, 1978), as was a case involving a strike by graduate teaching assistants at the University of Wisconsin (Regents v. Teaching Assistants Association, 1970). All of the quotations indicated that the strike in question was enjoined without a specific showing of harm.

Note—The cases which were quoted involved school custodians (Redding), municipal employees (Pana v. Crowe), firemen (Teaneck), and university graduate students (Regents v. Teaching Assistants). Public school teachers were not involved. Clearly the plaintiffs were relying upon a broad construction of the applicability of the Port of Seattle case, i.e., a construction indicating that the case applied to all public employees, rather than just dockworkers. However, the strategy appears to invite a court sympathetic to teachers to distinguish among public employees (as happened in Illinois, where the Redding doctrine in subsequent cases was limited to public school employees, rather than extended to all public employees). Under what circumstances do such distinctions occur? Unless the issue is pre-empted by federal courts, it seems likely that the political preferences of judges, rather than fine points of law or the weight of "authority," will determine the outcome.

In an apparent effort to include teachers among the "public employees" to whom the per se argument presumably applied, the Seattle Memorandum referred to (but did not quote) teacher strike cases in Connecticut and California; these strikes, said the Memorandum, further supported the rule that "unlawful strikes are enjoined without a specific showing of substantial or irreparable injury" (Plaintiff's Memorandum in Support of Injunctive Relief, Seattle, p. 15).

Note—The writer is not an attorney, and so it is with some trepidation that I suggest that these cases do not seem to give much support to the Seattle Board's position. The Connecticut case, McTigue v. New London Education Association (1973) is principally concerned with a contempt proceeding. However, the court also observed that legislatures are within their rights to declare public employee strikes unlawful. With respect to obtaining injunctive relief from such strikes, the court said that "A governmental body can, under proper circumstances, obtain injunctive relief forbidding a strike by public employees" (McTigue, p. 466; emphasis added). The Connecticut court then cited several cases including, interestingly, the Holland case (which suggested that irreparable harm was an appropriate consideration in the exercise of judicial discretion in awarding injunctive relief). Thus the Connecticut case appears to give, at best, very weak support to the Seattle Board's contention, and may even lead in the opposite direction. The California case, Los Angeles Unified School District v. United Teachers (1972) is not much more helpful. There the court considered an injunction that teacher appellants complained had been issued "without the proper showing of irreparable injury to justify equitable relief" (Los Angeles, p. 808). Claiming that this and other disputed issues had been "exhaustively treated, with extensive citation of authority," in three other California appellate cases, the

California appellate court simply affirmed the Los Angeles order.

The point we wish to make is that, given the haste with which labor injunction cases are handled; it is highly unlikely that the courts will benefit from the advantages normally cited for adversary proceedings. Opposing attorneys simply do not have time to prepare thorough critiques of each others' legal positions. The Seattle School Board's Memorandum relies upon two federal court cases, 19 out-of-state cases, 14 Washington cases, and a host of citations to statutes and administrative regulations. In the condensed time-frame of an injunction proceeding, the costs to defendants of developing careful analyses of each of these citations would be prohibitive, even if logistically feasible. What may happen, in effect, is that the time constraints tempt attorneys to "throw everything in," partly in hopes that the sheer number of citations may impress a judge, and partly in the expectation that an opposing attorney is unlikely to be able to do a point-by-point critique. In different terms, the strategy becomes one of persuading the court of the merits of one's own position, rather than engaging in a careful critique of the other party's position. There is advocacy on both sides, but the proceeding is hardly adversarial. As we shall see in a moment, the process provides occasions in which a court may be misled.

In raising questions about the inclusion of the California and Connecticut cases in the Seattle School Board's legal Memorandum, we are not implying that the exclusion of these cases, or the inclusion of different cases, would have had any effect upon the outcome of the Seattle case. Our point, rather, is that the question of the place of the irreparable harm standard in teacher strikes was not closely argued or adjudicated. The issue received only enough attention to satisfy the needs of the moment; comprehensive analysis was foregone.

Continuing its argument, the Seattle Board's Memorandum took brief note of Holland, and then cited a labor law text indicating that Holland was no more than "a major exception to the general rule that injunctive relief is available to public employers without a showing of irreparable harm" (Plaintiff's Memorandum in Support of Injunctive Relief, Seattle, p. 15). Concluding, the Memorandum quoted Port of Seattle with an approving comment: "The court correctly presumed that an illegal strike automatically causes sufficient harm to a public body so as to warrant temporary and permanent injunctive relief" (Plaintiff's Memorandum in Support of Injunctive Relief, Seattle, p. 16).

Note--To this point we have implied that the arguments set forth in the Seattle Board's Memorandum were creations of the Board's attorney. In fact, however, with the exception of

the references to the Connecticut and California cases, the argument is a near-exact copy of the argument set forth by the Board of Education in the Central Kitsap and Tacoma cases. We do not know who copied whom. Perhaps all the memoranda echoed those of cases argued at other times and places. We set aside our professorial sensitivity to plagiarism. In trial courts, where the same legal issues arise in case after case, and where judicial determination is required in each case, it clearly would be wasteful to labor at crafting new legal arguments in every case. (Of course, if the same affidavits cropped up in different cases great skepticism would be warranted, for our system of trial courts rests on the assumption that facts differ from case to case. Theoretically the law does not.) Perhaps the main question then, is why legal arguments occasionally differ from case to case. Perhaps the answer is obvious: where plaintiffs usually win, as they do in labor injunctions in Washington, the sensible course of action is for them to stay with their winning arguments. The burden is on the defendants to cast about for new arguments which may turn the tide. Indeed, in our Washington cases there was far more variety among defendants' memoranda than among plaintiffs' memoranda, insofar as the irreparable harm standard is concerned. But in Washington creativity was no match for tradition.

The Defendants' Arguments: Per Se Harm. The Seattle Teachers Association argued that an injunction was an extraordinary remedy which would not issue "except upon a clear showing by the school districts of (1) invasion of a clear legal right, (2) consequent irreparable harm, (3) favorable balance of equities, and (4) clean hands" (Defendants' Brief in Opposition to Motion for Preliminary Injunction, Seattle, p. 22). Defendants grounded their position upon the Washington statute governing injunctions and upon a 1952 case which held that:

Granting or withholding of a temporary injunction is addressed to the sound discretion of the court, to be exercised according to the circumstances of the particular case.... That discretion must also be exercised within the bounds of established rules and principles of law. An injunction pendente lite will not issue in a doubtful case nor where the material facts in the complaint and supportive affidavits on which the right depends are controverted or denied (Isthmian Steamship Co. v. National Marine Engineers Beneficial Association, 1952: p. 247).

Note--The initial case cited by the defendants, like those initially cited by plaintiffs, did not involve teachers. Indeed it did not even involve public employees. Thus, while the school board built their case about the irreparable harm standard by invoking cases involving public employees generally, the teachers' argument rested on injunction rules applied in private sector employment (Defendants' Brief in Opposition to

Motion for Preliminary Injunction, Seattle, pp. 23-25).

The applicability of the Isthmian case to teachers was suggested by discussing and quoting from a recent Idaho case and from the Holland line of decisions. In the Idaho case, School District v. Oneida Education Association (1977) the Supreme Court dissolved an injunction, saying that "mere illegality of an act does not require the automatic issuance of an injunction" (Oneida, p. 834). The defendants' Memorandum then quoted Holland, including the passage that "it is basically contrary to the public policy of this State to issue injunctions in labor disputes absent a showing of violence, irreparable injury, or breach of the peace..." (Holland, p. 210, emphasis added by Seattle defendants).

Analogous language from Westerly was quoted, and then a long passage from Timberlane was presented; the latter dealt not only with the irreparable harm standard but also with other traditional equitable standards, and stood for the proposition that injunctive relief in teacher strikes should not issue except in the most unusual circumstances--whatever the legality of the strike. An extensive list of "authorities" then was presented, with the admonition that "the Holland line of decisions is in accord with the weight of scholarly authority on the subject of public employee strikes" (Defendants' Brief in Opposition to Motion for Preliminary Injunction, Seattle, p. 27).

The last of the "scholarly authorities" was a Washington Law Review article that discussed the Clover Park case. That case, according to the Seattle defendants' Memorandum, "held that a school district seeking to enjoin a teacher's strike must demonstrate 'that the public health and safety is being harmed'" (Defendants' Brief in Opposition to Motion for Preliminary Injunction, Seattle, p. 28).

Note--In an earlier Note we observed that in the context of expedited labor injunction cases, extensive citation of appellate authority by plaintiffs probably made it difficult for defendants to respond with careful critiques. Defendants played the same game, and indeed carried it further, citing not only appellate cases, but also trial court cases and a host of academic writings. While we are reluctant to say that the defendants were here employing a "baffle them with baloney" strategy (as one teacher source characterized the legal strategy used in another state), we are unable to dismiss altogether the idea that the phrase has some applicability here. However, the label is of less significance than the function. If both the plaintiffs and the defendants inundate the court with citations, what is a judge to do? In the trial courts law clerks rarely are available to check citations, and in any event the press of the calendar precludes any extensive analysis of cases cited in oral argument or in memoranda. One strategy open to a judge is to decide an issue on non-legal grounds, i.e., personal predilection, sensitivity to public opinion (or re-election), or social philosophy. Another is to decide an issue as other courts have decided it. The legal profession calls this strategy "adhering

to precedent." When faced with conflict, it is a common human and organizational response to act on the basis of past actions, rather than to seek new solutions. Perhaps the legal profession simply has made a virtue out of necessity.

The defendants' arguments in Seattle, like the plaintiff's, were not unique to that case. Virtually every passage was identical to passages in the defendants' memoranda in Everett and Central Kitsap (with respect to the irreparable harm standard). (We did not obtain the defendants' Memorandum in Tacoma, but a teacher source indicated it was closely patterned on the Central Kitsap work.) The Everett Memorandum, despite identities with Seattle's, was far more elaborate, and parts of it are worthy of mention, as follows.

Additional Defendants' Arguments: Everett. In Everett the defendants' legal Memorandum included a detailed critique of the Port of Seattle case. The rules of grammar were applied:

This counsel anticipates that plaintiff will rely upon language contained on page 319 of the Port of Seattle case to support its position as follows:

In its order granting the temporary injunction, the trial court concluded that the strike and picketing were unlawful; that by reason thereof the Port was suffering "immediate, substantial and irreparable loss and damage."

Plaintiffs will no doubt argue that the phrase "that by reason thereof" refers to the word "unlawful" and that because of this a teacher strike is automatically enjoined. Such conclusions are improper.

By ordinary rules of sentence structure, it is plain that the prepositional phrase, "by reason thereof" must refer back to the noun "strike", which noun has been modified in this case by the word "unlawful". Reading the above language in that fashion it is clear that the court intended that the notion be enunciated that it was a result of the strike that the Port was suffering the harm and damage, not as a result of the "unlawful" nature of the strike (Defendants' Memorandum of Authorities in Opposition to Motion for Temporary Relief, Everett, p. 15).

Note--Several features of the argument warrant notice. First, it is apparent that the argument was prepared even before the Everett Board filed its petition for injunctive relief. The defendants' response then, was anticipatory. The answer preceded the question. Gamesmanship of this sort may be necessary to the legal process, but it can hardly be calculated

to enhance the legitimacy of the legal process in the eyes of affected parties. Second, if the rules of grammar must be invoked in order to ascertain the meaning of a Supreme Court opinion, one must ask about the efficacy of law as a device for social control. Most people, we suspect, are likely to act upon their own preferences, rather than the rules of grammar, where the law is ambiguous.

The drawn-out nature of the Everett proceeding evidently gave the Everett teachers' attorney an opportunity to introduce new arguments concerning the harm standard. (These arguments may have been provoked by the plaintiffs' submissions, which we did not obtain.) In a Supplemental Memorandum the Everett attorney went beyond his grammarian's challenge to Port of Seattle. An "essentiality" doctrine was offered as a substitute for the sovereignty doctrine undergirding Port of Seattle:

Even if the rationale which plaintiff contends is inherent in the Port of Seattle case is rejected as insufficient, the question remains whether there is some other governmental interest which would justify the state in prohibiting all teacher strikes. A review of the literature, as well as the relevant legislative history in various states throughout the country, makes it abundantly clear that the asserted justification for prohibiting strikes in any segment of employment is that the services in question are deemed so essential to the public health, safety, or welfare that any interruption would cause immediate and irreparable harm..

...an absolute prohibition on teacher strikes would meet the due process requirement only if it could be demonstrated that all such strikes necessarily endanger the public health, safety, or welfare. There is no empiric support whatsoever for such a position.

While it is true that some public employees perform services that are so essential that they cannot be discontinued for even a brief period of time without seriously disrupting a community, teacher strikes do not come within this category. Although entrusted with a serious responsibility to the community, they do not perform functions directly affecting the public health, safety, or welfare.... Schools are frequently closed because of communicable diseases, broken boilers, inclement weather, and a variety of other causes.. The children may have an unexpected holiday but no one could seriously argue that there has been permanent damage and irreparable injury to their psyches, a deterioration of their character or irretrievable loss of their opportunity to learn. School calendars are sufficiently flexible so that a day lost in October can readily be made up by appropriate adjustment in the program,

or if necessary, by a later termination of the school year in June (Defendants' First Supplemental Memorandum of Authorities in Opposition to Motion for Injunctive Relief, Everett, pp. 7-8).

Although the essentiality argument evidently did not persuade the court, it at least ploughed new ground. Perhaps in some future case a Washington court will seize upon the argument—much as Judge Bryan in Central Kitsap seems to have acted upon the teachers' contention that the legislature in Washington had not outlawed teacher strikes. For our purposes, the Everett argument sets the stage for our next question: What is irreparable harm?

Defining the Standard

As noted in the previous section, the plaintiff's principal contention was that teacher strikes are per se harmful, where defendants argued that the per se argument was not applicable. Since the law in Washington is not crystal clear on the point, i.e., since there was the possibility that a court might require a showing of harm, it was necessary for the parties to argue the harm standard as if it might be germane. Argument required, first, some clarification of the legal meaning of irreparable harm, and second, a mustering of evidence pertaining to the standard. In this section we deal with the first problem.

Plaintiff's Definition of Harm. In its memoranda, the Seattle School District developed a conception of harm that was both "low" (i.e., not requiring truly extraordinary circumstances), and "broad" (i.e., encompassing many possible varieties of harm). The plaintiffs began by contending that irreparable harm meant "great injury" in Washington's injunction statute; a plaintiff was not required to show an "emergency," or "catastrophe" or "violence" or "the complete cessation of educational activities" (Plaintiff's Memorandum in Support of Injunctive Relief, Seattle, p. 16).

Turning next to cases in states where the "minority rule" (i.e., the Holland line of cases) had been discussed, the Board's attorney cited several cases that, together, implied that a plaintiff required to show harm could do so in a variety of ways—none of them very demanding. A 1974 Delaware case was cited; it said that pecuniary damages need not be great and that irreparable harm depended on "interference with a legal right" (State v. Delaware Educational Association, 1974: 875). A California case was said to justify injunctive relief on the grounds that "(1) over half of the district's teachers had not reported for work; and (2) the teachers' strike could result in a loss of state and federal funds to the district" (Los Angeles Unified School District v. United Teachers, 1972: 807). A 1976 Rhode Island case found irreparable harm in disruption to the school calendar, failure to provide free lunches for needy

children, and "the disadvantage seniors might experience from an untimely entry into the job market caused by a late school closing" (Menard v. Woonsocket Teachers Guild-AFT, 1976: 1354). A 1977 Michigan case was said to warrant injunctive relief as a "means for assuring the uninterrupted delivery of vital educational services to the public" (Lamphere Schools v. Lamphere Federation of Teachers, 1977: 829). Finally a 1969 New York case was quoted; the court had noted an illegal strike's effects upon "thousands of impressionable students...of teachers blatantly disobeying a statute enacted by the legislature of this state" (Union Free School District 21, Town of Oyster Bay v. Klein, 1969).

Note—At the risk of being redundant, but in the interest of reminding the reader of the central concern of our investigation, it is worth noting that the citations do not establish evidence that would be required for a court to find that seniors are disadvantaged, or that youngster's impressions are harmed, or that educational services are vital. Rather, the cases propose the topics about which evidence would be presented, in the event that evidence was required by the court. In different terms, the cases establish the rules, not the evidence. Defendants, as we shall see, sought to establish a different set of rules, and, consequently, a different set of evidentiary requirements.

Summarizing these out-of-state cases, the Seattle plaintiffs said

Thus courts applying the minority rule requiring a showing of harm have found strikes by public school teachers to be enjoined when they have involved disruption of calendars or other interruption of educational services; when they have affected the academic or vocational opportunities of students; when they have the potential to affect the district's eligibility for state or federal funds; or when they confront impressionable students with non-compliance with the law on the part of striking teachers (Plaintiff's Memorandum in Support of Injunctive Relief, Seattle, p. 19).

The Board also advanced a constitutional argument. The Washington Constitution and compulsory attendance laws, said the Board, "create a right in students to continuous, uninterrupted education, and impose on school districts the highest obligation to maintain a sound, continuously functioning school system." The strike interfered with that right and duty (Plaintiff's Memorandum in Support of Injunctive Relief, Seattle, pp. 19-20).

In a Supplemental Memorandum submitted to the court on the day of the hearing, the Seattle Board further elaborated on the nature of the irreparable harm standard (without surrendering its principal position that the standard was satisfied on a per se basis). Broadening its previous argument that harm was inflicted upon the

district, itself, and upon students, the plaintiffs spoke of harm to "the District's constituents." Harm to the latter was to be inferred from the affidavits of the intervenors--who had materialized after the first Memorandum had been drafted and who shortly would receive a court ruling allowing the Board to incorporate their affidavits as the Board's own (Plaintiff's Supplemental Memorandum in Support of Injunctive Relief, Seattle, pp. 9-10).

A final argument warrants special notice. Responding to the STA's charges of bad faith bargaining, and to the teachers' assertion that the "dirty hands" of the Board precluded the issuance of injunctive relief, the Board suggested that irreparable harm took precedence over clean hands in the case of injunctions against teacher strikes. The argument was supported by rulings in Board of Education v. New Jersey Education Association (1968) and Menard v. Woonsocket (1976), where the courts had said that strikes injured children and the public, and that charges of bad faith bargaining therefore were not relevant to the issuance of injunctions (Plaintiff's Supplemental Memorandum in Support of Injunctive Relief, Seattle, pp. 11-13).

Defining Harm: Defendants' Position. Defendants' interests would not have been served by advancing a particular conception of irreparable harm. Their strategy was to (a) insist that the plaintiffs must make a strong showing of irreparable harm, and then (b) challenge that showing. Ideally, of course, the challenge would have been based upon evidence submitted to the court, or, if testimony were not allowed (as usually is the case in Washington labor injunction cases) through affidavits. In addition however, defendants approached the definitional problem as a matter of law. The approach emphasized the negative, i.e., what did not constitute irreparable harm.

First the Holland case was quoted:

(T)he only showing made to the chancellor was that if an injunction did not issue, the district's schools would not open, staffed by teachers on the date scheduled for such opening. We hold such showing insufficient to have justified the exercise of the plenary power or equity by force of an injunction (Holland, p. 210).

Then language from Rhode Island's Westerly case was quoted:

(T)he mere failure of a public school system to begin its school year on the appointed date cannot be classified as a catastrophic event....There is a flexibility in the calendaring of the school year that not only permits the make-up days which might have been missed for one reason or another, but also may negate the necessity of the immediate injunction which could conceivably subject some individuals to the court's plenary power of contempt (Westerly, p. 445).

New Hampshire's Timberlane case was invoked:

We are persuaded...that it would be detrimental to the smooth operation of the collective bargaining process to declare that an injunction should automatically issue where public teachers have gone on strike....The courts should intervene in this process only where it is evident the parties are incapable of settling their disputes by negotiation or by alternative methods such as arbitration and mediation (Timberlane, p. 558).

Note--To our non-lawyers' minds it is hard to see how the Timberlane case was helpful to the teachers' case in a drawn-out strike, such as Seattle's became. A plausible inference to be drawn from the New Hampshire court's opinion is that injunctive relief may be warranted in an extended strike. Perhaps if the teachers' Memorandum had been prepared late in the strike, rather than at its inception, the Timberlane citation would have been handled differently. However, teachers' attorneys are not at liberty to delay the creation of their legal memoranda. These documents must be ready for presentation whenever the Board chooses to file for injunctive relief. Typically, in Washington, such filing occurs early in a strike. In Seattle the Board's unexpected decision to proceed slowly had the effect of partially attenuating some of the teachers' legal arguments.

The defendants also cited one appellate court case in Washington. In Mead School District v. Mead Education Association (1975) the court had considered whether a teacher strike was a sufficient "emergency" to warrant Board waiver of the state law requiring notice of meetings. The court held that a strike was not that sort of "emergency." From that the teachers concluded that.

If a teachers' strike is not such an "emergency" as to permit the school board to bypass the notice of meeting requirements....it seems clear that it certainly does not, absent specific proof to the contrary, amount to the type of emergency justifying the issuance by a court of equity of an extraordinary strike-breaking restraining order (Defendants' Brief in Opposition to Motion for Preliminary Injunction, Seattle, p. 30).

No further legal arguments were offered in the teachers' memoranda vis-a-vis the nature of the irreparable harm standard. Much more attention was paid to the problem of evidence--a matter to which we now turn.

Evidence on Irreparable Harm

The previous sections showed that plaintiffs tried to persuade

the court that it was not necessary to provide evidence of irreparable harm; defendants insisted that a showing was necessary before injunctive relief would be granted. The parties then developed differing conceptions about the nature of the irreparable harm that must be shown, should such showing be required. The remaining task then, was for the plaintiffs to muster the evidence which might be needed to show harm, and for the defendants to challenge the board's evidence directly or by submitting their own evidence indicating that the strike was not creating irreparable harm.

The Seattle Plaintiffs' Showing. The plaintiffs attempted to show irreparable harm in (a) their initial Complaint, (b) their legal Memoranda, (c) their Affidavits, and (d) the Affidavits adopted from the parent group which tried to intervene in the case.

(a) and (b) The Complaint and Memoranda

Complaints and legal memoranda usually do not present evidence. Rather, they set forth claims about which the plaintiff is prepared to offer supporting evidence (through affidavits, testimony, exhibits, etc.). In its Complaint Seattle alleged that the strike was creating the following types of irreparable harm to the district:

- "material and substantial interference with the District's primary educational responsibility of ensuring the opportunity of all District students to attain their educational objectives"
- "impairment of its operations"
- "closure of the schools"
- "(potential) loss of state support funds"
- "(potential) cancellation of previously scheduled school events"
- "extension of the school year which disrupts the plans of the District's constituents and necessitates extra maintenance, personnel, and transportation costs"
- "the health, safety, and welfare of students and nonstriking employees are seriously threatened" (Complaint for Injunctive Relief and Declaratory Judgement, Seattle, pp. 5-6).

The district's initial legal Memorandum essentially repeated these allegations, with a few embellishments. The harm associated with extension of the school year would affect "the summer school, college entrance and vacation plans of thousands of District students, parents, and non-striking employees." The threat to health, safety, and welfare would result from the opening of schools in "the absence of the full, regular teaching staff." The potential loss

of state aid could result because of state regulations setting program standards (e.g., staffing ratios, safety provisions) which must be met in order to qualify for aid; however, the district pointed out, the aid was not jeopardized "if there is a court order directing teachers back to work" (Plaintiff's Memorandum in Support of Injunctive Relief, Seattle, pp. 20-21).

Note--The irony in this last point warrants notice. The state administrative rules cited by the district evidently were designed to assure a minimum level of program adequacy; failure to achieve such a level would result in forfeiture of state aid. Yet the rules provided that a court order--ostensibly designed to avert harm--would protect state aid entitlements even if the educational program failed to meet standards!

The legal Memorandum added a further type of harm not mentioned in its Complaint: "loss of support for financial propositions for school funding caused by a strike-induced frustration of voters and parents....Loss of such funds would entail material cuts in the educational programs and services of the district" (Plaintiff's Memorandum in Support of Injunctive Relief, Seattle, p. 21).

Two additional aspects of the irreparable harm case were added in a Supplemental Memorandum, submitted to the court on the day of the hearing. First, the district pointed out the defendants' own affidavits were premised upon short strikes; however, the present strike was now "major" and hence the defendants' affidavits did not apply. Further, the district referred to the evidence of damage included in the affidavits submitted by the parent intervenors--implicitly incorporating those affidavits in the Board's case (Plaintiff's Supplemental Memorandum in Support of Injunctive Relief, Seattle, p. 10).

Note--The Board's allegations reflect one of the most difficult strategic aspects of the irreparable harm standard. In effect, the plaintiff who is to prove harm must somehow muster evidence about future events and their consequences. Such social prognostication is a task which even professional social forecasters carry out with carefully constructed probability statements and all sorts of hedges. But a plaintiff using cautious language is open to challenge from the other side. Thus the legal language acquires an unwarranted tone of certitude, and it becomes argumentative. Neither is likely to enhance the legitimacy or credibility of the court proceedings. In effect, the labor injunction inspires greatly exaggerated claims.

Theoretically the problem could be lessened where a strike has been under way for some time, as in Seattle. In such situations data generated by the strike itself could be used. However, the politics of a strike and the inertia of the

legal process militate against using data from the strike itself as evidence. The legal memoranda of both parties were prepared before the strike began, as both attorneys were primed to act at the behest of their clients, rather than at the time which might be most conducive to a showing of harm. Most of the affidavits were prepared at the inception of the strike. Opportunities for making adjustments thereafter were quite limited, and probably were not fully utilized in view of the general expectation that evidence of harm would not be decisive in any circumstances. Comparative data from settings where the irreparable harm standard is formally used would help clarify this point. A partial comparison can be made by contrasting the Board's evidence with that of parents, filed suit in the third week of the strike.

(c) Seattle's Affidavits

The Seattle Board's "proof" of irreparable harm was contained in four of the six affidavits submitted to the court. (Two were limited to descriptions of the bargaining process.) The Affidavits of Board President Patt Sutton, Superintendent David Moberly, Associate Superintendent Harold Reasby, and Personnel Director Robert Weltzien depicted a mosaic of harm which the strike would inflict on the district. Sutton and Moberly stated that the strike had made it impossible to open schools as scheduled. Weltzien cited the 1976 strike, in which the district had attempted to use substitute personnel; the efforts, he said "were unsuccessful in fully staffing the schools for the reason that the number of qualified certificated teachers necessary to staff a school district the size of Seattle's were not then (as they are not now) available in the local labor market" (Affidavit of Robert T. Weltzien, Seattle, p. 2). Three of the affiants made special note of the desegregation plan which was scheduled to go into effect with the opening of the 1978-79 school year; all stated that the success of the plan was dependent upon the availability of the regular teaching staff, which had received special training in anticipation of the plan's implementation. Additional assertions were pretty much a "laundry list," as follows:

--Sutton cited "hundreds of complaints, statements of concern, and pleas from citizens, parents and students...to open schools for the reason that students are being harmed by the continued closure of school and by the example of the students' teachers...violating State law" (Affidavit of Patt Sutton, Seattle, p. 2). Reasby also cited "the harmful impression left upon thousands of young citizens, the District's students, by their teachers...striking in disregard of State law and contractual agreements" (Affidavit of Harold V. Reasby, Seattle, p. 3).

--"The likelihood of having to cancel many worthwhile school events including athletic events, dances and other student

activities" was cited by Moberly and Reasby (Affidavit of David L. Moberly, Seattle, p. 3; Affidavit of Harold V. Reasby, Seattle, p. 3).

Note—The use of identical words by different affiants provides one clue to the low value given to affidavits as matters of evidence. Perhaps the words were drafted by the attorney for the Board, or perhaps one of the affiants simply copied the words of the other. In either event it is difficult to think of the words as careful reports of independent and objective observers. Further, no specific events or activities were cited. Finally, one must ask whether the cancellation of a school dance or athletic events qualifies as "irreparable harm." The reason for the Board's prior effort to establish a definition of harm that was "low" and "broad" is obvious here.

--Reasby claimed make-up days would impose "substantially increased maintenance and personnel costs for the District" (Reasby, Seattle, p. 2).

--Reasby singled out Special Education classes. "Special education students more than others need continuity in their highly structured programs...Loss of the continuity of developmental and speech therapy, psychological services, resource room and self-contained classroom programs may cause these students to regress in performance" (Reasby, Seattle, pp. 2-3).

Note—Here Reasby touched upon (without any real evidence) what may be the Achilles heel of teacher claims that strikes do not create irreparable harm. While we have not researched the area ourselves, it is noteworthy that Judge Dimmick, in enjoining the strike, gave Special Education her particular attention. Moreover, national and state legislation increasingly is giving Special Education the status of a "right." Future litigation in labor injunctions, we suspect, will give more and more attention to the harm wrought in this particular area.

--Moberly spoke of "anticipated day care costs and inconvenience for many parents of school age children" (Moberly, Seattle, p. 4).

--Sutton and Moberly both expressed the view that the strike would jeopardize chances of success of future local tax levies.

--Moberly elaborated upon the effects of extending the school year. Such extension, he said, would disrupt and alter the summer school and vacation plans of "hundreds of District students and parents"; place Seattle students "in a less competitive position for summer employment opportunities"; postpone graduation for seniors, "some of whom need and plan to enroll in summer school courses in order to meet college entrance requirements"; disrupt the summer plans of the district's non-

certificated employees; and disrupt summer maintenance schedules (Moberly, Seattle, p. 4).

--The strike would disrupt the schedules of the city's Parks and Recreation Department, said Moberly./

Note—The foregoing excerpts accurately convey the level of specificity incorporated in the Board's affidavits. Virtually no "hard facts" were submitted. Sutton's claim of "hundreds" of complaints was wholly unsubstantiated. No specific extra-curricular activity was mentioned. No specific evidence of harm in the Special Education area was brought forth. No person whose summer plans would be disrupted was mentioned. And so forth. The affidavits, in short, were general statements not meeting the burden of "strict proof." It may be that this general level of treatment reinforces teacher views that strikes do not create harm or that court orders ostensibly predicated on a showing of harm are of dubious credibility.

A further indication of the limitations of affidavits was apparent in the Tacoma case, where the Associate Superintendent's Affidavit attesting to harm contained assertions that were word-for-word copies of assertions which earlier had appeared in the Affidavit of Seattle Superintendent Moberly. We found no clearer illustration that, in Washington at least, it was the appearance of harm, rather than evidence of harm, that was conveyed to the courts in labor injunction proceedings. On the other side, teachers' counteraffidavits were much the same. In Everett the teacher attorney evidently submitted 69 affidavits from parents, who simply were required to fill in blanks indicating the number of children they had, and the schools attended; the rest of the affidavit was a standardized claim that "a delay in schooling will not in any way adversely affect my child's educational process of learning." In Seattle the teachers' Affidavits (discussed below) were not exact copies of each other, but it is obvious that many of them were responsive to a common stimulus—perhaps an outline provided by the STA attorney.

Intervenors' Evidence of Harm. On September 22, a group of parents, students, and taxpayers petitioned the court for permission to intervene in the case, contending that they "have interests at stake here which may not coincide with the interests of Seattle School District No. 1 and the Seattle Teachers' Association" (Affidavit of Greta Weigand, Seattle, p. 3). The group sought an order which would require concurrent good faith bargaining by both parties.

At the court hearing the motion to intervene was denied, but the group's supporting Affidavits were added to those of the Board of Education, and hence became a part of the formal record. The Affidavits dealt very directly and forcefully with irreparable harm. One of the Affidavits was from a mother who had three children with

learning problems. The mother maintained that the "delay in the opening of the schools, and the resulting uncertainty is definitely affecting their mental and psychological well-being," that "every day that the schools are closed now is a lost opportunity to make up the ground that has been lost over the summer," and that "the special responsibilities that fall on the shoulders of a parent with handicapped or learning disabled children are difficult to explain, but we desperately need the formal assistance and care that our children receive in the public schools" (Affidavit of Terri Boies, Seattle, p. 2).

Note--In an earlier Note we called attention to the special vulnerabilities which Special Education poses for teachers in strike litigation. The foregoing Affidavit spells out some of the difficulties in poignant detail. It is worth noting, in passing, that litigation currently under way in Pennsylvania is aimed at establishing that even loss of summer school infringes on the rights of handicapped children. This litigation could become a major asset for plaintiffs' efforts to show irreparable harm, unless teachers devise strike strategies which permit continuation of services for Special Education youngsters. Such strategies will become increasingly difficult if the current trend toward "mainstreaming" continues.

An Affidavit from a student maintained that the delay in opening of schools would handicap students seeking admission to competitive colleges, disadvantage Seattle students in the competition for scarce summer jobs, and result in loss of activities revenues used to support various student functions "that enrich our educational experience." Concluding, the student said:

We students seem to be pawns caught up in the struggle. We do not feel that we should be forced to take sides for or against either the Teachers Association or the School District. We do feel that the needs and concerns of the students of Seattle are being ignored now; I sincerely believe that the students of Seattle are suffering the most while these schools are closed as a result of the strike. It is impossible for anyone to compensate or correct the harm that all of us have already suffered (Affidavit of Carla Rossi, Seattle, p. 3).

Note--Interestingly, the losses mentioned here have virtually nothing to do with classroom teaching and learning. Evidently getting into college, getting summer jobs, and the extra-curricular program are the crucial things to this student. A cynic might infer from this that classroom teaching and learning are merely incidental aspects of schooling. The "back to basics" movement--if it results in downplaying the significance of non-classroom outcomes, may ultimately be useful to teachers' efforts to fight injunctions--assuming, that is, that delayed and disrupted schooling does not interfere with teaching and learning of the basics. As we will see, the

teachers' Affidavits squarely focused on classroom teaching and learning.

A parent whose child had experienced the 1976 strike stated that "that strike ruined her whole year. It was a terrible emotional jar which left her with a feeling of abandonment...I believe this resulted in her learning to read later than she would have had she not been subjected to those conditions." This parent further explained that she was incurring inconvenience and additional costs necessitated by child care, and that she "(does) not understand how the teachers can expect to establish any sort of ethical behavior or respect for authority in the schools when they are willing to participate in such unlawful behavior for their own ends. I believe this has a serious and perhaps irreversible negative impact on the Seattle Public Schools." Finally, she said, she was

deeply concerned that this sort of continuing disruption in the public schools will cause many responsible parents who are genuinely concerned about their children's education to give up on the public schools and place their children in private schools. This withdrawal of support by the middle class, of all races, can deal a fatal blow to the schools and to the community at large (Affidavit of Eleanor Sundquist, Seattle, pp. 1-3).

Another Affidavit reflected the experience of a mother who had quit her \$2.65 per hour job because babysitting costs of \$2.00 per hour were using the funds which the job was supposed to provide for "extra clothes for the children" and to "pay for school photos" (Affidavit of Iva Tyson, Seattle, p. 1).

Note—The intervenors' Affidavits clearly complemented those of the district. They also offered more explicit detail about the effects of the strike: Perhaps their most intriguing feature however, is the chasm which they reveal between teachers and parents. While the teachers focused on teaching and learning in the subject areas customarily associated with schooling, parents focused on the harm to the schools' custodial functions, to taxpayer support, and to extracurricular aspects of schooling. If irreparable harm ever becomes an important consideration in Washington labor injunctions, it may be necessary for the courts to weigh the relative significance of harm to the various functions of schooling. That will be a difficult task indeed.

Seattle Defendants: There is No Evidence of Irreparable Harm.

Note—When the present study first was conceived, we were intrigued by the conundrum which, we thought, confronted teachers with respect to the irreparable harm standard. How could teachers possibly argue that strikes were not harmful? Would

it not be self-defeating? In Pennsylvania we found that a principal strategy was to rely on the rules of evidence as a device for contesting the board's effort to show that a strike was harmful. In Michigan expert witnesses were summoned by the teachers. However in Washington, where injunction requests typically do not include the presentation of testimony, it was necessary for the teachers to assert positively that a strike does not create irreparable harm. As the evidence below will show, the teachers' burden is not quite as severe as we first imagined. They argue, first, that a strike is not a loss, but rather a delay in schooling. Moreover, blame for the delay is assigned to the board of education. Even where schooling is lost, however, loss is not uncommon, as children regularly miss school for illness, family vacations, testing, and the like. Teachers also point out that they are professionally prepared to cope with schedule readjustments, which frequently occur as a result of factors beyond their control. Finally, regarding the non-pedagogical harm cited by plaintiffs (e.g., loss of state aid, community disruption) the teachers tend to be silent. Privately however, they asserted that the loss of state aid is fictitious, that past experience indicates that strikes cause no loss of taxpayer support, and that the community inconveniences are simply inconveniences, rather than manifestations of irreparable harm. The manner in which the teachers' position is developed is illustrated below.

At the beginning of the Seattle strike STA attorney Green secured two- to three-page Affidavits from 21 of the district's most experienced teachers. (Other Affidavits, which were much more detailed, were designed to substantiate the teachers' charge that the district had "unclean hands"; here those Affidavits are ignored.) Three major themes pertaining to irreparable harm pervade the teachers' Affidavits. First, the teachers cited their experience in the 1976 strike to support their contention that no irreparable harm was involved:

- A social studies teacher wrote that his students were "not adversely affected by the strike," that "nothing was omitted from the State mandated U.S. History course, that I taught," that all of his Advanced Placement students passed the special CEEB examination, and that the football team he coached "finished as a runner-up in the State High School Football Championship (Affidavit of James N. Creighton, Seattle, pp. 1-2).
- A math teacher wrote that in 1976 "the nine day delay did not have any lasting negative effect on the education of any of my students" (Affidavit of Dennis J. Anderson, Seattle, pp. 1-2).
- A home economics teacher stated that "I was teaching during the 1976 strike and the time lost was smoothly made up by

eliminating part of the Christmas vacation and extending the school year" (Affidavit of Gretchen C. Harrell, Seattle, p. 1).

--A social studies teacher wrote that "having experienced the 1976-77 strike which closed our schools for nine days, I am sure that there will be no negative effects on the educational program" (Affidavit of James D. Kourkoumelis, Seattle, p. 2).

Note--At the time the Affidavits were prepared, it made sense to try to be concrete by drawing on the specific experience of the 1976 strike. Subsequently however, it became apparent that these affidavits were counterproductive. In their repeated attention to the two-week duration of the 1976 strike, the teachers failed to anticipate that the 1978 strike would not get to court until it was already 50% longer than the 1976 strike. The teachers' attorney evidently recognized the problem, for in two supplemental Affidavits prepared on September 25 there is a noticeable change in the language referring to the duration of a strike. Whereas the first set of Affidavits referred to strikes of ten or 15 days, the later set spoke of a delay of "a few weeks" (Affidavit of Lee Anne Bowie, Seattle, p. 1), or "a month or two" (Affidavit of Lawrence Neil Broder, Seattle, p. 2). But the damage had been done. A Supplemental Memorandum from the Board pointedly noted that the 1976 experience was hardly pertinent to the 1978 strike by the time court action occurred, for the 1978 strike by then had lasted much longer.

A second theme developed in the teachers' Affidavits was that a strike was simply one of many types of disruptions in teaching, and that such disruptions are routinely accommodated without resulting in irreparable harm:

--"I have taught in Seattle when two days were lost due to snow closure of schools and when three days of instruction were lost in my building due to an unexpected special testing program. In both cases the days were not made up, however the students did not suffer any severe loss in their education. Teachers are trained and experienced in making adjustments in their instructional plans to accommodate... a wide variety of interruptions such as assemblies, fire drills, group tests, field trips by other teachers, band practices, and absences due to illness or family vacations" (Affidavit of Dennis Anderson, Seattle, p. 2).

--"With the help of his instructor, a student who has been ill or absent for some other reason for an extended period, has in many cases completed the course at the top of his/her class.... The situation involving a student that has been home ill for an extended period is much more difficult to handle than

a situation where the entire class missed material or instruction for an extended period. Yet each day the teacher is faced with returning students who have been home ill. When the entire class must complete the program in a slightly reduced amount of time, the instructor simply has to provide additional material which combines the information from two units into one" (Affidavit of Kenneth B. Goetsch, Seattle, pp. 1-2).

--"In past years I have seen so-called innovative programs come and go, some of which used less class time and more home study time. Most notably, for a number of years, a rotating schedule was adopted, which in effect reduced the student's class time by thirty hours per class, out of a yearly total of one hundred eighty. As far as I could tell through testing, observation, etc., the students were able to accomplish the goals as set for each subject" (Affidavit of Russel H. Nelson, Seattle, p. 1).

--"Of greater significance than the strike on the quality of education is...the new textbook adoptions that didn't show up for the opening of school" (Affidavit of Dee Pinkerton, Seattle, p. 1).

The third theme developed in the teachers' Affidavits was that a forced return to work would have more adverse consequences than continuation of the strike.

--"It is my opinion that starting school with the unsettled disposition of the staff would result in an inferior program as compared to starting school after having resolved the issues so that one's full resources can be directed toward providing a quality integrated educational program" (Affidavit of Wallace H. Cogley, Seattle, p. 3).

--"From a counseling viewpoint...it appears more likely that opening school in an unsettled atmosphere would be more detrimental than a delay in opening or a shortened school year. Forcing teachers to go back to school before there is resolution and mutual agreement means that the school staff would be working under more than the usual opening-of-school stress. When people are under stress, it is reflected in increases in interpersonal conflicts...and inability to see others' views. It may also lead to apathetic task performance. If we increase stress and anxiety on school staff, we in turn decrease their ability to be responsive to student needs, interests, and tensions" (Affidavit of Floyd Hammersla, Seattle, pp. 2-3).

--"To start school without a contract and face a possible walk-out sometime during the school year would...be much more disruptive to the educational process than merely delaying

the start of school until everything is settled" (Affidavit of Gretchen C. Harrell, Seattle, p. 2).

"If teachers are forced to start the school year without having settled the paramount issues of salary, fringe benefits, and evaluation procedures, they will be angry and frustrated. This cannot help but have an impact on the quality of their teaching... The irreparable harm caused to the educational process by forcing the teachers to teach prior to the conclusion of bargaining will far exceed any harm which would result from delay in the opening of school" (Affidavit of Peter Neuschwander, Seattle, pp. 6-7).

Note--The three lines of argument discussed above clearly were orchestrated to serve the needs of litigation. However the teachers' affidavits also contained a smattering of extraneous comments that reveal the concerns and the day-to-day problems of teaching in ways which go a long way toward explaining why the teachers were striking, and why they really thought that the strike was not such an extraordinary handicap to the teaching-learning process. In one sense, the affidavits help reveal the "human side of enterprise." A Special Education teacher referred to a two-month disruption in special services "due to the reassignment of the Language, Speech and Hearing staff to State special education compliance duties rather than to the provision of service to students" (Cogley, p. 3). A counselor, echoing the perennial counselor claim that student-counselor ratios are too high, calculated that on the basis of the ratio "which the Superintendent has announced," each lost week of school resulted in "a loss of 5.2 minutes" of counseling per student (Hammersla, p. 2). A teacher noted that he had chaired an association committee whose main purpose was to "protect senior graduation requirements in language arts and social studies" from an administration effort to eliminate the requirements (Kourkoumelis, p. 2). Another teacher noted that strikes were less significant than uncertainties and last-minute changes in staffing and "the adverse feelings and morale arising from a feeling of a lack of School Board and administrative support or concern for the legitimate needs of Seattle's staff" (Pinkerton, p. 1). A music teacher, evidently accustomed to regular threats to the very existence of the elementary instrumental music programs, indicated that his usual concern was survival of the program, and against that standard a strike "would not cause any serious problems, even if the classes are not made up" (Affidavit of Donald D. Snow, Seattle, p. 2). Finally, in a comment that reached to the very heart of the pedagogical issues, a teacher noted that "learning is not just a matter of so many weeks at school, but so many learned concepts"; he personally based his teaching on the latter, not the former (Affidavit of Sol Birulin, Seattle, p. 2). Together, these and kindred comments expressed in other affidavits provide a basis for examining the fundamental questions of pedagogy and irreparable harm. However, for better

or for worse, the labor injunction proceeding in Seattle did not bring such issues to the fore. Instead, the issues were ignored. In Washington at least, the limits of the law precluded systematic examination into the nature of the pedagogical harm created by strikes and by efforts to enjoin them.

Moments before the court hearing, STA President Peter Neuschwander drew up a final affidavit that recapitulated the teachers' views of the Board's bad faith bargaining, and responded to the Board's affidavits about the harm caused by the strike. On the latter point, Neuschwander said that the plaintiffs were "misguided" in their fears of levy failure; the 1976 strike followed a double levy failure, but every subsequent levy had been approved. Educational benefits to students, he said, were being delayed, not lost. There were ample days left to meet the state's 180-day requirement. Moreover, said Neuschwander, he was "not aware of the cancellation of any worthwhile school events, athletic or otherwise." Finally, expressing concurrence with the Board President's and the Superintendent's affidavits about the importance of "an orderly and harmonious beginning," Neuschwander drew the conclusion that an orderly beginning would be jeopardized by a back-to-work order, and required instead good faith bargaining and an agreed-upon contract (Neuschwander, Seattle, pp. 5-7).

Irreparable Harm: The View from the Bench⁴

On September 25 and 26 Superior Court Judge Dimmick addressed herself to the nature and function of irreparable harm in the context of the Seattle School Board's request for injunctive relief. Judge Dimmick's views were informed by her personal predilections, by the memoranda and affidavits submitted by the parties and intervenors, and by something less than two hours of oral argument by the attorneys.

Note--Here we address only one of the questions before the court. There were many other questions, and some of them undoubtedly were more significant to the case. For example, the court had to decide on jurisdiction, on the lawfulness of the strike, on the defendants' contentions that the plaintiffs had "unclean hands," and on the status of the group seeking to intervene in the case. Under the circumstances, and given the history of judicial inattention to the irreparable harm standard in prior Washington teacher strike cases, it is less remarkable that the standard received scant attention, than that it received any at all.

Speaking from notes, before a courtroom crowded with teachers, parents, representatives of the district, and interested citizens, Judge Dimmick rendered her oral decision. She first addressed the question of the court's jurisdiction. Next she disposed of the question of whether the school district had exhausted its adminis-

trative remedies. Then, following a declaration that the teachers' strike was unlawful, the judge stated that "an unlawful strike is presumed to cause substantial or irreparable or great harm and should be enjoined per se. That is what the prohibition is all about. It is presumed it is irreparable and it need not be proven" (Court's Oral Decision, Seattle, p. 3).

Note--At this point, holding to the per se rule, the court evidently was uninterested in fine distinctions between terms such as "substantial," "irreparable," and "great" harm. Such distinctions, of course, are of no importance in the event that per se harm is assumed by the mere existence of a strike. Interestingly, however, in an earlier portion of the statement, dealing with the exhaustion of administrative remedies, Judge Dimmick said, "I think enough time has elapsed and passed during the mediation process to indicate to the Board that great harm is being done and likely to be done and that the issues are probably not going to be settled momentarily" (Court's Oral Decision, Seattle, p. 2). On the face of it, the statement indicates that the court was willing to leave it to the plaintiff to establish the point at which "great harm" was occurring, and at which injunctive relief was warranted. However, allowing plaintiffs to determine unilaterally when harm is occurring is hardly consistent with traditional equitable principles. Nor does it add much clarity to the nature or function of the irreparable harm standard in a teacher strike proceeding.

Following her apparent claim that irreparable harm could be presumed, and need not be shown, Judge Dimmick discussed the affidavits which the two parties had submitted concerning harm. "The affidavits that I have read," said the judge, "have convinced the Court...that there is evidence of great injury about to be perpetrated because there is no end of the strike in sight" (Court's Oral Decision, Seattle, p. 3). Ironically though, it was not the affidavits of the plaintiffs or the intervenors which the judge then cited; it was the affidavits of the teachers. She noted that the teachers were experts who "can take children who start late and catch them up." "However," she said, "that was for a period of a couple of weeks, possibly three. There being no end in sight, I feel irreparable damage has been shown" (Court's Oral Decision, Seattle, p. 3). Evidently the teachers' own affidavits backfired. These affidavits had attempted to go beyond vague assertions by presenting impressions based on the experience of the 1976 strike. The School Board's decision to delay proceedings had, on this point then, paid dividends. The teachers' submission of additional affidavits was too late to undo the damage. Thus the teachers inadvertently gave the judge one criterion--duration of the strike--against which to assess harm.

Note--In subsequent strikes of short duration, the Seattle opinion may stand the teachers in good stead, for the opinion

can be interpreted to mean that short strikes are not per se harmful.

There was one more indignity for teachers. The judge singled out one of the teachers' affidavits for particular attention:

In my opinion, education delayed is education denied, especially in the cases of the people who are in special education. One of the teachers had a very poignant affidavit where he indicated he had a child with a cleft palate, another one with a speech defect. He felt that the child's education was being damaged because of no summer school. I am sure that he feels a delay in the opening of school is just as disadvantageous for that child (Court's Oral Decision, Seattle, pp. 3-4).

Note—Nowhere are the limits of an affidavit-based proceeding more starkly illustrated. The teacher whose Affidavit here is being used to attack the teachers' case was not allowed to testify, and, as far as we know, never said—and perhaps did not even believe—that "a delay in the opening of school is just as disadvantageous for that child (as the absence of summer school)." Obviously judges can make whatever inferences they wish about affidavits, but to put words in the mouth—or thoughts in the head—of people who are before the court is patronizing at best, and probably beyond the pale of judicial propriety. This is not to say that the judge was incorrect in assuming that a delayed school opening is as harmful as a denial of summer school; it is to say that the basis for the assertion can hardly be found in the Affidavit on which the judge ostensibly relied.

Finished with admonishing the teachers by hoisting them on their own affidavits, Judge Dimmick made reference to the plaintiffs' claim about harm. "There is...the remote possibility of state funding being withheld and several other horrors that we can all imagine that would show irreparable damage were this strike to continue." With that, the judge turned to the final issue before the court (the "clean hands" argument) and once again invoked the harm standard: "Why should there be further injury to the public just because both sides may have acted improperly?" (Court's Oral Decision, Seattle, p. 4).

Note—How is one to reconcile Judge Dimmick's disclaimer about the importance of the irreparable harm standard, and her repeated references to harm in her oral opinion? No one with whom we talked even took note of the apparent discrepancy. Thus we must rely upon conjecture. It is important to note that the judge was addressing a mass audience—not simply the attorneys, but also the courtroom spectators, the reporters for whom the injunction hearing was the only significant current.

event in the drawn-out strike, and whatever audience was reached by the television cameras in the courtroom. If we think of the court's Oral Opinion as a political speech, the references to harm make a good deal of sense. As a political speech, the court's words must have been designed to secure approval of the court's decision and compliance with it. Thus the main audience was the striking teachers. It would not take a great deal of political acumen to surmise that among those teachers were some who were determined to continue the strike, some who were ready to end it immediately, and some who wavered. The latter group probably was influenced by the court's finding that the strike was illegal, that the court had jurisdiction, and that harm was being done. If teachers can be influenced by the courts, surely it is through reference to children. In that sense, reference to a child with a cleft palate, and another with a speech defect, were neatly selected. Moreover, if these references can be drawn from the teachers' own case, rather than from that of the "enemy" (i.e., the Board), so much the better from the point of view of persuasion. What seems to have happened, in effect, is that Judge Dimmick avoided the legal and evidentiary pitfalls in the harm standard by claiming that harm need not be shown to enjoin a strike; however she then capitalized upon the political advantages in recitations of harm by referring extensively to harm in her Oral Opinion.

A preliminary injunction was issued the day after the hearing, following a conference involving the attorneys and Judge Dimmick. Language to be included in the court's order was proposed by both attorneys. Board attorney Little proposed an extensive section summarizing the "material and substantial interference" resulting from the strike. Essentially the section recapitulated the list of harms contained in Superintendent Moberly's Affidavit; the list referred to the delayed opening of school, the cancellation of extracurricular activities, loss of taxpayer support, and extension of the school year, with its attendant effects upon summer and vacation plans, college plans, summer employment, maintenance schedules, childcare costs, and the programs of the Parks and Recreation Department. STA attorney Green prepared, quite naturally, a simpler statement, merely saying that unless enjoined the strike "will continue to cause and contribute to great injury to the District." It was the latter language which Judge Dimmick incorporated in her Order (Preliminary Injunction, Seattle, p. 2).

A Different View: Everett

In Everett the schools were operated with substitute teachers while the regular teachers struck. There was some violence on the picket lines. On the first day of a three-day hearing, Judge Bibb issued an order limiting picketing, but deferred his decision on enjoining the strike. In his Oral Opinion, and in his Order, Judge Bibb appears to have accepted, in substantial measure, the

teachers' contention that the traditional equity standards, rather than a per se rule, are applicable to labor injunctions in teacher strikes. Orally, Judge Bibb took note of the defendants' discussions of "the Holland case and the Michigan rule which has been cited as the minority but certainly the better rule according to the defendant." Then the judge said, "I am inclined to think maybe the defendants are right in that" (Oral Ruling of the Court, September 15, 1978, Everett, p. 7). However, the judge then proceeded to reverse his field by finding in favor of the Board, as follows:

- (1) The facts of this case bring this action within (the Holland) rule which is that if there is violence involved, or if there is a clear harm shown, then injunctive relief is appropriate. Certainly there has been violence in this case.
- (2) I have to agree with (the Board's attorney) that the spectacle of this violence, particularly as it reflects upon the public and the children and their image of educators, has got to be a concern to the court.
- (3) We have a situation where it is now almost through the first five scheduled days of school, going into the next week; we are talking about something more than just a brief interlude which could easily be made up.... It has the appearance anyway at this point of lasting a considerable period of time and that is a matter of weighing the amount of harm sufficient to persuade the court that irreparable harm will result if something isn't done (Oral Ruling of the Court, September 15, 1978, Everett, pp. 7-8).

In the formal Order issued by the court later that day, Judge Bibb acted upon the first two observations, finding that "actions in furtherance of a strike...including non-peaceful picketing and conduct, have caused and will, unless restrained, continue to cause substantial, immediate and irreparable injury and damage to plaintiff and to the public" (Temporary Restraining Order and Order Regarding Bargaining, Everett, p. 2). The Order then went on to direct limitations on picketing.

Note--In one sense the Order and the preceding Oral Opinion are unexceptional, given that picketing had been accompanied by some violence. What appears to be significant is that the picketing was not restrained because it was non-peaceful. That is, it was restrained on the basis of social facts, not legal facts. What the court appears to have done, in essence, is to accept the defendants' argument that harm must be shown, and plaintiff's showing of harm. In the apt phraseology of a press account, the "judge walked a thin line...when he ruled on the Everett School District teachers' strike and left both sides

fairly happy" (Seattle Times, September 16, 1978).

The results are tantalizing. Clearly the irreparable harm standard, evidence of harm, and weighing of the standard against other aspects of equity, played a part in the court's actions and decisions. But the part is not squarely set forth. As in Seattle, the ambiguities of Port of Seattle were not resolved. Instead, we have evidence of a political disposition of an issue, with the court seeking resolution of the dispute rather than clarification of the law. The result: continued ambiguity.

FOOTNOTES

¹This report was prepared by David Colton.

²Information on Washington strikes was gathered from a wide variety of sources. Newspaper accounts in the Seattle Times and the Seattle Post-Intelligencer provided very helpful background material, basic factual accounts of strike developments, and occasional analyses. Interviews were held with four attorneys who were involved in three of the strikes, with officials of the state education association, with a superintendent, and with a judge. The courthouse files for both the Tacoma and Seattle strikes were thoroughly analyzed; additional legal documents bearing on the Everett and Central Kitsap legal proceedings were provided by attorneys. Publications of the Washington Education Association and the Washington State School Directors Association were utilized. Special appreciation is expressed to Mr. Don Barnhart of the University of Washington, who prepared a detailed observers' account of the injunction hearing in Seattle.

We have not attempted to provide citations for every bit of information presented. However readers wishing to know about the source of a particular bit of information are invited to contact the author. References to documentary sources will be provided. However guarantees of anonymity preclude divulging the sources of interview statements. In the text these sources are identified simply as "board source" or "teacher source."

³"Note" sections reflect observations and analyses of the author, and are akin to the "interpretive asides" used by anthropological field workers. Notes were particularly helpful in relating Washington events to those observed in other settings studied in this project.

⁴Material for this section is based upon newspaper accounts, a transcript of the Oral Opinion rendered by Judge Dimmick, the courthouse file developed during the Seattle case, interviews with key actors, and a first-hand account of the preliminary hearing, prepared for us by Mr. Don Barnhart.

REFERENCES

- Alcorn, Richard. "Labor Law-Educational Employment Relations Act—Legislative Silence and the Function of the Courts in Teachers' Strike Injunction Suits." Washington Law Review 51 (1975): 186-208.
- Colton, David L. "A Teacher Strike in Collinsville, Illinois." Center for the Study of Law in Education, Graduate Institute of Education, Washington University, St. Louis, Missouri, unpublished, 1980a.
- Colton, David L. "Two Missouri Strikes: Hazelwood and St. Louis." Center for the Study of Law in Education, Graduate Institute of Education, Washington University, St. Louis, Missouri, unpublished, 1980b.
- Graber, Edith E. "Pennsylvania: The Butler Area School District Strike." Center for the Study of Law in Education, Graduate Institute of Education, Washington University, St. Louis, Missouri, unpublished, 1980b.
- Graber, Edith E. "California: The Daly City Strike." Center for the Study of Law in Education, Graduate Institute of Education, Washington University, St. Louis, Missouri, unpublished, 1980c.
- Jascourt, Hugh D. "Is Looking Up Case Precedent in Other Jurisdictions Worthwhile in Public Sector Labor Relations?" Journal of Law and Education VI (April 1977): 205.
- Washington Education Association. Action (October 1978).
- Washington State School Directors' Association. Compass (July/August, 1978b).
- Washington State School Directors' Association. Crisis Communications (1978c).
- Washington State School Directors' Association. Signal XXIX (December 7, 1978a).

Cases

- Aberdeen School District No. 5 v. Aberdeen Education Association, Washington, Grays Harbor County, No. 69484 (1977).
- Board of Education of Community Unit District No. 2 v. Redding, 207 N.E. 427 (1965).
- Board of Education v. New Jersey Education Association, 247 A.2d 867 (1968).

Central Kitsap School District No. 401 v. Central Kitsap Education Association, Washington, Kitsap County, No. 78-2-00607-0 (1978).

City of Pana v. Crowe, 316 N.E.2d 513 (1974).

Clover Park School District No. 400 v. Clover Park Education Association, Washington, Pierce County, No. 238548 (1975).

Delaware State v. Delaware Educational Association, 326 A.2d 874 (Del. Ch. 1974).

Everett School District No. 2 v. Everett Education Association, Washington, County of Snohomish, No. 78-2-02852-1 (1978).

Holland School District v. Holland Education Association, 157 N.W.2d 206 (1968).

Isthmian Steamship C. v. National Marine Engineers, 247 P.2d 549 (1952).

Lamphere Schools v. Lamphere Federation of Teachers, 252 N.W.2d 818 (1977).

Los Angeles Unified School District v. United Teachers, 24 Cal. App. 3d 142 (1972).

McTigue v. New London Education Association, 321 A.2d 462 (1973).

Mead School District v. Mead Education Association, 530 P.2d 302 (1975).

Menard v. Woonsocket Teachers Guild-AFT, 363 A.2d 1349 (1976).

Norwalk Teachers Association v. Board of Education, 83 A.2d 482 (1951).

Oneida County v. Oneida Education Association, 567 P.2d 830 (1977).

Port of Seattle v. International Longshoremen's and Warehousemen's Union, 324 P.2d 1099 (1958).

Regents v. Teaching Assistants' Association, 74 LRRM 2049 (1970).

School Committee of Westerly v. Westerly Teachers Association, 229 A.2d 441 (1973).

Seattle School District No. 1 v. Seattle Teachers Association, Washington, King County, No. 851172 (1978).

Seattle School District v. State of Washington, 585 P.2d 71 (1978).

Tacoma School District No. 1 v. Tacoma Association of Classroom Teachers, Washington, Pierce County No. 270633 (1978).

Township of Teaneck v. Local No. 42, Firemen's Mutual Benevolent Association, 1977-78 PBC 36,258, 36,505 (1978).

Timberlane School District v. Timberlane Education Association,
317 A.2d 555 (1974).

Union Free School District 21, Town of Oyster Bay v. Klein,
59 L.C. 52,036, 66,725 (1969).

MICHIGAN: THE WARREN CONSOLIDATED SCHOOLS STRIKE

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CONTENTS

CHRONOLOGY OF THE STRIKE 1

THE LEGAL CONTEXT..... 2

 The Statute 2

 Case Law 3

 Holland 1968 3

 Previous WCS Cases 6

THE 1978 STRIKE 7

 Pre-Trial Documents 7

 The Show Cause Hearing 12

 Subsequent Action 21

 Summary 21

FOOTNOTES 24

REFERENCES 26

MICHIGAN: THE WARREN CONSOLIDATED SCHOOLS STRIKE

CHRONOLOGY OF THE STRIKE¹

Wednesday, September 6: date of scheduled school opening.

Tuesday, September 5: 1390 certified teachers, librarians and nurses take a strike vote; more than 80 percent vote to strike. Warren Consolidated Schools District (hereinafter WCS) is Michigan's fourth largest K-12 school system with 29,500 students. School enrollment is declining. The peak had been reached in 1973-4 with 34,900 students. The strike is the district's fourth since 1970.

Wednesday, September 13: School Board attorney Richard Mosher files a complaint with the court, seeking a temporary restraining order and a preliminary injunction. Judge Raymond R. Cashen, presiding judge of the Circuit Court of the County of Macomb denies the ex parte restraining order, and sets a show cause hearing for Friday, September 15.

Friday, September 15: At the show cause hearing, three school administrators testify for the board, alleging financial and other irreparable harm. One expert witness testifies for the Warren Educational Association (WEA), citing a study and other evidence that strikes do not cause irreparable harm to children. Judge Cashen concludes that irreparable harm does exist and issues a preliminary injunction. He finds it "appalling" that strikes have occurred in Warren with such frequency (Transcript of Warren Consolidated Schools v. Warren Education Association, 1978:119. Hereinafter Warren). He orders the teachers back to the classroom by Tuesday, September 19 and further orders bargaining for a minimum of four hours a day.

Friday, September 15: A letter from Dr. John W. Porter, Superintendent of Public Instruction of the Michigan State Board of Education to the WCS district reminds them that they may lose state aid unless they start classes by the end of the month. Attendance figures on the fourth Friday after Labor Day are used as the basis for state aid. For each day falling short of the required 180 days, WCS would lose \$74,000. Further, Porter reminds WCS personnel that schools are mandated by state laws to get in 180 days of instruction before the following June 30.

Monday, September 18: Teachers meet from seven to midnight. They decide by an 8 vote margin -- 668 to 660 -- to continue the strike, thus defying the preliminary injunction.

Tuesday, September 19: Picketing continues with as many as 200 pickets at one site, confronted by as many as 32 police officers. Five picketing teachers are arrested; there are minor injuries to two police officers.

Wednesday, September 20: Judge John Roskopp, acting for Judge Cashen, who is attending a judicial conference, issues a temporary restraining order, limiting pickets to three per school site. Judge Roskopp also schedules a Monday hearing before Judge Cashen on contempt charges against teachers who are not in compliance with the preliminary injunction.

Thursday, September 21: WCS begins accepting applications to replace striking teachers.

Friday, September 22: WCS fires 36 striking teachers. It is only the third time that teachers have been fired by Michigan for striking. President of the Michigan Education Association (MEA) Edith Swanson threatens to call an area-wide strike to protest firings. The MEA is termed by the Detroit News as "one of the largest and most powerful labor groups in Michigan, behind the UAW, AFL-CIO and the Teamsters."

Monday, September 25: Judge Cashen defers action on contempt charges, and orders parties to continue negotiations. He appoints attorney Walter Nussbaum master of the court to represent him in negotiations.

Monday, September 25: Judith Locher, WEA president, says "No teacher goes back until all go back" (The Detroit News, September 25, 1978:1A).

Tuesday, September 26: A tentative agreement reached during the night is ratified by teachers by a vote of 1079 to 13. The strike which lasted 21 days (15 instructional days) is over.

THE LEGAL CONTEXT

Consideration of the 1978 Warren Consolidated School District strike requires examination of the legal context in which it was situated. This includes review of the statute governing public sector strikes, of previous Michigan court cases dealing with irreparable harm and previous legal action undertaken by the district.

The Statute

Michigan is not among the six states which have granted teachers a limited right to strike. Its statute regulating labor relations of public employees, commonly referred to as the "Hutchinson Act" (Mich. Comp. Laws 423.201 et seq.) was passed in 1947 and amended in 1965, 1973, and 1976. The 1947 act specified that the penalty for engaging in strikes, within the definition of the act was automatic termination. Such employees could be rehired but were subject to sanctions so severe that they had never been applied (Howlett, 1966: 12).

Lt. Governor William G. Millikin, in urging passage of the 1965

amendments, the Public Employment Relations Act (herein referred to as PERA) stated:

The law (Hutchinson Act) is so punitive that not once in its 18 year history has it been fully enforced...Take the recent 'teacher strike' in Hamtramck, for example. If the automatic firing provision would have been enforced, the schools would have been closed. With the teacher shortage, who would have stepped in to fill those empty positions? (Millikin, as cited in Howlett, 1966: 14).

The PERA (the 1965 amendments) drastically altered labor relations in Michigan. It retained the ban against public employee strikes but eliminated the automatic termination and punitive reinstatement provisions. Where the Hutchinson Act had prohibited collective bargaining by public employees, the PERA not only permitted but required employees to bargain with employees' bargaining units. And Section 6 of the PERA was amended to specify that a public employer's power to discipline or remove a striking employee was optional; not mandatory. Such an employee might then secure a review of the discipline or discharge, first by the employer, and if desired, by a circuit court if sought within thirty days of the employer's decision. Discipline and termination of employment were thus strategies which a board might employ in a strike as an alternative to seeking an injunction.

Case Law

Holland, 1968. The no-strike provisions of public employee laws have been the subject of court challenges in a number of states. Until 1968, in a series of cases, the courts have held that teachers, as public employees, do not have the right to strike and that when they do so, such actions are enjoined by the courts. Arguments that the ban on such strikes was illegal on First Amendment grounds (violating the freedom of speech, expression and assembly), on Thirteenth Amendment grounds (as constituting involuntary servitude) and on Fourteenth Amendment grounds (as failing to provide the "equal protection" guaranteed to private employees who are under no such ban) were turned aside by virtually every court (Comment, 1969; 266n; Smith, et al, 1974:, 675).

However, in the case of School District for the City of Holland v. Holland Education Association (157 N.W. 2d 206, 1968), the Michigan Supreme Court issued a decision which has been termed "one of the most important in Michigan labor relations in many years" (Sachs, 1968: 247). In addition, the decision has been widely cited in other states and has been a significant focal point in the developing case law on teacher strikes.

During a 1967 teacher strike, the Holland Board of Education petitioned the Ottawa County Circuit Court for a preliminary injunction ordering the teachers to return to their classrooms. The court granted the injunction and its action was affirmed by the Michigan Court of Appeals. However, the Michigan Supreme Court, to which the Holland Education Association appealed the case, reversed and remanded the case to

the lower court. It held that in Michigan, it was public policy that injunctions should not be issued in labor disputes absent a showing of violence, irreparable injury or breach of the peace.

The teachers had argued that they were not employees within the meaning of the PERA since no contracts of employment were in force; hence, the act did not apply to them and the injunction was invalid. Teachers referred to this as the "keystone issue" in the case. But the Supreme Court found that a previous case, Garden City School District v. Labor Mediation Board (358 Mich. 258, 99 N.W. 2d 485, Mich. Sup. Ct., 1959) was the relevant precedent. In that case, the School Board had argued that the state labor mediation board had no jurisdiction in the case because no written contracts existed. The Supreme Court had held there that the law allowed "mediation of salary disputes in advance of the determination of the salary provisions in individual teacher contracts" (Garden City, 1959: 263). Thus, there was jurisdiction in advance of the execution of such contracts. Holding this, the court found that teachers in Holland were also subject to the no-strike provision of the PERA.

Second, teachers argued that Section 6 of the act providing for the discipline of employees was the exclusive remedy available to the Board under the act. However, the Supreme Court agreed with the Court of Appeals that the provisions "for disciplining of striking public employees and review procedure for them cannot be interpreted to imply removing the historic power of courts to enjoin strikes by public employees" (cited in Holland, 1968: 210).

The court thus affirmed the validity of the strike prohibition; it asserted that the teachers, whether under legal contract or not, were engaged in an illegal strike; and it affirmed the powers of the court to issue injunctions under such circumstances. Nevertheless, the court reversed the action of the lower courts as to injunctive relief.

The court held that the fact that an injunction could issue did not mean that it must necessarily issue. For the legislature to compel the courts to issue injunctions in every case "would be to destroy the independence of the judicial branch of government" (Holland, 1968: 210). The illegality of the strike was not, in itself, sufficient grounds for an injunction. The question that remained was whether the chancellor (the judge in an equity action) "had before him that quantum of proof of uncontradicted allegations of fact which would justify the issuance of injunctive relief in a labor dispute" (Holland, 1968: 210). The court stated:

We here hold it is insufficient merely to show that a concert of prohibited action by public employees has taken place and that inso facto such a showing justifies injunctive relief. We so hold because it is basically contrary to public policy in this State to issue injunctions in labor disputes absent a showing of violence, irreparable injury, or breach of the peace... See Cross Company v. United Automobile (citation omitted). We further so hold because such an interpretation of the act would as before noted raise a serious constitutional question (Holland, 1968: 210).

2
The court noted that no testimony had been taken at the initial hearing on the injunction. "(T)he only showing made to the chancellor was that if an injunction did not issue, the district's schools would not open, staffed by teachers on the date scheduled for such an opening. We hold such showing insufficient to have justified the exercise of the plenary power of equity by force of injunction" (Holland, 1968: 210). The court commended the "exemplary conduct" of the teachers and noted that the Board had continued the salary schedule of the previous year.

The justices overturned the decisions of the lower courts somewhat reluctantly for they noted that "great discretion is allowed the trial chancellor in the granting or withholding of injunctive relief (Holland, 1968: 211) and that they would not, ordinarily, substitute their judgment for his. However, because of the "lack of proof" which would support the issuance of injunctive relief, the court dissolved the temporary injunction. In remanding the case, they specified:

We suggest that such proceedings inquire into whether, as charged by the defendants, the plaintiff school district has refused to bargain in good faith, whether an injunction should issue at all, and if so, on what terms and for what period in light of the whole record to be adduced (Holland, 1968: 211).

In conjunction with its assertion that it is the public policy in Michigan not to issue injunctions in labor disputes "absent a showing of violence, irreparable injury, or breach of the peace," the court referred to the case of Cross Co. v. Local 155, UAW (371 Mich. 184, Mich. Sup. Ct., 1963). Justice Souris, one of the justices hearing the present case, had written the opinion in Cross; in it he argued against the facile issuance of injunctions in the private sector:

In labor cases, where picketing is sought thus to be enjoined or restricted summarily, nothing less than a clearly persuasive showing of imminent and irreparable injury beyond the power of the regularly constituted police authorities of the community to control must be insisted upon by the chancellor to justify his exercise of the extraordinary power of injunction prior to such hearings as due process demands (emphasis in original, Cross, 1963: 221).

The court thus suggested that some of the restraint and judicious use of the injunction in the private sector be transferred to the public sector in the enjoining of labor disputes (Sachs, 1968: 251). It thereby also affirmed the principle of equity that the injunction is an extraordinary remedy to be used in those instances where irreparable injury, harm or damage of a substantial character would result absent such relief.

Some courts in other jurisdictions also assert the extraordinary character of injunctive relief in public sector labor disputes (City of Rockford v. Firefighters Local 413, 240 N.E.2d 705, Ill. Sup. Ct., 1968; School Committee of Westerly v. Westerly Teachers Association, 299 A2d 441 R.I. Sup. Ct., 1973). In general, however, "The Holland case stands as the major exception to the general rule that injunctive relief is

available to public employers without a showing of irreparable injury or clean hands" (Smith, et al., 1974: 718).

Some observers contend that as a consequence of developments noted above, teachers in Michigan have a de facto if not a de jure right to strike (Michigan Department of Education, 1976: 4). They base this essentially on two arguments: when the Hutchinson Act was amended by the PERA in 1965, the punitive provisions specifying statutory penalties for striking were repealed. Second, in Holland, the Michigan Supreme Court further tempered the no-strike provisions of the PERA by specifying that courts need not issue injunctions absent a showing of violence, irreparable injury or breach of the peace. On the one hand, statutory penalties for striking are removed. On the other, courts are instructed that it is public policy that a more substantial showing than mere illegality be required to enjoin a strike. By implication, some strikes are not enjoined and some strikers are not subject to legal sanction. Barrett and Lobel conclude, "The result is that in Michigan, in spite of a clear statutory prohibition against strikes, the actual practice differs little from those of the states which grant a limited right to strike" (Barrett and Lobel, 1974: 21).

Two additional cases further clarified and restricted options open to a board in considering strategies in a teacher strike. In a 1975 case, the Michigan Supreme Court held that the action of the Board in firing 184 teachers for striking was not a violation of the PERA and that, absent substantiation of an unfair labor practice charge against the Board by the Michigan Employment Relations Commission, the action could stand (Rockwell v. Crestwood Board of Education, 393 Mich. 616, Mich. Sup. Ct., 1975). The net effect was to affirm the Board's power to deal administratively with teacher strikes.

In another case, the Michigan Supreme Court held that a school district was barred from suing a teachers' union for "alleged monetary damages incurred as a result of a peaceful strike prohibited by the PERA" (Lamphere Schools v. Lamphere Federation of Teachers, 400 Mich. 104, 1977: 107). The court held that except for the historic relief of injunction, the discipline procedures of Section 6 of the PERA were "the sole and exclusive remedies available to a school district in dealing with a peaceful strike by a teachers' federation" (Lamphere, 1977: 107). It held further that there was no applicable case law to support such a suit for damages and public policy considerations militated against creation of a new cause of action which would unsettle an already precarious labor-management balance in the public sector. Hence, boards could deal administratively with striking teachers but they could not file a suit to hold them liable in tort.

Previous WCS Cases

In two previous cases involving the WCS, parties to court action gave some attention to the issue of irreparable harm and to the Holland case. In September, 1971, teachers withheld services for 11 days while contract was under negotiation. When a tentative agreement was reached on September 18, they returned to the classrooms. However, the

contract was not ratified. As negotiations continued, the Board withheld automatic wage increases and full staffing "to retain some flexibility in making economic proposals at the negotiating table" (Warren Consolidated Schools v. Warren Education Association, Circuit Court, Macomb County, Mich., 1971). In December, teachers withheld those services which dealt with extra-curricular activities and after-hour duties. The Board sought an injunction and argued that the educational program of the schools was being irreparably harmed. They cited Holland arguing that where there is an adequate hearing of the facts, an injunction may issue. The teachers asserted that they were faithfully performing normal teaching functions and that the duties being omitted were voluntary. They argued that Holland had established that an injunction need not issue in every case in which it was requested. The court nevertheless issued the injunction, citing the rights of students and the importance of the orderly conduct of educational activities.

A second case, a 1973 dispute, reached the Court of Appeals (Warren Education Association v. Adams, 226 N.W.2d 536, 1975). The 1971-3 contract for teachers had expired; however, teachers returned to schools in September without a contract. The School Board instituted "interim operating regulations" which eliminated many of the provisions and protections of the expired contract. On October 8, teachers began a strike, seeking reinstatement of the omitted provisions. The Board took no action so the teachers filed an action for a declaratory judgment; the Board counterclaimed "and with permission of the trial court, filed a third-party complaint against the teachers individually for injunctive relief and damages" (Warren, 1975: 537). In this instance, the teachers stipulated irreparable harm. The trial court affirmed as to irreparable harm and ordered the teachers back to work, requiring the Board to reinstate the terms of the expired contract.

The teachers took the case to the Michigan Court of Appeals. The focal question on appeal was "whether the withholding of services by the teachers in an effort to cause the school board to reinstate the provisions of the expired contract is a 'strike' within the meaning of the aforementioned (PERA) act." (Warren, 1975: 537). The Court of Appeals found that the trial court could properly issue an injunction "upon a showing of violence, irreparable injury or breach of the peace." Since the teachers had stipulated irreparable injury, the court affirmed as to injunctive relief. However, they remanded for consideration of the remaining issues.

The legal context in which the present WCS strike is situated is thus shaped by the statute governing strikes by public employees, by previous Michigan cases (particularly the Holland case) and by previous legal action taken by parties to the present suit.

THE 1978 STRIKE

Pre-Trial Documents

On September 13, 1978, attorneys for the Board filed a complaint with the Circuit Court of the County of Macomb, Mount Clemons, Michigan,

thus initiating the case Warren, 1978. The complaint alleged that the WEA and named defendants who were officers and members of the executive board of the WEA and employed as teachers by the plaintiff, were public employees and were engaging in an unlawful strike. The Board asked the court to issue a temporary restraining order to restrain the WEA and the named defendants and members from engaging in the work stoppage, to cease "inducing, encouraging, persuading, directing or causing" others to do the same and to abstain from obstructing or interfering with entrance or egress to school district premises and buildings; further, that they be required to show cause at a court hearing why they should not be enjoined from engaging in such activities.

The complaint stated that the unlawful strike "is causing, and will continue to cause, irreparable injury and damage to the plaintiff and the more than 29,500 students of the Plaintiff School District" in the following ways:

a) Students were being deprived of the educational opportunity to which the law entitled them.

b) Plaintiff was unable to carry out its constitutional and statutory duty to provide education.

c) Actions of defendants constituted a "patent display of utter disregard for the law" by teachers whom students were expected to emulate and from whom they were "to learn the precepts of good citizenship."

d) Plaintiff feared actions of defendants would cause some students to leave school.

e) Such actions might also adversely affect "the students' attitude for learning, and thus adversely affect the students' achievement."

f) If allowed to continue, actions of defendants would adversely affect the ability of the plaintiff to provide sufficient instruction to enable students to advance to higher grades and to institutions of higher learning.

g) Continuation of the strike might also preclude plaintiff from providing sufficient instructional days to be entitled to state aid.

h) Such injury and damage could not be compensated for in monetary damages. (Complaint, Warren, 1978: 4-5).

Further, it was held that defendants would suffer no monetary loss if a restraining order and injunction were issued. Finally, it was alleged that plaintiff had no remedy at law.

Superintendent Arthur Woodhouse entered a statement verifying the matters as stated in the Complaint.

On September 13, the day the Complaint was filed, Judge Raymond R. Cashen denied the request for a temporary restraining order. He struck the names of all defendants except that of Judith Locher, President of the WEA, and ordered that the show cause hearing be held at 9:30 on Friday, September 15.

Attorneys for the School Board filed two additional pre-trial documents with the court; the first, a "Plaintiff's Memorandum in Support of Complaint for Injunctive Relief" was dated September 15, the day of the show cause hearing. The bulk of this document focuses on establishing the case for irreparable injury. Citation is made to the Holland and the 1975 Warren cases, indicating that strikes may be enjoined if injury is established. A further citation is to Ainsworth v. Hunting and Fishing Club (153 Mich. 185, 1908) in which the Michigan Supreme Court had set the standard for the determination of whether irreparable harm was sufficient to justify issuance of injunctive relief:

An injury to be irreparable need not be such as to render its repair physically impossible; but it is irreparable when it cannot be adequately compensated in damages, or when there exists no certain pecuniary standard for the measurement of damages... due to the nature of the right or property injured (Ainsworth v. Hunting and Fishing Club, 1908: 191).

The first two and the sixth reasons given below had been enunciated in the Complaint but were elaborated in the Memorandum supporting the Complaint. The other arguments had not been cited earlier. It was alleged that harm had and would continue to occur in the following ways:

1) Students were being deprived of the educational opportunity to which they were entitled by law. Continuation of the strike would force rescheduling of instruction into the summer or to Saturdays and Holidays. Both would result in a less effective learning environment. Each further strike day would delete a day of vacation.

2) Teachers were role models for students. Strike action by teachers could suggest to the students "the detrimental idea that disregard of the law in pursuit of one's desires is a trait to emulate." It could also cause students to lose respect for teachers "who may teach the ideals of good citizenship, but obviously practice a different philosophy." Evidence that this had already occurred was found in "the presence of students at various schools carrying signs advocating the firing of teachers." Prolongation of the strike would only exacerbate this effect.

3) Students were further harmed by the cancellation of extracurricular activities; scheduled activities could not later be made up "and thus are lost forever to the students." This could mean not only a loss of participation in such activities but might seriously impede the student from acquiring an athletic scholarship, thereby perhaps preventing such a student from attending college.

4) Other special programs (vocational education and placement in trainee positions) were also being lost, disadvantaging students at WCS in comparison with neighboring schools. Students who had already been placed were working without the benefit of counseling and instruction by teachers.

Similarly, special education programs for blind, deaf, mentally and emotionally impaired and home-bound students are provided by WCS, not only for its own district but for other Macomb County school districts as well. Plaintiff feared that rescheduling such activities during vacation days would mean that other districts would be unable to provide transportation to the program and thus would deprive those students of participation.

5) Another program affected was the district's program for drop-outs. The district had found that the longer a dropout stayed away from school, the more difficult it would be to reach such a student and convince him to return to school. This program was normally held during the first month of school; potential participants were located and encouraged to attend. The continuation of the strike left doubt whether there would be sufficient time to complete enrollment before the fourth Friday, the state funding count date.

6) Further, the school district was losing students. Parents were enrolling their students at other schools with a consequent loss of state aid. Further, the number of students living outside the district who enrolled in the WCS prior to a forthcoming move into the district was down from previous years.

7) Increased operating expenses would be incurred because of the strike. This included unemployment compensation payments to laid-off employees, additional costs for the operation of school facilities during the winter months and additional cost of overtime for those employees who are required to work during their scheduled holiday periods. The Michigan Supreme Court's holding in Lamphere v. Lamphere Federation of Teachers (1977) precluded districts from bringing action for civil damages against an employee union in an illegal strike. Hence, the memo alleged, plaintiff had no remedy for the above-noted damages. The only remedy was injunctive relief (Plaintiff's Memorandum, Warren, 1978:3-10).

Plaintiff's Memorandum continued to argue that under similar circumstances, the present court had granted injunctive relief. In Warren Education Association v. Adams (1975), Judge Gallagher had issued an injunction, noting that teachers had stipulated that there was irreparable injury. The decision had been upheld on appeal.

In summary, the plaintiff held that the strike was illegal, that Michigan Appellate Courts had held that a Circuit Court could issue an injunction restraining teachers from engaging in such a strike and that, based on cited authorities and the showing of irreparable injury, such injunctive relief should issue.

Attorneys for the School Board also filed a "Memorandum of Law" directed to questions raised by the fact that counsel for the defendants had refused service of the Complaint and the show cause order. Hence, an anticipated issue in the suit was that not all of the WEA's teacher-members had been named in the suit or served with the injunctive order. The Board memo argued that "this court has jurisdiction to issue injunctive orders that may bind persons who have not been personally serviced with process," and that an injunction binds those who act on behalf of or under control of the parties enjoined.

On September 15, defendants WEA and Judith Locher filed a "Motion for Summary and/or Accelerated Judgment" urging dismissal for the following reasons:

1) The plaintiff Board lacked the capacity to bring this action since the Board had not complied with the mandates of the Open Meetings Act, 1976 PA 267 and had initiated the legal proceedings without formal action at a properly noticed and conducted public meeting. Hence, the legal action was invalid.

2) No proper class had been brought before the court and "none of the essential allegations for the class action are contained in the Complaint..." Defendant Judith Locher was not presently a classroom teacher and therefore, not an employee of the Board. Defendant WEA also had no duty to perform services with the Board. Hence, there was no party properly before the court who could "fairly insure the adequate representation" of those the plaintiff sought to enjoin.

3) Plaintiff had not complied with the requisites of GCR 208.1 for maintaining its purported class action by failing to specify the "common question of law or fact affecting the several rights" of members of any assertable class and had failed to specify the rights common to all members of such a class.

~~4) Since no proper class was before the court, any of the extraordinary equitable relief which plaintiff sought would be futile.~~

5) "Other than by mere conclusory allegations," the Complaint failed to state facts "which demonstrate the requisite, immediate and irreparable injury required to obtain such extraordinary relief from the Court under its powers in equity."

6) Nor did the Complaint allege "any legally sufficient claim of unlawful activity on the part of the defendants other than by conclusory allegations."

7) The Complaint failed to specify any duty on the part of the defendants to report for any duty of employment.

8) The Complaint failed to allege that any defendant had absented him or herself from work for the purpose of inducing a change in the terms and conditions of employment. Mere absence from work did not constitute an unlawful strike within the meaning of Section 1 of the PERA.

9) Plaintiff had stated in the Complaint that the previous contract had expired on August 15, 1978. Hence, plaintiff had failed to state a claim on which relief could be granted since absent a contract, there was no obligation to work.

10) Plaintiff had alleged violations of MCL 423.9f. However, plaintiff failed to assert that such alleged activities were not controllable by the local police nor was there any claim that plaintiff had sought the help of local authorities in restraining such alleged unlawful

conduct. Hence, the Complaint was deficient in its request for the extraordinary powers of the court.

11) Plaintiff had filed with the Michigan Employment Relations Commission (MERC) on or about September 13, 1978, an unfair labor practice charge against defendant WEA requesting the Commission to pursue injunctive relief against the WEA under Section 16 (h) of the PERA. But plaintiff had not permitted the MERC to seek the relief which it had requested; the Complaint before the court was thus premature.

12) Plaintiff had thus not yet exhausted administrative remedies and therefore lacked capacity to bring this action (Defendants Motion, Warren, 1978: 1-5).

In summary, counsel for defendants requested that the court dismiss the Complaint and "that the court grant the aforesaid Defendants such other and further relief to which it deems them entitled in equity and good conscience."

The Show Cause Hearing

The show case hearing was held on Friday, September 15, at 2:30 P.M. In his opening statement, Judge Cashen indicated that the attempt to resolve the dispute in chambers had been unsuccessful; hence, the case would proceed. Robert Finkel attorney for the WEA, made a motion to dismiss the action in keeping with the points raised in the Motion filed with the court. The judge responded to those arguments. As to the WEA charge that the plaintiff was not properly before the court because the decision to file the suit required formal action of the Board at an open and properly noticed meeting, Judge Cashen found that the fact that Superintendent Woodhouse's signature appeared in the Complaint "carries all the indicia of legality" and that the issue was extraneous to the case. As to the contention that the parties named in the suit were not representatives of a class, the judge stated that the WEA membership was in court by virtue of Mrs. Locher's appearance. As to the charge that unfair labor practices charge filed with MERC required deferral by the court to MERC, the judge agreed with Board attorney Richard Mosher, that an unfair labor practices charge becomes relevant in a strike injunction case only when the union files such a charge against the Board and makes this the basis of their strike. In addition, Mosher asserted that MERC had indicated that it was not their policy to seek injunctions in such instances and that they would not do so in this case. Hence, the judge ruled that the case should proceed.

The first witness for the Board was Associate Superintendent for Personnel and Employee Relations Howard Chenoweth. Attorney Mosher first established the duration of the bargaining between parties to the suit. He then asked whether any references were made to a strike during that bargaining. The MERC had found the WEA guilty of an unfair labor practices charge in the 1973 strike because they had "announced ahead of time and had plotted and moved...to go on strike, and second, had coerced the board the night before saying 'If you don't accept our ultimatum, we will go on strike'" (Teacher Source). Attorney Mosher

was apparently seeking to establish that the same conditions obtained in this strike.

The next person on the stand was John P. Hamm, Associate Superintendent for Business and Finance. Initial questioning established Superintendent Hamm's credentials for his position as chief financial officer for the WCS. Hamm's testimony was directed toward the establishment of financial harm because of the strike. He testified that the second largest portion of the revenue for the district comes from the State of Michigan through "membership aid and various other categorical revenues." He explained how the amount of aid allotted to the district is calculated, including the significance of the 4th Friday attendance count and of getting in the legally required 180 days of instruction; each day shy of that mark would result in a loss of about \$74,000 a day.

He was then asked what costs the school district had incurred since September 5 that would not normally occur when school is out of session. He cited the following:

- 1) The mailing of two flyers to citizens of the district giving information about the negotiations and strike, costing \$2,800 - 3,000.
- 2) Notification by first class mail to all ten-month clerical employees that they would be laid off for the duration of the strike and a projected similar recall notice at the end of the strike.
- 3) Salaries to three union officials among the clerical employees who could not be laid off and who were being employed at the administration building at a cost of about \$940.
- 4) Salaries to central cafeteria staff who had to remain for three days to prepare the cafeteria for non-use at a cost of about \$1,500.
- 5) Anticipated future costs, should the strike continue, might entail keeping school open during four contractual holidays to which the district was committed with its AFSCME custodial and clerical employees; for such holidays, the district would be obligated to pay them at trifle time which would run about \$18,000 a day. If all seven contractual holidays were required, costs would be proportionately higher. Further, there would be potential costs of unemployment compensation for which these employees would be eligible.
- 6) Heat costs would rise, given that five of the holidays taught would fall in winter.
- 7) The loss in enrollment of one student would cost the district approximately \$1620 in lost state aid (Transcript, Warren, 1978: 39-45).

Under cross-examination, Hamm admitted that the district could still get in the 180 days if schools began as late as October 13, a date nearly a month away. And he concurred that the fourth Friday count would be taken on September 29, a date two weeks away. Further, he conceded that the school year could be extended from the contemplated closing date of June 15 until June 30.

WEA Attorney Finkel's questioning referred to cases in the Crestwood and Clawson school districts where school had not been in session on the fourth Friday; Finkel implied that they had nevertheless received state aid. Further, he secured agreement from Hamm that the district had not been compelled to mail the flyers about the strike. And he called to the attention of the court a statute which specifically states that if an employee is laid off as a result of certain activities, that employee is not entitled to unemployment benefits.

The next witness for the Board was John Kouzoujian, Associate Superintendent for Instruction. Again, Attorney Mosher established his record of experience and credentials for his position. Almost all of Kouzoujian's testimony dealt with irreparable harm.

Kouzoujian testified that the role of the teacher is to impart knowledge, develop basic skills and transmit the basic tenets of good citizenship. He continued:

Without reviewing all the ways of the students to learn, I think, and there are many, one of the more important matters is by their emulating the behavior of adults and when they perceive the adult participation in an unlawful act, it usually leads to one or two conclusions: either that lawlessness is legitimate and it is appropriate form of behavior or they become confused. They don't understand the dichotomy between ~~what they are taught verbally in terms of how they should behave and~~ then see vivid example of contrary behavior (Transcript, Warren, 1978: 56).

Kouzoujian was asked whether, from his perspective as an expert in the area of instruction, the holding of six-day school weeks to make up strike days was a viable option. He felt it would not be:

~~...one has to understand the intensity of instruction that is taking place...to extend that to a sixth day I think there would be diminishing returns for the effort exerted...~~ (Transcript, Warren, 1978: 58).

In addition, there would be financial costs of paying employees overtime. Further students would be deprived of time with parents on weekends "which provides the necessary re-enforcement and support so that when they do return to school they can get the most out of the particular experience" (Transcript: 58-9). He testified that student interest begins to "wane and fade" at the end of May and early June and would be difficult to sustain in the warm weather of late June. Instruction would, in his opinion, "be reduced wholly to a custodial function."

Running the school month through June could jeopardize enrollment of high school seniors at junior colleges or universities. Those not going to college would find many jobs taken. And the summer program of the WCS would be adversely affected, with the program perhaps ending in late summer.

If the calendar were altered to teach during allotted vacation days, this would have an adverse effect on learning:

I think it is widely accepted in terms of learning theory that students do need respite and relief from the vigorous instruction, and as a result, we've seen this concept I think advanced by our own teachers at the bargaining table (Transcript, Warren, 1978: 61).

In negotiation, several years earlier, teachers had argued for a mid-winter break citing the need for relief from continual operation of the schools.

Kouzoujian testified that extra-curricular activities were being affected. Schedules for football and girl's basketball were set a year in advance and would be impossible to make up.

Then came a part of the trial which all parties agree was crucial in the issuance of the injunction. Kouzoujian was asked:

Q: Will the continuation of the strike have any affect (sic) on student receptivity to the instructional process?

A: In my opinion the longer the strike the greater the adverse effect.

Q: Would you explain why that is your opinion?

A: Well, first of all, I think that in the mind of the students there are anxiety tensions that do develop. I don't imagine I see them. I was driving down in front of Mott Senior High School and observed what appeared to be a high school student carrying a sign and when I say they appeared to be high school, they seem to be of a lesser age. At first I thought they might be teachers, except the sign was saying 'Fire the teacher.' To me this is an expression of anxiety, of hostility that I think impairs the relationship necessary for effective instructions.

Q: In your opinion, what affect (sic) will the continuation of the strike have on that tension and anxiety?

A: I think the longer the strike the more intense the anxiety and I think if and when teachers do return to the classroom I think it impairs their ability to transmit the knowledge and the concepts and the skills that we are responsible to do (Transcript, Warren, 1978: 65-6).

The impact of this part of the court testimony will be discussed later. Kouzoujian further testified that continuation of the strike would effect the vocational education program; since teachers were not in the classroom, they could not be placing students in jobs or giving them follow-up supervision.

Further, the program for dropouts might be seriously impaired:

an intense effort is made to identify and to encourage those students to return. While we are on strike we are not performing

that service, and in my judgment the longer we are out the greater the danger becomes of losing significant numbers of marginal students (Transcript, Warren, 1978: 69).

In addition, the WCS District conducts programs for the deaf and blind for much of the county. Sending districts furnish transportation for their special students. The schedule of the WCS would not be the same as those of the sending districts with the possible loss of students while families were on vacation. In addition, the sending districts would incur additional costs for transporting students during normal vacation days. Finally, attendance would fall if school were held on Saturdays.

On cross-examination, Kouzoujian admitted that achievement levels for the district had been stable despite strikes in 1971 and 1973. Under further questioning, he concurred that the role of teachers was not only to impart knowledge, develop basic goals and instruct in good citizenship but that they were also expected to teach students the art of critical thinking and analysis. Regarding his statement that the strike produced confusion and an example of lawlessness in children, he was asked whether he could cite studies to substantiate his opinion of alleged harm. He replied, "Only direct experience. Only my experience as a high school principal....I can't recall any titles of articles."

He was similarly asked to substantiate his statement that the six-day week would have an adverse effect on students; he again cited his direct experience in similar situations. Counsel then asked if it was not true that schools in France and Japan had six days of instruction. Kouzoujian replied that he did not know.

Next, he was asked about WCS's 1530 Program. He explained that it was an attendance policy wherein if a student were absent 30 days in a school year, that student could be dropped from the course. Counsel drew the implication that WCS did not consider less than 30 absences detrimental to drop students from the school rolls.

He was further queried regarding his statements that holding school six days a week or extending the year to the latter two weeks in June would be counterproductive because of the need for time away from an intensive learning atmosphere. Again, he could cite no study but indicated he could find one if given the time.

Counsel reminded him of schools which operated on the 45-15 Program -- 45 days of instruction with 15 days off -- in which children are in school throughout the calendar year. Kouzoujian asserted that this was an experimental program which usually was conducted under two factors not present in the current situation.

(A) they usually have air conditioned facilities; (B) they have planned recesses of the 15 days so they create the opportunity to provide respites and relief when needed. I think that's an entirely different kind of question (Transcript, Warren, 1978: 79).

He was further asked to substantiate with studies or to otherwise support his statements that the strike was causing harm because pupils' interest fades by late May or early June, that extending the school year would have an effect on college admissions, that students had been denied admittance to college because the student went to school past the cutoff date, that students would have difficulty seeking job opportunities, that delaying summer school till after July 4 because of an extended school year would harm students, that cancelling vacations would have an adverse impact. Kouzoujian could cite no studies but again asserted that, given the time, he believed he could find some.

Again, he was asked to cite objective evidence or to substantiate the nature of irreparable injury in eliminating vacations at Christmas, in impact on extracurricular activities, in effect on the anxiety of students, on the program for drop-outs or on the conjectured loss of enrollment due to the delay in starting the school year. Again, he could cite no studies of evidence other than his own direct experience.

Attorney Mosher then called Mrs. Judy Locher to the stand. She was asked whether a letter from the WEA, admitted as evidence, had been sent to substitute teachers in the district. Paragraphs four and five of that letter read:

~~At this time the bargaining teachers are firmly convinced that we~~
have no alternative but to strike in order to protect the Union and the rights of all teachers. Schools must not be opened. You must not go into classrooms of the striking teacher (Transcript, Warren, 1978: 97).

Mrs. Locher affirmed that the letter had gone out. Neither attorney had further questions for her.

Teachers' attorney Finkel then made a motion to dismiss on grounds that the plaintiff had failed to prove his case. He asserted that the Holland decision affirmed that although strikes were prohibited in the PERA, the Board must show irreparable harm in order to receive injunctive relief. Testimony by plaintiff "does not come anywhere near close to showing any irreparable harm or imminent injury" (Transcript, Warren, 1978: 98). He reminded the court that the writ of injunction was an extraordinary writ to be exercised in a very cautious manner. School officials had testified that they could get in 180 days of instruction if school began as late as a month hence; further, the fourth Friday count was two weeks away. He continued:

I submit to the Court that there hasn't been any inkling of showing of irreparable injury and in that case and on that basis I would move to dismiss the complaint, your Honor (Transcript, Warren, 1978: 99).

Judge Cashen denied the motion indicating that in such a case, he took "the facts plaintiff has elicited from the witness stand as being true" and that they "would adequately prove -- provide the requirement of Holland as set forth in the granting of the requested writ" (Transcript,

Warren, 1978: 99). Attorney Mosher then asked that, given that the strike was deemed illegal and that a determination of irreparable harm had been made, the court issue a temporary restraining order pending presentation of the defense of the Union. But Judge Cashen asserted that the defense be allowed "their day."

The defense called only one witness: Professor Sam Corl of Michigan State University (Associate Professor of Education and Director of Secondary Education, Pilot Program). He was asked whether, in his opinion, a two- or three-week strike would have an adverse effect on the relationship of students to the school and to society. Corl replied this would depend on how the incident was handled by teachers but given good teachers, there would be no adverse effect. In further questioning, he testified that there would be no irreparable harm to students or teachers because school did not start on time and was delayed for some weeks. Nor would extending the school year beyond June 30 have an adverse impact. When asked whether there were educational studies or research on which he based his opinions, he cited a study made in Philadelphia in 1972. In that instance, testing of pupils began prior to the start of the strike. The finding was that there was no difference in achievement levels of children who had been in school and those who had been out of school during the eight-week strike. He was asked to cite other studies. He referred to one conducted by Harbor which examined all those factors that seem to account for student success or failure and found that schooling had no measurable impact on such outcomes. If the impact of the schooling was negligible, then it would be difficult to conclude that missing some school would cause harm.

He was asked whether a six-day week could cause harm. He replied that, based on evidence in Japan and Europe where Saturday classes were routinely held, it would be difficult to infer harm. As to spacing and length of vacation periods, he testified that the literature was inconclusive as to the optimum duration. He was asked "Would the concept of the role of the teacher in a strike situation tend to create irreparable injury on that student and his perception of that student and that teacher's role as someone to inculcate knowledge to a student in that instance?" He replied that in the short run, there was always some anxiety and turmoil in such a situation but that Michigan was one of the key states in collective bargaining, with many parents being union members. Under those conditions "it is hard for me to conceive of students in any long period at all being negatively impressed by a teacher who exercises collective bargaining" (Transcript, Warren, 1978: 106).

He was asked whether a lengthened school year would injure students with respect to college admission. He replied that at Michigan state, exceptions were made in such instances. He testified that several teachers who were students in his own education classes had been prevented from attending initial class sessions due to a strike. He continued, "I think it is very common practice and I don't have a single faculty member on our staff who penalize people for that purpose. We make exceptions and work it out" (Transcript, Warren, 1978: 107-8).

When questioned whether non-college students would be penalized because of the extended school year he referred to Michigan State University's trimester system in which students attended until mid-June. He said there was no evidence that these students suffered because they could not compete with students who were out earlier. Nor was there evidence that school districts under a strike suffer a loss of enrollment.

On cross-examination, he concurred that the cited Philadelphia study had to do with school achievement, not with student attitudes. He was then asked whether he would advocate a seven-day-a-week school calendar. He said he would not. He was asked whether a six-day week would be harmful; he replied that he did not believe it would. When asked when harm begins to occur, he replied that in the Philadelphia study, harm did not occur despite an eight-week strike. He concurred that if school ran for only one month, there would probably be harm to students. He indicated that he disagreed with Doctor Kouzoujian not only as to when irreparable harm occurs but also on the kind of irreparable harm that might occur. This concluded the presentation of its case by the WEA.

Teachers' attorney Finkel, in summation, again referred to the argument that plaintiff was not in court in "any legal capacity" because of the violation of the Open Meeting Act and the school code. Further, the case had not been made for irreparable injury in keeping with Holland "and I don't see how this Court can issue an injunction."

Judge Cashen then issued his opinion. He indicated that both sides understood his thinking on the subject since he had expressed it during negotiations in chambers. He continued:

The teachers are employees. They have the right to withhold services normally as any other employee would. They don't have the duty to subsidize the community, and that's the way I feel about this issue. On the other hand, we have the School Board who represents management and they say, "Look, regardless of what anyone else says, we know our position is the best. We only have 'X' number of dollars and our responsibility is to run a solvent school district," and I am convinced that we have some pretty decent people here (Transcript, Warren, 1978: 114).

He indicated he believed both parties had been bargaining in good faith:

...but we do have a circumstance that the law provides that public employees cannot strike. It is that simple, and that's the law and as set forth in Holland and the Crestwood and several other subsequent cases, public employees cannot strike. Whether that's fair or not is not in my preview of things to decide. The only function that I serve at this point is to determine the facts and as to whether or not under Holland the statute should be enforced against this particular activity (Transcript, Warren, 1978: 114-5).

He held that a strike was occurring. The next question "was whether or not irreparable harm under Holland exists." Both counsel had "very ably addressed their attention" to this issue and he had enjoyed listening to the experts. But the experts did not agree:

Doctor Corl has his thinking on this, you see, and the other man here has spent nine - no 29 years, Doctor Kouzoujian, and he has an entirely different opinion. Yet we are talking about the same thing. Here are two fellows who have been called and they can't agree. Their discord in agreement is unbelievable (Transcript, Warren, 1978: 116).

The focal issue was not Christmas vacation or teaching on legal holidays. Rather it was the "education of the kids."

I don't (sic) look at it from the point of view of young kids walking up and down the street carrying a picket sign. That's the most devastating thing you can imagine. Can you imagine a young kid walking up and down the street with a sign saying, "Fire my teacher?" That's a terrible thing (Transcript, Warren, 1978: 116).

The judge noted that youngsters usually have great fondness for a classroom teacher. So when a youngster is somehow alienated from the classroom teacher for even a brief period of time, "that's a devastating event."

In addition, "financial aspects" of the school district were in jeopardy. Further:

I am not at liberty as Doctor Corl to speculate in the future irreparable harm when it will commence or if it will commence. We are not in a position to do that...there are 30,000 kids out there and 1400 teachers, let alone the administrators, clerks, cafeteria people, whatever they all are. This situation affects their every movement of thinking. Right now each and everyone of them let alone the untold parents that are affected by this work stoppage, these are the things I have to think about (Transcript, Warren, 1978: 117).

He concluded:

The substance of all the facts overwhelmingly demonstrates to this Court that irreparable harm does exist. It exists to the School Board. It exists to the teachers. It exists to the kids. It exists to the community in which that school district exists. Everybody suffers each and every passing moment that this work stoppage continues (Transcript, Warren, 1978: 117-8).

He stated that the purpose of the Public Employment Relations Act was "to preserve to the public the benefits of those services for which they pay, and to me that is the overriding consideration in this whole picture" (Transcript, Warren, 1978: 118). Teachers, by virtue of working in the public sector, under PERA forfeit "certain rights and privileges including

the right to withhold services when irreparable harm exists. It was the obligation of the court to see that the public received the services to which they were entitled. He would therefore issue the injunction.

Judge Cashen indicated that he would have been delighted if the case had gone to someone else. His wife was a teacher and he understood both sides. But the law must be complied with.

He expressed the hope that the growing and continuing hostility and alienation on both sides could be contained. He found it "appalling" that strikes were occurring in Warren with such frequency with three strikes in "a few short years." He encouraged both parties to negotiate and reach an early agreement.

Subsequent Action

On September 20, plaintiff filed a memo of law dealing with picketing. The memo stated that defendants were continuing picketing and that on September 19, they had amassed to prevent egress and ingress to two high schools with approximately 125-200 pickets at each place. The pickets, it was stated, had threatened to cause physical harm to those non-striking employees who attempted to enter or exit these sites. Consequently, plaintiff was suffering irreparable harm. The remedy at law was inadequate since the school had requested the aid of local police who "have been unable to alter the situation." Judge John G. Roskopp, acting for Judge Cashen who was attending a judicial conference, issued a temporary restraining order on the same day it was requested, restraining defendants from interfering in any manner with ingress or egress and limiting the number of pickets to three per school site.

On that same day, plaintiff also filed a Petition to Punish for Contempt. A show cause hearing on contempt was set for Monday, September 25. It lasted only a few minutes. Judge Cashen asserted that he would not, at that time, issue contempt citations. Both parties had been bargaining in good faith and he ordered that such negotiations continue. He appointed Attorney Walter Nussbaum as master of the court who would monitor negotiations for the court. The judge warned that he would reconvene the hearing and issue contempt citations summarily if he felt such action were justified.

Bargaining commenced at 5:00 P.M.; by 10:00 P.M., the parties had reached tentative agreement. The following afternoon, the teachers ratified the agreement. The strike was over.

Summary

The Warren Consolidated Schools strike represented an almost classic case of the arguing of irreparable harm. Of our site studies, this strike and the one in Butler, Pennsylvania were the ones in which the establishing of harm through court documents and testimony was

taken most seriously. Given the Holland precedent, it is not surprising that this should be the case in Warren. What is surprising is that in some recent strikes in Michigan, ex parte temporary restraining orders were being issued. Ex parte orders are issued upon application of the board with no opportunity for teachers to present their case or, in some instances, to even be present in court. There is thus no opportunity for them to challenge or refute the allegations of harm made by the board.

However, in the Warren case, Board attorneys carefully prepared court documents and testimony arguing what a teacher source called "a normal litany of harm." Board actors testified that the Board was harmed in that they were unable to carry out their constitutional and statutory duty to provide education, that there was a threat to the capacity to provide 180 days of instruction and that the strike was incurring increased operating expenses and other financial harm. But the chief focus of their arguments as to irreparable harm was on the harm the strike was causing to students. Students were being deprived of educational opportunity; they were being given the example of illegal behavior by teachers; the strike would have adverse effects on attitudes to learning, a variety of programs (for drop-outs, special education, extra-curricular activities) were being threatened; and the intensive scheduling of make-up days necessitated by a continuation of the strike would be adverse to effective learning. The Board did not argue harm to the community or the public although the judge later concluded harm being incurred by those segments of the population.

In cross-examination, teacher attorney Eli Finkel challenged some of the Board testimony. He secured admission that the district was still two weeks away from the fourth Friday count at the time of the show cause hearing, inferring thereby that harm had not yet begun to occur. In addition, he established that the district was still a month away from the time when the 180 days of instruction could no longer be procured (if holidays and the month of June were used for make-up days.).

But teacher sources indicated that they felt the Board's inability to furnish evidence of harm by citing educational studies and authorities was the weakest aspect of the case. They referred to statements made by Board actors in court as "conclusory allegations," opinions which were not substantiated by evidence. Again and again, WEA Attorney Finkel asked for citation of professional studies and authorities to back up statements being made by school personnel. But they could cite none, although they indicated that, given time in the library, they would be able to find some.

But teachers made a case that harm would not occur as a result of a teacher strike on a scholarly but nonetheless risky basis. The witness for teachers cited studies and authorities indicating that schooling had little measurable impact on student success or failure in life. An absence because of a teacher strike should therefore not affect pupils adversely. This is a two-edged argument, likely to undercut the position of teachers in some future

argument over the importance of their contribution to the lives and learning outcomes of children. Teacher sources admitted they were uncomfortable in using that approach but used it nevertheless.

But teachers also used the example of several learning programs and variant class schedules in other countries to establish that learning could occur even if the five-day-a-week schedule were not followed. And they cited a study made during an eight-week Pennsylvania strike in which there were no differences in scholastic achievements between those who had been in school and those who had been out during the entire strike. This was perhaps their most persuasive refutation of harm; it received little attention.

Judge Cashen was then left with a battle of the experts. Learned men had testified on both sides; they were far apart in their assessment of the consequences of the strike and on the existence of harm. Indeed, Judge Cashen noted, "Their discord in agreement is unbelievable" (Transcript, Warren, 1978: 116). The judge did not note that the case of the teachers had been substantiated by scholarly evidence while that of the Board had not. That quality of evidence was apparently not decisive for him. For him, there had been harm to the teacher-student interaction process as exemplified by the student with the sign "Fire my teacher." That erosion of relationship seemed to epitomize the existence of harm for him. In addition, he found that there was harm to the Board, to teachers and to the community. The public was being deprived of services for which they were paying. To secure those services, the judge issued the injunction.

In summary, the precedent of Holland that an injunction not be issued in a teacher strike absent a finding of violence, breach of the peace or irreparable harm was observed in the court action in this strike in the denial of an ex parte temporary restraining order and in the provision for a show cause hearing. Further, the consideration of the case in that hearing was focused on the issue of irreparable harm. In face of the disagreement by the experts, the judge relied on court testimony but also, on his independent judgment in finding the existence of harm. He agreed with the Board that the learning process was being harmed; in addition, he also found there was harm to the Board, to teachers and to the community. So finding, he issued the requested injunctive relief.

FOOTNOTES

¹Report prepared by Edith E. Graber. The chronology of the strike has been constructed from information gleaned from the Complaint filed in Warren Consolidated Schools v. Warren Education Association, September 13, 1978; from the Order to Show Cause and Temporary Restraining Order, September 20, 1978; from the Affidavit of William A. Gordon, WCS v. WEA, September 19, 1978; from the Preliminary Injunction, September 15, 1978; from the Transcript of WCS v. WEA 78-6390-CL; from the issues of The Detroit News from September 15-26, 1978, and The Macomb Daily of September 23 and 27, 1978; and from interviews with Board and teacher actors in the case. In order to protect the confidentiality of our sources, interviews with teacher attorneys, teacher union officials and other observers of the strike from the perspective of teachers are grouped anonymously under the designation "teacher source." Similarly, interviews with Board attorneys, school administration officials and observers of the strike from the perspective of the Board are designated as "Board source."

²Norwalk Teachers' Association v. Board of Education (Conn. Sup. Ct. of Errors, 1951): teachers as government employees have no right to strike; City of Manchester v. Manchester Teachers Guild (N.H. Sup. Ct., 1957) teachers' strike illegal and was properly enjoined; City of Pawtucket v. Pawtucket Teachers' Alliance (R.I. Sup. Ct., 1958): teachers' strike illegal. Constitutional rights to assemble, petition for redress of grievances not violated by injunction; Board of Education v. Shanker (Sup. Ct., N.Y. Co., 1967): teachers engaged in an illegal strike which entitled Board to injunctive relief; Board of Education v. Education Association (Md. Cir. Ct., 1968): strike by public school teachers unlawful and enjoined; Pinellas Co. C. Teachers Association v. Board of Public Instruction, (Fla. Sup. Ct., 1968): court was authorized to enjoin public school teachers from striking.

³In 1973, the Supreme Court of Rhode Island became the first state court to apply the principles announced in the Holland Decision (Barrett and Lobel, 1974: 521). The court held that an injunction would not issue "unless it clearly appears from specific facts...that irreparable harm will result" and concluded that "the mere failure of a public school system to begin its school year on the appointed day cannot be classified as a catastrophic event" (School Committee of Westerly v. Westerly Teachers Association, R.I. 299 A2d 441, 445, 1973).

In 1974, the New Hampshire Supreme Court used similar reasoning: "The injunction is an extraordinary remedy which is only granted under circumstances where a plaintiff has no adequate remedy at law and is likely to suffer irreparable harm" (Timberlane Regional School District v. Timberlane Regional Education Association, 317 A2d 555, 558, 1974).

In 1975, the Supreme Court of Wisconsin noted that cases from other jurisdictions sometimes inferred irreparable harm from the legislative prohibition of public sector strikes. But the court found the

showing of harm necessary for relief in the case before it. In those other jurisdictions, "a ban on public employee strikes is deemed indicative of a legislative public policy determination that such activity will cause irreparable harm to the public and therefore may be enjoined without the presentation of evidence of actual harm in a particular case. Nevertheless, the key prerequisite to injunctive relief -- irreparable harm -- remains, and a court should not restrain illegal acts merely because they are illegal unless the injury sought to be avoided is actually threatened or has occurred... We conclude in this case that immediate and serious harm to public health and safety was not apparent and that an injunction should issue only after a showing of irreparable harm dependent upon the facts and circumstances as shown at the hearing" (Joint School District No. 1 v. Wisconsin Rapids Educational Association, 234 N.W. 2d 289, 1975: 300, 301).

In 1977, the Supreme Court of Idaho cited Holland, Westerly and Timberlane; the court concluded that while school teachers did not have a right to strike, "mere illegality of an act does not require the automatic issuance of an injunction" (School District No. 351 Oneida City v. Oneida Education Association, 567 P.2d 830, 834, 1977).

The Crestwood decision can be read to imply a further de facto right to strike. Faith Bishop, Director of the Office of Tenure, Negotiations and Retirement for the Michigan State Board of Education explains: "The Crestwood decision... in essence says that absent a showing of unfair labor practice on the part of the board or on the part of either side, the board can fire teachers for striking." And so we in essence can have a legal strike if there is an unfair labor practice charge filed that is proven. In essence, then, it would be a legal strike." (Interview with Faith Bishop, Director, Office of Tenure, Negotiations and Retirement, Michigan State Department of Education, November 13, 1978: 3).

REFERENCES

Barrett, Jerome T. and Lobel, Ira B. "Public Sector Strikes--
Legislative and Court Treatment." Monthly Labor Review 97
(September 1974): 19-22.

Bishop, Faith, Director, Office of Tenure, Negotiations and Retirement,
Michigan State Department of Education, Lansing, Michigan.
Interview, 13 November 1978.

Comment. "Collective Bargaining for Public Employees and the
Prevention of Strikes in the Public Sector." Michigan Law
Review 68 (December 1969): 260-302.

The Detroit News, 15, 17, 19, 22, 23, 25, 26 September 1978.

Howlett, Robert G. "Michigan's New Public Employment Relations Act."
Michigan State Bar Journal 45 (April 1966): 12-16.

"Hutchinson Act." Mich. Comp. Laws, Sec. 423.201 et seq.

The Macomb Daily, 23, 27 September 1978.

Michigan. Department of Education. Office of Tenure, Negotiations
and Retirement. The Role of the Michigan Department of Education
in Teacher/School Board Negotiations. 1976.

Public Employment Relations Act. Mich. Comp. Laws, Sec. 423.201 et
seq. (1965).

Sachs, Theodore. "Annual Survey of Michigan Law--Labor Law." Wayne
Law Review 15 (Winter 1968): 243-251.

Smith, Russell A.; Edwards, Harry T. and Clark, Jr., R. Theodore.
Labor Relations Law in the Public Sector. New York: Bobbs
Merrill Co., 1974.

Cases

Ainsworth v. Hunting and Fishing Club, 153 Mich. 185, Mich. Sup. Ct., 1908.

Board of Education v. Education Ass'n, 67 LRRM 2745, Md. Cir. Ct.,
Montgomery Co., 1968.

Board of Education for the Warren Consolidated Schools v. Warren
Education Association et al. MI. No. 78 6390 CL, Matomb County
Circuit Court (1978).

Board of Education of City of New York v. Shanker, 283 N.Y.S. 2d 432,
Sup. Ct., N.Y. Co., 1967.

City of Manchester v. Manchester Teachers Guild, 131 A. 2d 59,
N.H. Sup. Ct., 1957.

City of Pawtucket v. Pawtucket Teachers' Alliance, 141 A. 2d 624,
R.I. Sup. Ct., 1958.

City of Rockford v. Firefighters Local 413. 11. Sup. Ct., 240
N.E. 2d 705 (1968).

Cross Co. v. Local 155, UAW. 371 Mich. 184, Mich. Sup. Ct. (1963).

Garden City School District v. Labor Mediation Board. 358 Mich.
258, (MI. Sup. Ct., 1959).

Joint School District No. 1 v. Wisconsin Rapids Educational Ass'n.
234 N.W. 2d 289, Wis. Sup. Ct., 1975.

Lamphere Schools v. Lamphere Federation of Teachers. 252 N.W. 2d
818 (MI. Sup. Ct., 1977).

Michigan. Circuit Court for the County of Macomb. "Affidavit of
William A. Gordon." Warren Consolidated Schools v. Warren
Education Association. Civil No. 71-4520 (19 September 1978).

Michigan. Circuit Court for the County of Macomb. "Complaint."
Board of Education for the Warren Consolidated Schools v. Warren
Education Association. Civil No. 71-4520 (13 September 1978).

Michigan. Circuit Court for the County of Macomb. "Memorandum of
Law." Warren Consolidated Schools v. Warren Education Association.
Civil No. 71-4520 (15 September 1978).

Michigan. Circuit Court for the County of Macomb. "Motion for Summary
and/or Accelerated Judgement." Warren Consolidated Schools v.
Warren Education Association. Civil No. 71-4520 (15 September 1978).

Michigan. Circuit Court for the County of Macomb. "Order to Show
Cause and Temporary Restraining Order." Warren Consolidated
Schools v. Warren Education Association. Civil No. 71-4520
(20 September 1978).

Michigan. Circuit Court for the County of Macomb. "Petition to
Punish for Contempt for Disobeying Preliminary Injunction." Warren
Consolidated Schools v. Warren Education Association. Civil
No. 71-4520 (20 September 1978).

Michigan. Circuit Court for the County of Macomb. "Plaintiff's
Memorandum in Support of Complaint for Injunctive Relief."
Warren Consolidated Schools v. Warren Education Association.
Civil No. 71-4520 (15 September 1978).

Michigan. Circuit Court for the County of Macomb. "Preliminary Injunction." Warren Consolidated Schools v. Warren Education Association. Civil No. 71-4520. (15 September 1978).

Michigan. Circuit Court for the County of Macomb. Transcript of Board of Education for the Warren Consolidated Schools v. Warren Education Association. Civil No. 71-4520 (15 September 1978).

Norwalk Teachers' Ass'n. v. Board of Education. 83 A.2d 482, Conn. Sup. Ct. of Errors, 1951.

Pinellas Co. C. Teachers Ass'n. v. Board of Public Instruction. 214 So. 2d 34, Fla. Sup. Ct., 1968.

Rockwell v. Crestwood Board of Education. 393 Mich. 616; MI. Sup. Ct., 1975.

School Committee of the Town of Westerly v. Westerly Teachers Association. 299 A. 2d 441, R.I. Sup. Ct., 1973.

School District for the City of Holland v. Holland Education Association. 157 N.W. 2d 206 Mich. Sup. Ct., (1968).

Timberlane Regional School District v. Timberlane Regional Educational Association. 317 A. 2d 555, N.H. Sup. Ct., 1974.

Warren Consolidated Schools v. Warren Education Association. MI. Civil No. 71-4520, Cir. Ct. of Macomb Co., (1971).

Warren Education Association v. Adams. 226 N.W. 2d 536, MI. Ct. of Appeals, Div. 2, (1975).

PENNSYLVANIA: THE BUTLER AREA SCHOOL DISTRICT STRIKE

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CONTENTS

CHRONOLOGY OF THE STRIKE 1

THE LEGAL CONTEXT 3

 Statutes 3

 The origin of Act 195 3

 Enjoining teacher strikes 5

 The 180 day dilemma 6

 Court Cases 8

ANALYSIS 13

 Consequences of the Injunctive Process for Teachers
 and Boards 14

 The Role of the Judge 21

CONCLUSION 23

APPENDIX 25

FOOTNOTES 26

REFERENCES 27

PENNSYLVANIA: THE BUTLER AREA SCHOOL DISTRICT STRIKE

CHRONOLOGY OF THE STRIKE

January 9, 1978: In the Butler Area School District, 540 teachers and professional employees went out on strike. The contract for the 1977-78 school year had expired on July 1, 1977. Since that date, teachers had been working without a contract and had been continuing negotiations.

Under Pennsylvania's Act 195, the Public Employee Relations Act (PERA), teachers and other specified public employees may strike if certain bargaining procedures are first exhausted. In keeping with those requirements, state mediator August Turak had been appointed by the Pennsylvania Labor Relations Board (PLRB) to assist in negotiating the impasse. Turak first met with the parties on March 16, 1977 and was present at 24 other mediation sessions until October 6, 1977 (Court Transcript, Butler Area School District v. Butler Education Association, Common Pleas Court, Butler County, Pa., 1978).

On October 3, Mediator Turak requested the PLRB to institute fact-finding. The Butler Education Association (BEA) had called a general membership meeting in order to conduct a strike vote if no contract settlement had been reached by that time. District officials reasoned that this deadline left Turak no option but to request fact-finding in order to halt the strike. Twenty-nine unresolved items remained to be negotiated. A district official indicated that fact-finding is usually instituted when relatively few but stubborn issues remain. The request for fact-finding effectively delayed the strike at least 55 days since the fact-finder, after appointment, must take written and oral testimony from both sides, prepare his recommendation within 40 days of the request for the procedure, and then allow the two sides ten days to consider his recommendations. If either rejects, the report may be made public. No sooner than five but not longer than ten days after publication of the report, the two sides must again notify PLRB whether they accept or reject the recommendations. Only at this point may a strike legally be called. (The Butler Eagle, October 5, 1977; Act 195; Court Transcript, Butler, 1978:188-191).

School administrators asked students to report two hours late on Monday January 9. Recognizing that there were not enough teachers to hold school, they cancelled classes (Court Transcript, Butler, 1978:191).

January 16, 1978: One week later, attorneys for the Butler Area School District (BASD), Thomas W. King, III and Charles E. Dillon filed a complaint in equity, alleging that the strike had created a clear and present danger or threat to the health, safety and welfare of the public, and requesting an injunction. Butler County Common Pleas Court Judge George P. Kiester set a hearing on the

request for Thursday, January 19. The primary reason for the request for an injunction, according to Superintendent Dimitri Bourandas, was the district's inability to provide 180 days of instruction, should the strike last much longer. School was scheduled to close June 9 and the requisite legally required 180 days had to be provided by June 30, 1978. The district already had four days to make up from the first semester--two days missed when the district was engaged in bus contract negotiations and two days because of inclement weather in December (Court Transcript, Butler, 1978:4-15; The Butler Eagle, January 10, 1978).

January 10, 1978: Concerned Parents/Taxpayers for Better Education issued a statement urging teachers and the BASD Board to engage in round-the-clock negotiations and indicating, of the strike, that they could not "condone this action under any circumstance" (The Butler Eagle, January 10, 1978).

January 17, 1978: At the 38th negotiating session of the current round, William Hughes, director of research for the Pennsylvania State Education Association (PSEA) spent several hours presenting information which he claimed showed that the district could afford to increase teachers' salaries by \$1500, a sum slightly higher than teachers were requesting (The Butler Eagle, January 18, 1978).

January 19, 20, 23, 1978: Three days of court hearings ended as attorneys rested their case (court testimony is discussed below). Judge Kiester received legal briefs and verbal arguments on the afternoon of the 24th. (A negotiating session scheduled between the parties for January 22 at the urging of Judge Kiester was "fruitless." Teachers and Board returned to court on the 23rd.) (The Butler Eagle, January 20, 21, 23, 24, 1978).

January 24, 1978: Butler County Common Pleas Court President Judge George P. Kiester read his ruling to an estimated 200 teachers in a packed courtroom. Judge Kiester enjoined the strike, ordering the teachers back to their classrooms. And in a surprising move, he declared Act 195 unconstitutional:

The strike provisions of PERA (Public Employee Relations Act) relating to public school teachers cannot be reconciled with the Public School Code and the Constitution of Pennsylvania. The portion of PERA legalizing strikes by public school teachers is unconstitutional (Court Transcript, Butler, 1978:113-114).

The decision shocked educational and legal officials. BEA president Barbara J. Bishop said, "The judge overstepped the bounds of his authority. I'm sure it will be appealed." Albert Fondy, president of the Pittsburgh Federation of Teachers called the ruling "ridiculous." Superintendent Bourandas said, "We didn't seek to have it declared unconstitutional but we saw the clear and present danger in that the children were not going to be able to get

180 days of instruction if it went on much longer." Steve Russell, an attorney and representative of the Pennsylvania School Boards Association in Harrisburg, said he was "surprised" but "happy it came up." Russell said that state appellate courts had heard a group of cases involving the right of public employees to strike but none had addressed the question of constitutionality (The Butler Eagle, January 27, 1978).

January 27, 1978: Members of the Butler Education Association voted by a 2 to 1 margin (261 votes to 129) to return to classes on January 30, thus ending their three-week absence from the classroom. Teachers heard from their attorneys that three concurrent appeals would be taken in the case: a request for a stay of the injunction order would be filed in both Butler County Common Pleas Court and in the Commonwealth Court. The third appeal would be filed with the Commonwealth Court on the judge's ruling, including the issue of constitutionality. The 39th negotiating session was scheduled for that afternoon (The Butler Eagle, January 28, 1978).

May 25, 1978: BASD teachers and Board reached tentative agreement on the contract. The contract was signed on June 5, bringing to an end the longest running contract dispute in the history of the district (The Butler Eagle, June 6, 1989).

September 21, 1978: The Butler Area School District case was argued before the Supreme Court of Pennsylvania. On the following day, the justices, in a per curiam decision, held that Judge Kiestler's ruling that Act 195 was unconstitutional was "improvident...and is declared of no effect" (Butler Area School District v. Butler Education Association, 391 A. 2d 1295, Pa. Sup. Ct., 1978:1295). Since the strike had long been settled and other issues raised were moot, the appeals were dismissed.

THE LEGAL CONTEXT

Statutes

The origin of Act 195. Pennsylvania is one of six states in the nation to allow a statutory limited right to strike to teachers and to certain other public employees (Colton, 1980d). Its Public Employee Relations Act, commonly referred to as Act 195, went into effect in October, 1970. Before 1970, public sector labor relations were governed by a 1947 No Strike Law, Act 492 (P.L. 1183) which prohibited strikes and ruled out binding collective bargaining. The act provided no penalties for employers but harsh mandatory penalties for striking employees. Any employee who engaged in a strike was fired; if subsequently rehired, the employee could receive no raise in salary for a period of three years. And the employee remained on probation for five years from rehiring and was without tenure during that time. (Davidoff, 1973:689). Courts generally refused to assess

these penalties on striking employees, and there was general recognition that the law was unreasonable and unenforceable (Hartley, 1968:165). It was also ineffective. Numerous illegal strikes occurred and labor unrest in the public sector was widespread.

To remedy this situation, on May 14, 1968 Governor Raymond P. Shafer appointed a commission chaired by Leon E. Hickman. The governor directed the commission to

review the whole area of relations of public employes and the public employers and make recommendations to the Governor (by June 20, 1968) for the establishment of orderly, fair and workable procedures governing those relations, including legislation, if the Commission deems it appropriate (The Governor's Commission, Report and Recommendations, 1968:14. Hereinafter cited as Hickman Commission Report.)

During its short, intensive lifespan, the Hickman Commission conferred with officials from Wisconsin, Michigan and New York City concerning the administration of their statutes allowing public sector employees to bargain collectively. The Commission also scheduled extensive public hearings and heard testimony from representatives of 63 agencies representing both those who favored and those who opposed the right to strike (Hartley, 1968:165-6). In its final report, the Hickman Commission recommended that the 1947 law be replaced with a new law recognizing but carefully limiting the right to strike, believing that this would be a deterrent to labor impasses. "In short, we look upon the limited and carefully defined right to strike as a safety valve that will in fact prevent strikes" (Hickman Commission Report, 1968:14).

The Commission further recommended that:

Except for policemen and firemen, a limited right to strike should be recognized subject to these safeguards:

- a. No strike should be permitted for any reason whatsoever until all of the collective bargaining procedures outlined above have been fully complied with.
- b. No strike should be permitted to begin or continue where the health, safety or welfare of the general public is in danger.
- c. Unlawful strikes should be subject to injunctions, and violations thereof enforced by penalties that will be effective against the bargaining agent or individual employees or both (Hickman Commission Report, 1968:5).

After two years of considering various measures, the Pennsylvania General Assembly passed and the governor signed a law substantially incorporating the recommendations of the Hickman Commission.

Enjoining teacher strikes. Under Act 195, strikes are prohibited 1) during the pendency of specified collective bargaining procedures and 2) if a strike "creates a clear and present danger or threat to the health, safety or welfare of the public." Between these two specified restrictions, then, there is a "window" in which strikes are legal, e.g., after the exhaustion of mediation and fact-finding (if fact-finding is requested or directed by PERB) and until a court rules that a clear and present danger or threat to the public health, safety or welfare exists and enjoins the strike.

The traditional basis for enjoining strikes is the irreparable harm standard. According to well-established principles of equity, the injunction is considered an extraordinary remedy to be used sparingly and only in cases where irreparable harm or injury will occur to the plaintiff, absent such relief.

These principles of equity are further supported by a small but significant body of case law suggesting caution in the use of injunctive relief in teacher strike cases. In School District for the City of Holland v. Holland Education Association (157 N.W. 2d 206, 1968), the Michigan Supreme Court held that "it is basically contrary to public policy in this State to issue injunctions in labor disputes absent a showing of violence, irreparable injury, or breach of the peace" (Holland, 1968:210). The Holland case was followed by four other appellate court cases which likewise indicate the necessity to establish that irreparable harm will occur if an injunction does not issue (Timberlane Regional School District v. Timberlane Regional Education Association (317 A. 2d 555, N.H. Sup. Ct., 1974); Joint School District No. 1 v. Wisconsin Rapids Education Association (234 N.W. 2d 289, Wisc. Sup. Ct., 1975); and School Committee of Westerly v. Westerly Teachers Association (299 A. 2d 441, R.I. Sup. Ct., 1973); and School District No. 351 Oneida City v. Oneida Educational Association (567 P. 2d 830, 1977).

The Hickman Commission, however, did not rely on the traditional "irreparable harm" standard, but invoked one new to the field of public sector labor relations: that a strike "creates a clear and present danger or threat to the health, safety or welfare of the public". Why this substitution?

One impetus for the new language may come from the federal law governing labor relations in the public sector. The Report of a second Governor's Study Commission on Public Employee Relations, created by Governor Milton Shapp in 1978 to review the functioning of Act 195 and to suggest recommendations for revision (here termed the Jones Commission after its chairman, to distinguish it from the Hickman Commission of ten years earlier), notes that the Hickman Commission

had very little public labor relations experience to guide it in its deliberations. Not surprisingly, the Commission, in its report, gleaned many of its salient recommendations from the National Labor Relations Act (Jones Commission Report, 1978:1).

The National Labor Relations Act specified that peaceful, concerted activities by labor should not be enjoined by law. This was amended by the Labor-Management Relations Act of 1947 (Taft-Hartley) to direct that whenever a strike affected an entire industry or substantial part thereof, which, if permitted, would "imperil the national health or safety," such a strike might be enjoined. The precedent for attention to health and safety in Act 195 can thus be found in the NLRA. But members of the Hickman Commission felt that if strikes, and particularly, teacher strikes were to be enjoined only when they affect the public health and safety, there would be a virtually unlimited right to strike. Management representatives, too, felt that even far-reaching consequences of a teacher strike would be unlikely to affect public health and safety. The addition of the term "welfare" would obviate this difficulty. Labor representatives, however, opposed its inclusion; "welfare" was alleged to be too broad a term, thereby limiting or negating the right to strike. Almost any strike could be deemed enjoined on the basis of harm to the public welfare. But the term was added to the act (Kaschock, 1977).

The reason for the use of the phrase "clear and present danger" is somewhat more obscure. As the Commonwealth Court pointed out in Armstrong Education Association v. Armstrong School District (291 A. 2d 120, 1972), "The phrase has almost invariably been used heretofore in cases involving government interference with First Amendment rights" (Armstrong, 1972:123).

As will be noted below, the entire standard, "a clear and present danger or threat to the health, safety or welfare of the public" is often treated by the courts as synonymous with "irreparable harm." An exception is the distinction drawn between the two by Judge Mencer in his dissent in the case of Bristol Township Education Association v. School District, (322 A. 2d 767, Commonwealth Court, 1974).

The 180 day dilemma. Act 195 is a general act directed to improving public sector labor-management relations. Although public school strikes comprise the majority of work stoppages, there have also been strikes by government employees at the state, county and municipal level.

Since Act 195 is a general labor law, it provided no role in collective bargaining and no additional funds to accommodate changed procedures to some of the state agencies most immediately affected. Its implementation falls within the jurisdiction of the Pennsylvania Department of Labor and Industry (DeAngelis, August 4, 1977:4). The act also does not take cognizance of the conflict between laws, which results from its provisions. The Pennsylvania Department of Education, for instance, is given the responsibility for administering Commonwealth laws which are concerned with the operation of the state's public schools and is charged with providing a "thorough and efficient system of education." Under the Pennsylvania School Code of 1949 (Section 1501 as amended), school districts must provide 180 days of instruction each year. On the basis of a subsidy formula, the Department reimburses each district for the actual number of

days taught up to 180 days. For each day less, 1/180 of the state instructional subsidy is deducted. Teachers, too, are paid only for the days they actually work. Section 1121 of the Public School Code mandates deductions from annual salary for "loss of time." Hence, state law mandates the provision of the full 180 days and both district and teachers stand to lose income for less than 180 days of instruction.

However, Act 195 permits teachers to strike. If the strike proceeds long enough, it may be impossible to provide 180 days of instruction before the end of the fiscal year. Act 195 also provides that "no public employe shall be entitled to pay or compensation from the public employer for the period engaged in any strike" (Sec. 1006). But, to the extent that lost strike days are rescheduled, teachers receive full pay despite the law's proscription. Observers thus assert that there is no economic disincentive to deter teachers from striking. When lost days are rescheduled, teachers receive full salary, students receive full 180 days of instruction and the district receives full reimbursement from the state.² When they are not rescheduled, teachers lose pay, students lose part of the school year, and the district, according to law, loses its subsidy.

However, teacher associations and unions charge that 1) the Department of Education sometimes gives the district the full year subsidy for less than 180 days; 2) even where it does not, school districts actually make money during a strike.³

Most teacher contracts specify more than 180 days of instruction, also allowing several days for inservice training and planning time. The school district loses no subsidy for the days above 180 days which are lost due to a strike and it saves the amount of the teacher's salaries. But even when the days taught are less than 180, enough money may be saved in teacher salaries and in retirement and social security benefits to more than offset the subsidy loss from the state. The Pennsylvania Department of Education compiled a study of ten districts and the net amount saved in strikes in 1975-76 (See Appendix). The net saving is smaller for the poorer districts which rely more heavily on state subsidies to meet their instructional budget and larger for districts with a strong tax base. Hence, both teachers and boards lack the economic pressure and incentive to end a strike which obtains in labor relations in the private sector.

The Pennsylvania School Boards' Association, testifying before the 1978 Governor's Commission, held that

To force makeup days is tantamount to the National Labor Relations Board requiring private employers to provide sufficient overtime after a strike in the private sector so that the wages lost because of a strike were made up after the strike...Were such a thing to be done in the private sector, the balance that now exists would be destroyed (Atkinson, 1978:4).

In several court cases, school board officials have testified that they sometimes "do not schedule instruction days lost due to a strike to punish the teachers for striking" (Atkinson, 1978:5).

Teachers contend that many strikes are attributable to the intransigence of school boards with the penalty falling mainly on teachers. They charge that boards seek injunctions to end strikes averring the necessity of the full calendar year of instruction, but do not commit themselves to rescheduling the days lost (Court Transcript, Butler, 1978:515). Teachers support the retention of the 180-day requirement.

Given this situation, it is not surprising that where equitable relief is sought, concern for the 180-day requirement has permeated the court's consideration of whether there is a "clear and present danger or threat to the health, safety or welfare of the public."

Court Cases

In the first case to reach the appellate court after the passage of Act 195--Armstrong Education Association v. The Armstrong School District (1972), the Commonwealth Court overturned a lower court order enjoining a teacher strike. The trial court had denied the request for an injunction in an initial September 1 hearing but following a September 14 hearing (when 12 instructional days had been lost), had issued the injunction, finding a clear and present danger or threat to the health, safety or welfare of the public. The Commonwealth Court noted the origin of the "clear and present danger" standard in cases involving government interference in First Amendment rights. Citing one such case, the appellate court noted

The "clear" in that epigram is not limited to a threat indubitably etched in every microscopic detail. It includes that which is not speculative (but real, not imagined but actual. The "present" in the epigram is not restricted to the climatically imminent. It includes that which exists as contrasted with that which does not yet exist and that which has ceased to exist (Armstrong, 1972:123-4).

The court further noted that

...the "danger" or "threat" concerned must not be one which is normally incident to a strike by public employees. By enacting Act No. 195...the legislature may be understood to have indicated its willingness to accept certain inconveniences, for such are inevitable, but it obviously intended to draw the line at those which pose a danger to the public health, safety or welfare (Armstrong, 1972:124).

The disruption of routine procedures, the harassment of school board directors and the danger of losing state subsidies--all cited by the lower court--were not, at the time of the September 14 hearing,

valid reasons for granting the injunction. The disruption and the harassment were "clear and present" but neither a danger or a threat. The loss of school subsidies was a "danger" but "it was not, at least not yet, 'clear and present'" (Armstrong, 1972:124). The court continued:

If the strike lasted so long, therefore, that any continuation would make it unlikely that enough days would be available to make up the 180 required, the teachers could be properly enjoined from continuing it... (but) the strike must at the very least have reached the point where its continuation would make it either clearly impossible or extremely difficult for the District to make up enough instructional days to meet the subsidy requirement within the time available (Armstrong, 1972:125).

The court concluded that the inconveniences incidental to a strike might "conceivably accumulate to such an extent, be continued so long or be aggravated by some unexpected development, so that the public health, safety and welfare would in fact then be endangered" (Armstrong, 1972:125). However, the purpose of Act 195 was to avert danger, not to prevent future danger.

The Armstrong case is often cited in subsequent cases for the finding that the legislature did not intend that the inevitable inconveniences attending a strike, in themselves, constituted sufficient grounds for an injunction. But another finding, which the court in Root v. Northern Cambria calls dictum, is also relied on in subsequent cases namely the finding that

the danger that the district will lose state subsidy by the failure to teach 180 days, if clear and present, would be proper grounds for enjoining a strike... (Root v. Northern Cambria, 1973:178).

It was a dictum that came to be relied on as precedent.

In Philadelphia Federation of Teachers v. Ross; (301 A. 2d 405, 1973), the Commonwealth Court held that there was sufficient evidence to warrant the lower court issuance of an injunction in 1) the threat of increased gang activity, 2) the \$133,000 per day being expended by the city for additional police protection and 3) the threat of financial loss to a debt-ridden school district. Where the Armstrong court had focused its attention on the "clear and present danger" standard, the court here stated that the rest of the phrase "threat to the public health, safety or welfare" could not be ignored. The cited indicia constituted such a threat. In addition, the possibility of not being able to teach the minimum number of instructional days to meet minimum educational standards also constituted "a very real threat to the health and welfare of at least the school population segment of the public" (Ross, 1973: 410-1). But the court indicated that it did not thereby "decide that any particular number of days of lost instruction caused by a

strike produces such a threat. We do decide in the instant case that the facts reasonably found to exist by the lower court are sufficient to establish as a matter of law a threat to the health, welfare or safety of the public" (Ross, 1973:411).

The case was later appealed to the Supreme Court on procedural grounds. That body found that the trial court did not have jurisdiction in the case because the strike had not yet been in progress when the Board sought equitable relief. The Supreme Court therefore vacated the injunctive decree and the contempt proceedings resulting from non-compliance with the Ross decision (Commonwealth v. Ryan, 327 A. 2d 351, Pa. Sup. Ct., 1974).

In Bellefonte Area Education Association v. Board of Education (304 A. 2d 922, 1973), the trial court had found a threat or danger to public health, safety and welfare in 1) the threat to loss of state subsidies due to a shortened instructional year; and 2) the possible loss to the district of its "quality assessment program." But the Commonwealth Court found that at the time of the issuance of the injunction, there were still sufficient days to reschedule instruction; the injunction was therefore premature. And it found that even the loss of the "quality assessment program" belonged in the category of an inconvenience attendant on a strike which the legislature had sanctioned in order to promote "orderly and constructive" labor relations. Finally, it found the lower court's judgment that the procedures required by Act 195 had not been fully accomplished, erroneous. Hence, it reversed the order.

In another 1973 case, Root v. Northern Cambria School District (309 A. 2d 175, 1973), a taxpayer filed a complaint seeking a decree which would require the School Board to use each weekday for the balance of the school year in order to make up 30 lost strike days. The question at issue on appeal was whether the lower court had abused its discretion in refusing to issue the decree.

The Commonwealth Court stated that "Boards must schedule 180 days and provide this number or, if unavoidable cause prevents, amend the schedule so as to provide as many days as sound educational practice would indicate" (Root, 1973:178). The opinions of school administrators should be given great weight in assessing the matter. The lower court had based its action on the testimony of the Superintendent of schools that the education of the pupils would not be served by the intensive rescheduling proposed but would indeed, be harmed. The appellate court found no abuse of discretion on the part of the trial court and affirmed the decision.

Judge Mencer dissented, contending that it was for the legislature, not the courts, to deal with the irreconcilable conflict between the calendar limitations of the school code and Act 195. He asserted that school boards had discretion in determining the first day of school but that the last day was not discretionary. It could come only when the full 180 days had been provided.

In a 1976 Case, Pittenger v. Union Area School Board (356 A. 2d 866), the Commonwealth Court reconsidered its Root decision. Here the court faced the question of whether a School Board has the duty to reschedule five instructional days lost due to a school strike. The Board unanimously voted not to do so and so notified the Department of Education. The Secretary of Education and the Attorney General of the Commonwealth brought mandamus action seeking to compel the district to make up the lost days. The issue was not, as in Root, whether the lower court had abused its discretion in failing to grant the decree but rather, the specification of the duty of the School Board in this instance. The court found that the Board had the positive duty to provide the 180 days of instruction and that the Board's contention that it could not do so without violating the section of Act 195 prohibiting pay for striking employees to be "wholly without merit." The court noted that since the present decision was directed to the actions of the Board (and not, as in Root, that of the lower court), there should be no "inherent conflict" between the two decisions. But to avoid any confusion, it asserted "our holding here prevails and any inconsistent portions of Root are overruled" (Pittenger, 1976:869).

In Bristol Township Education Association v. School District the Chancellor (the trial court judge in an equity action) had found the following facts sufficient to justify the issuance of an injunction: 1) the denial of a complete educational program to students; 2) injurious effects to working mothers of school-age children; 3) the loss of 26 instructional days and the possibility of making up only 23; 4) a partial loss of state reimbursement; 5) loss of wages to cafeteria workers and bus drivers; 6) the cessation of programs for special students; 7) disadvantage to seniors in college admission; 8) the unavailability of county services for students with hearing, vision or speech disabilities; and 9) the cessation of extra-curricular activities.

In addition, the chancellor noted the cessation of the following programs: 10) driver education; 11) a community swim and life-saving training program; 12) adult education and citizenship training; 13) a cooperative work experience program; 14) a driver improvement program for those threatened with loss of their driver's license; 15) federally funded "Itinerant teachers" program; 16) social worker programs; and 17) free lunch programs. The issue on appeal was whether such facts would support the issuance of an injunction.

The Commonwealth Court cited Armstrong to the effect that the normal inconveniences incident to a strike might cumulate, continue so long or be aggravated that the public health, safety and welfare would in fact be endangered. Citing Root, the court noted "the loss of any money needed to support the schools, especially those closed by labor troubles, is clearly a threat to the general welfare and, as Armstrong suggests, could compel injunctive relief." The appellate court found the chancellor's ruling reasonable and affirmed his order.

The court found, however, that the chancellor had erred in imposing a "judicially created settlement" on the parties by ordering them back to work under the terms of their previous contract and by giving the Board an absolute right to implement its proposed class schedule until such time as the parties reached agreement on the matter. These actions exceeded the limited powers of the chancellor in equity jurisdiction and this part of his decision was not affirmed.

Judge Mencer wrote a vigorous dissent, holding that with this decision "the majority has almost equated the inability of a school district to offer 180 days of instruction...with a clear and present danger or threat to the health, safety or welfare of the public" (Bristol, 1974:771). He charged that this concept had originated with what the court in Root had proclaimed as dictum in the Armstrong case. Although the majority in the instant case had specified that more than the mere passage of time was needed, it was clear to Judge Mencer that the basis of the lower court's decision was the inability to meet the 180 day requirement. The dictum of Armstrong had become the ratio decidendi in Bristol. The judge again asserted that it was the duty of the legislature, and not the courts, to correct inconsistencies and inequities resulting from the conflict between Act 195 and the mandatory scheduling requirements of the School Code.

The lower court had also stated that its other principle reason for issuing the injunction was the finding "that the strike has caused incalculable harm" to students, public and teachers. Judge Mencer asserted "I do not believe this is the test established by the statute or enunciated by us in Armstrong..." (Bristol, 1974:772). It was rather whether a strike created "a clear and present danger or threat to the health, safety or welfare of the public."

Finally, Judge Mencer noted that although the lower court had found the district would lose subsidies, it had not given attention to testimony that the school district stood to profit from the strike, despite the loss of subsidy. He concluded

I hold to the view that the substantive evil, which is not the strike itself because legally permitted nor the natural disruptions flowing therefrom, must be extremely serious and the degree of imminent danger extremely high before the courts can utilize the extraordinary remedy of injunctive relief to terminate a strike specifically authorized by statute (Bristol, 1974:774).⁴

The appellate court cases have thus dealt with the question of what constitutes a "clear and present danger or threat to the public health, safety or welfare" in teacher strike cases. They have focused on general indicia of harm to students and public but they have given fully as much attention to the conflict between the requirements of the School Code and the provisions of Act 195: the 180 day dilemma.

ANALYSIS

The goal of Act 195 is to "promote orderly and constructive relationships between all public employers and their employees subject, however, to the paramount right of the citizens of this Commonwealth to keep inviolate the guarantees for their health, safety and welfare" (Section 1101.101). To what extent did these goals obtain in the Butler strike?

On the face of it, it appears that in the Butler case, the collective bargaining process proceeded in very much the way the Hickman Commission and the General Assembly of the Commonwealth had intended when they created Act 195. When direct negotiation failed to produce a contract, the prescribed procedures for mediation and fact-finding were followed. After these were exhausted, the teachers initiated a legal strike on January 9, 1978. They had sufficient support and organization that they were able to keep schools closed for three weeks.

On the other hand, the School Board could and did use the injunctive process. They waited nearly one and a half weeks before filing a complaint in Judge Kiester's court. There was an additional two-day delay until the three days of court hearings began. At the close of that time, the judge ordered the teachers back to work on Monday, January 30, and they complied. The teachers had their strike, the Board secured its injunction and the judge got compliance with the orders of the court. And the public interest was protected. At the end of an orderly three-week legal strike, the injunctive process brought the teachers back to the classroom in time to provide a full 180 day instructional year (Bourandas, 1979:4).

But when one begins to look deeper, one sees that the surface simplicity covers a tangled complexity in which all parties--the teachers, the Board and administration, legal counsel for both parties and the judge indicate dissatisfaction with the roles they played and with the options open to them under Act 195. This closer look reveals some of the paradoxes, conflicts and perplexities connected with the operation of the act and indicates why there has been a move for revision.

The following analysis is based on a study of the court transcript of the Hearings before Judge Kiester, of newspaper clippings and general materials on the effect of Act 195 in Pennsylvania and on interviews conducted with a number of the principal actors in the Butler strike. In order to protect the identity of those actors and the confidentiality of their responses, all persons who reflected on the position of the Board in the Butler case are amalgamated into one general category of "board actor." This group includes such persons as members, administrative personnel, school solicitors and more distant observers who commented on the Board's viewpoint in Butler. Similarly, the category of "teacher actor" refers to responses and opinions of teacher union officials, teachers, teacher attorneys or those outside observers who reflected on the position of teachers in

Butler. Thus, while the responses are anonymous, they are the actual words of a person we interviewed in our research, commenting on the Butler case.

Consequences of the Injunctive Process for Teachers and Boards

To understand the role of law, one must observe the law as it is carried out. Statutes often result in unforeseen and unintended consequences as the law is translated into action. It is useful to study such consequences, not only for the formulation of social policy but also to assist in understanding socio-legal processes. The translation of Act 195 into action in the Butler case needs such closer examination.

1. The injunctive process takes the impasse out of the hands of those most immediately concerned and places it in the hands of a third party: the judge. At that point, the case may take a life of its own, focusing on issues not brought by the parties or lead to remedies they do not desire.

a. The judge may raise issues not brought by the parties. A most direct illustration is the constitutional issue raised by Judge Kiestler. Normally, the issue in an injunction case is whether the teachers go back to work but in Butler, the constitutional issue "mushroomed and became the whole case" (Board actor). And once the judge had raised the issue, the district "was obligated to follow through. No way we could avoid it" (Board actor). It was not an issue raised by either party; but it became the case.

b. A judge may become involved in the bargaining process. A Board actor reflects

...our opinion...is that the courts ought not to get involved in the negotiations. As a matter of fact we're afraid of that to some extent. We don't want the court getting in...making public the offers and...getting us into the public's view because...our opinion is that the school directors have an obligation to negotiate with these teachers, number one. And that, number two, they have the duty to watch the public purse strings. And once you get it out in the public and so on, there's often more pressure to, well, just pay them what they want and get it settled...(Another judge) locks people in chambers... and orders them to negotiate for twenty-six hours or whatever you will and then they come out half dead with some sort of a settlement without much thought going into it on either side. And it seems to me if you're going to have free collective bargaining you can't have it judicially imposed...(Another judge in the X school district) ordered them to meet three times a week at the school for so many hours. Well, through the rumor mill, it came back to us that, yes, they were meeting three times a week.

One group would meet in one room and play cards. The other group would meet in another room and watch television. So that kind of collective bargaining is no good and the courts have no business getting involved in it.

A teacher actor, however, welcomed and requested judicial intervention and assistance in the bargaining process though he doubted the legal validity of such intervention. In such cases, the judge was in effect acting as a super-arbitrator, "using the pressures of his bench...to get both sides to move towards the middle to an agreement." It would be at the point "whereby the one group or the other would not have as much input as they like" that that party would begin to

test the propriety of the judge's intervention. In the purest sense of the word, I think the judge is there to decide the legal issues which are presented and do nothing more than that. He decides whether or not there is injunctive relief to be granted based on the facts and the law and nothing more...We've supported it because it ultimately seems to get the job done. No one's ever tested that question (Teacher actor).

At this point, the intervention of the court may work in favor of one party and not the other.

c. A judge may order or impose an interim contract while negotiations continue. Thus, judges may influence or structure not only the negotiation process but also the outcome of that process. In this sense, the judge moves in the direction of imposing conditions on the parties which the appellate court in Bristol Township indicated is beyond the limited equity jurisdiction of the chancellor (Bristol, 1974:271).

Board observers felt that the judge had "gone beyond his discretion to order them back under the terms and conditions of the prior contract." A step increase is normally granted to teachers each year based on the acquisition of another year of experience. It was the Board's position that this increase was one of the matters to be bargained. The judge's action had removed this item from the negotiations. Teachers felt, however, that bargaining should proceed from the point where the step increase had been granted.

When it is apparent that an injunction is to be granted, teachers' attorneys often feel it necessary to say to the judge: "...if you're going to grant the injunction, certainly give them some basis upon which to go back" (Teacher actor). With the end of the strike, teachers lose their major bargaining chip--the withholding of services. In order to protect their altered bargaining strength, they seek some judicially protected minimum contract while negotiation continues. But this may be particularly resented by boards when they are "in the process of stripping the contract (removing benefits

and protections granted in a previous contract). They (the Board) are being forced back under the old terms which are terms which they intend to remove" (Teacher actor). In essence, then, teachers are getting third-party help in structuring the post-court, pre-agreement period.

2. The injunctive process takes impasse issues and translates them into legal issues. But it does more. Within the area of legal issues, the focus is on narrow questions of evidence and proof, rather than on the declared purpose of the law.

The purpose of Act 195 is to promote "orderly and constructive relationships" between public sector employees and their employers. The full act specifies the steps which, it is hoped, will provide such relationships. But by the time the injunctive process is invoked, it is the opinion of one party that the action undertaken under the provisions of the law by the other party is no longer legal and they are seeking an end to the allegedly illegal action. Thus, the issue is 1) is the alleged action illegal? and 2) will the court order a cessation of the action?

Hence, in the court transcript, in legal documents filed with the court and in the decisions of judges, both on the trial and appellate levels, a large fraction of time and testimony is devoted to questions of evidence and proof. But in the Pennsylvania teacher strike cases, one type of evidence or indicia of "clear and present danger or threat to the health, safety or welfare of the public" soon overshadowed all others. This is the question of whether the requisite 180 instructional days can be provided. There are several reasons for this focus: first, the prior provisions of the school code require this minimum. It is a legal provision which has widespread public and professional support. Second, quantitative criteria are always easier to manage and measure than are qualitative criteria. They have a certain clarity and certainty about them which recommend their use. It is easier to determine whether it is still possible to teach 180 days before the end of the school year than it is to ascertain whether a "clear or present danger or threat" exists when the Christmas vacation is extended because of a strike, when there is a cessation of extra-curricular activities, when some seniors may experience difficulty in enrolling in college, etc. Such qualitative criteria are "messy" in that there is room for difference of opinion among experts on those questions. To the extent that quantitative criteria facilitate ease of decision and the facile disposition of the case, there is the temptation to rely on them. Third, case law had established the precedent that the failure to provide the full instructional year is an important, though perhaps not a sufficient decision criterion.

Given the above, it is not surprising that one of the first questions addressed in the court hearing in Butler is the question of whether and how it might be possible to reschedule lost strike days. Quantitative questions may lend themselves to more facile decisions but this does not mean that they can be quickly dispensed

with. More than one-third of the 516-page court transcript in Butler is taken up with some variant of the calendar question: whether the 180 days can in fact be provided, the possible loss of subsidy, how the subsidy is computed, the charge that districts make money in a strike, the impact on the calendar of possible inclement weather and a potential fuel shortage (perhaps necessitating forced school closings), and whether the Board will actually commit itself to schedule the strike makeup days.

But little attention is given in the trial court to the effect of court orders on the relative bargaining strength of the parties and on the promotion of orderly and constructive labor relations. Occasionally, on the appellate level, these factors are cited. The Pennsylvania Supreme Court, for instance, referred to the need to interpret teacher strike cases in terms of the purposes of Act 195:

...we should look to the circumstances that existed at the time of the enactment and determine the mischief sought to be remedied or the object to be obtained in its passage... Prior to the passage of Act 195 the prior law prohibited all strikes by public employees and did not require collective bargaining by public employers... The Hickman Commission... suggested the need for collective bargaining to restore harmony in the public sector and to eliminate the numerous illegal strikes and the widespread labor unrest... the legislature... fully recognized that the right of collective bargaining was crucial to any attempt to restore harmony in the public sector. It would be absurd to suggest that the legislature deliberately intended to meet this pressing need by providing an illusory right of collective bargaining (PLRB v. State College Area School District, 1975:266).

But in the trial court, the broader purpose of the law is often lost in attention to the immediate details of the instant case.

3. The injunctive process lacks clear and certain standards as to what constitutes sufficient proof to require an injunction. Despite nearly a decade of case law, actors in the Butler case reflected the need to introduce many kinds of evidence of harm. A Board actor reflected that one could include testimony about how strikes affected children emotionally (especially the mentally retarded and the emotionally disturbed children), on the difficulty seniors might have in gaining entrance to colleges, and on the 180 day issue.

Then you get into really what are peripheral issues... the idea that if you can collect a number of things and throw all these effects into one big ball, that cumulative effect may in itself present a clear and present danger. So then we throw in all these various things.

Interviewer: Keep filling up the cup, hoping it will run over?

Board actor: That's right. We're never certain that the 180 day argument will hold up and we want to cover all our bases, to be very frank with you (Board actor).

A teacher actor concurred. With reference to the 180 day rule, he reflected

...the school districts never leave that to be the only issue. They always attempt to show some of the harm as well and raise that as a secondary or tertiary issue.

A strategy of the board, therefore, is to argue what both parties refer to as the "laundry list of harm." In court testimony in the Butler case, this included attention to

- a. the loss of vocational and educational counseling services to seniors;
- b. jeopardy to summer or fall college entrance plans (including the taking of college entrance examinations);
- c. the effect of discontinuity of instruction on students;
- d. the possible loss of summer employment for college-bound seniors;
- e. the delay in entering the armed services;
- f. the loss of co-curricular activities;
- g. the loss of the lunch program;
- h. discontinuation of the adult education, recreation and driver education programs;
- i. the disruption to family plans where both parents work and child care must be provided during a strike (Court Transcript, Butler, 1978:346-366).

On cross-examination, counsel for teachers demanded strict proof on allegations of harm. He requested specific information as to how many persons were affected by disruption of services (e.g., the loss of counseling services) or whether those services could be provided in an alternate way (e.g., whether administrators could do counseling). In general, the person testifying could only cite estimates and opinions. With references to harm to the educational program, counsel asked for empirical studies to substantiate allegations of harm to students. But no studies or authorities could be cited by one Board actor. Another Board actor said he would be happy to provide such documentation, given time, though he could cite none from memory. This has led teacher actors to complain

...it can almost get to the point where you could send in, by affidavit, some of the material to show harm, without

even having anybody show up.. Because no matter how skillful our lawyers have been in cross-examination, showing that the specific harm...as portrayed to us by their witnesses, really is not as harmful upon close scrutiny...this seems not to be impressive at all to the judge listening to the case. It's almost as if it's a formality that he's just taking all this down for dress as opposed to any substance. No matter what we would say in counter-distinction, they will grant the injunction (Teacher actor).

There is thus, on the part of board actors, the feeling that it is necessary to introduce many kinds of evidence as to harm because of uncertainty as to what constitutes sufficient proof, particularly before the present judge. On the part of teacher actors, however, there is a feeling that almost any recitation of harm will be sufficient, that the hearing is largely a formality as far as the weighing of "hard" evidence goes and that the strike will, in the end, be enjoined.

The repeated demand for proof of statements of educational harm is an important part of the strategy of teachers' counsel. In the Answer to the Complaint filed in the Butler case, counsel reiterated repeatedly: "Strict proof is demanded." And in the courtroom, there were, as we have seen, repeated demands for empirical studies which would corroborate the points being made by the Board.

Board actors, in interviews, indicated that they would appreciate having empirical data to cite in the courtroom. They rely, instead, on generalizations from their experience and training to make statements in court. This may well be sufficient to satisfy the judge. A judge in Michigan, for instance, pointed out that school administrators were, by virtue of their position, "expert witnesses." Boards, in his view, did not have to secure outside witnesses. Their administrative personnel were authority enough (Graber, 1980a).

A Board actor also contended that the difference in achievement levels in the average teacher strike probably cannot be measured anyway and it may therefore be impossible to obtain empirical data.

I don't think the tests that we have for achievement tests are so discrete that they can identify eight weeks. Most of the tests deal with bigger spans of time (Board actor).

It is ironic, then, that a two-month gain in reading achievement tests will be regarded as a signal accomplishment by most-school districts.

Teacher actors contend that rules of evidence are simply not carefully observed in testimony as to educational harm. Strict proof is not demanded. They assert further, that there simply are no credible studies which indicate that a child is harmed by the average school strike. Absent demonstrated harm, they say, a strike should not be enjoined. It is a point which is persuasive to few judges. Few injunctions have been denied on grounds that plaintiffs have failed

to substantiate their case. The standards for judging harm and danger may be unclear and ambiguous; but the grounds cited in court are usually sufficient to produce the injunction.

4. The injunctive process requires that parties argue points which it is not in their best interests to argue or, occasionally, to argue points which they know to be untrue.

A Board actor, for instance, acknowledged that the Board argument that a loss of subsidy was threatened if the full instructional year was not provided was "a speculative argument too because no one has ever, to my knowledge, lost any money over a teacher strike." This did not prevent the Board from arguing the point with considerable conviction in court. When faced with the interviewer's observation that a board is actually making money during a strike, he replied:

Well, that's the teachers' association's argument. I never liked that argument because when one party is in court saying, "...We want to go back to work," it seems ludicrous to me to argue that "Well, you're making money by us not being there" (Board actor).

So the Board is, in this instance, strongly arguing a point which they know to be at best, conveying a false impression, namely that the Board will be financially hurt if it loses the instructional subsidy and the strike continues.

Teachers too, argue points which are not in their best interests. Particularly in cross-examination, teachers' counsel attempts to cast doubt on board testimony that the disruption to the continuity of learning is causing educational harm. Here teacher actors are arguing against the significance of their own work, an argument they may rue when they seek to make a case to the public for a salary raise because of the significant and, indeed, irreplaceable work they do.

Further, teachers, by their strike action, are threatening the completion of the full instructional year. The more credible the threat, the more likely they are to secure concessions. Yet it is in their interests to teach the full 180 days. In the Butler case, counsel for teachers sought to get a commitment into the court record that the Board would indeed reschedule the 180 days. To an extent, there is a bit of hypocrisy on both sides. This was reflected by the judge in the appellate decision in an earlier teacher strike case in which a taxpayer, Mr. Root, sought to compel the Board to make up strike days:

Unfortunately, there is more than a suggestion in the record that Mr. Root is really representing the teachers' interest in making up the lost instruction days in order to avoid a loss of salary. Equally unhappily, it appears that the school board refused to amend its calendar because it wanted the teachers to lose salary because of the strike (Root v. Northern Cambria, 1973:177).

These "hidden agendas" do not prevent both sides from arguing for a full instructional year before the court.

The Role of the Judge

We have seen some of the tangled complexity which lies beneath the surface of the injunctive process for boards and teachers. But there is also ambiguity, tension and strain in the role the judge is called on to play. Again, on the surface, the duties of the judge seem clear and straightforward. It is his duty to hear the arguments presented by both sides, to weigh the law governing the case, and to make a decision as to whether illegal behavior had been involved and, if so, what action to take in response.

We have noted that Judge Kiester ruled that the PERA was unconstitutional. However, he also held that, in the alternative that this conclusion were not sustained, the circumstances of the instant case nevertheless constituted a clear and present danger. He based this finding on the fact that, as of January 30 (the day the teachers were to return to the classroom), 19 instructional days had been lost. There were only 15 school days available between June 9, the scheduled end of the school term, and June 30, the end of the fiscal year. Hence, there would be difficulty in scheduling the required days. He did note, however that "The School District faces no financial loss by failing to complete the legally mandated calendar of 180 instruction days" (Court Transcript, Butler, 1978: 116).

Judge Kiester found the facts cited by the School Board regarding educational harm persuasive. He cited the consequences of the strike testified to by the Board and concluded

The teachers' work stoppage has created the stated conditions and they are a clear and present danger or threat to the welfare of the public as a whole (Court Transcript, Butler, 1978:118).

He wrote that under Act 195, the question was at what time the strike could no longer be tolerated. He found that that point had been reached and issued the injunction.

As indicated earlier, Judge Kiester's ruling that Act 195 was unconstitutional quickly overshadowed the more routine aspects and "became the case." A month after issuing his initial Order, Judge Kiester issued a Supplemental Opinion, further arguing the unconstitutionality of Act 195. In that document, he reflects on the strains which the teacher strike injunctive process creates in the role of the judge:

If the court issues an injunction it is unlikely that the demands of the public school teacher will be met. Should the Court refuse to grant the injunction the public employer may capitulate to the demands. The public employer then

blames the Court for forcing it to agree to unreasonable demands by the union. Neither result is in the public interest.

Depending upon the decision the judge is classified either as pro-union or anti-union in his sympathies. Legislations, the inevitable result of which is to place a Court in such a position, is bad regardless of the question of its constitutionality.

The statutory standard for granting an injunction under PERA is vague, indefinite, and is an intangible measurement test. The Court is simply required to determine the degree to which the public must suffer before service is restored. This is indicated by the attempts of the courts to apply the standard...From the decisions thus far the conclusion is inescapable that a trial judge is placed by PERA in a position that is not only untenable but also one that requires more of a political and economic result than a judicial decision (Court Transcript, Butler, 1978:149).

The judge is placed in a no-win situation in the injunctive process in teacher strikes. As in all civil and equity cases, he must inevitably decide in favor of one side or the other. But most civil and equity cases involve two citizens or small groups of citizens. In a teacher strike case, members of the families of perhaps more than one-half of a school district are immediately and directly involved in the decisions of the judge--the students and the administrative, teaching and support personnel. And what happens in court is taking place on a very public stage. There is extensive media coverage and what takes place in court makes front page headlines. Judge Mencer, in his dissent in Bristol, reflects on such a decision:

...nothing written here is intended to be critical of the court below since its role is a most difficult one. The words of the applicable statute and the reported pronouncements of the appellate courts, on the one side, and the exigencies of the situation that confronts him, on the other side, make his moment of decision a most unenviable one. Being the parent of a child...that has...recently experienced the ordeal of a school strike, I am well cognizant of the many community pressures, added to the assertions of teacher and school board, that center on the chancellor (Bristol, 1974:773-4).

The conflicts inherent in Act 195 must then ultimately be resolved by a judge on a very public stage. And he must accept the consequences: approval or disapproval of the general public, of the legal community and, as an ultimate judgment, the affirming or reversing of his decision by an appellate court.

CONCLUSION

The question to be addressed in closing is "Does Act 195 provide for constructive and orderly relationships between teachers and their employers?" The Act has been in effect for nine years so there is a considerable building of case law and practice from which to evaluate the law.

Act 195 has been institutionalized. Its provisions are part of the law-as-taken-for-granted in Pennsylvania. Observers reflect that it may not be perfect but it is preferable to many other alternatives. One legal actor contends

I don't think the School Board Lawyers Association or anybody else wants the turmoil that'll come about if that Act is ever declared unconstitutional. So I don't think it's ever going to come up again...it'll be slapped down... I would say there is a silent conspiracy not to make changes in the Act because they're afraid one change will beget another change.

Nevertheless; the work of the 1978 Commission on Public Employee Relations headed by former Supreme Court Justice Benjamin R. Jones is indication that there is interest in evaluating the manner in which the law has worked and in suggesting changes.

One such change was recommended to the Commission by the Pennsylvania Department of Education:

1. that the 180 day standard be adhered to,
2. that there be a percentage reduction in teacher pay for each day lost due to a strike,
3. that the Department deduct from the state subsidy all or a part of teacher salaries saved as a result of the work stoppage through failure to reschedule days lost (Atkinson, 1978:10).

It is alleged that this would more nearly provide the disincentive to prolong a strike that applies in the private sector, that it would be applicable to both parties in a teacher strike, and that it might lead to shorter and fewer strikes.

Ultimately, questions arise with regard to the injunctive process itself. A prescient point was made by Hattley, writing shortly after the publication of the Hickman Commission Report and before the enactment of Act 195:

To the extent that the Commission's underlying premise is that the bargaining rights of public employees should be more closely aligned with the rights now enjoyed by labor

in the private sector, it would seem inconsistent to authorize court injunctions of public employee strikes... Clearly, labor relations by injunction is no longer considered an acceptable final solution to labor conflicts in the private sector. To suggest that courts should assume their pre-Norris LaGuardia role of deciding social policy in the area of public employee relations by determining the propriety of public employee strikes, would certainly seem to be inconsistent with a desire to more closely align the rights of public employees with those of employees in the private sector (Hartley, 1968:171).

Analysis of Ten School Districts Salary and State Subsidy Penalties
1975-76

District	Teacher Days Worked	Teacher Contract Days	Pupil Days Attended	S A V I N G S			Tot. Savings Salary Retirement & Soc. Sec.	Net Gain
				Teachers ¹	Retirement	Social Security		
Reynolds	173	183	170	\$ 84,060	\$ 4,640	\$ 2,459	\$ 91,159 Subsidy loss 85,883	\$ 5,276
Blackhawk	173	183	170	139,943	7,725	4,094	151,762 Subsidy loss 120,705	31,057
Allentown C.	175	186	174	693,649	38,289	20,289	752,227 Subsidy loss 205,437	546,790
Hazleton A.	169	184	166	631,547	34,861	14,478	680,886 Subsidy loss 444,020	236,866
Sharon C.	173	183	172	164,093	9,058	4,800	177,951 Subsidy loss 83,177	94,774
Pittsburgh	173	189	173	3,756,744	207,372 Reg. Subsidy Modified Super Density	109,885 589,137 545,992	4,074,001 Subsidy loss 1,135,129	2,938,872
Hanover A.	168	182	168	121,197	6,690	3,545	131,432 Subsidy loss 78,758	52,674
Riverside	145	186	158	284,488	15,704	8,321	308,513 Subsidy loss 171,626	136,887
Upper Dublin	182	186	180	91,741	5,064	2,683	99,488 385 correc.	99,103
Brandywine Hgts.	181	185	180	21,318	1,177	624	23,119 1,043 correc.	22,076

379
¹Teachers
 Librarians
 Guidance
 School Nurses

380

(Gaber, 1977: Appendix)

FOOTNOTES

¹This report has been prepared by Edith E. Graber.

²Section 1504 of the School Code was amended by Act 80 to add flexibility to the length of the school day and the school term. The amendment reads:

Upon request of a board of school directors for an exception to the aforesaid daily schedule, the Superintendent of Public Instruction may, when in his opinion a meritorious educational program warrants, approve a school week containing a minimum of twenty-seven and one-half hours of instruction as the equivalent of five (5) school days, or a school year containing a minimum of nine hundred ninety hours of instruction as the equivalent of one hundred eighty (180) school days (Gerlach, 1975:1).

³During the first seven years of Act 195--October, 1970 through June, 1977-- there were a total of 2853 strike days. Of these, 1853 were made up, leaving 1000 instructional days lost and not rescheduled (Atkinson, 1978:Appendix A).

⁴Judge Kramer joined in the dissent of Judge Mencer but added a dissent of his own. It contains a call for attention to the rights of students which may have been an impetus to Judge Kiestler's ruling in the Butler case:

...no one really represents the interests of the students, who are the beneficiaries or victims of the disputes. In addition to other rights they may have, students have a constitutional right to a thorough and efficient system of public education, as found in Article III, Section 14 of the Pennsylvania Constitution of 1968. Absent adequate safeguards (at the very least representation), I question the validity of statutory procedure which may detrimentally affect these guaranteed rights (Bristol, 1974:774).

REFERENCES

- Atkinson, William J. "Memo to All Commissioners, Governor's Study Commission on Public Employee Relations." Harrisburg, 14 April 1978.
- The Butler Eagle; 5 October 1977, 10, 18, 20, 21, 23, 24, 27, 28 January and 6 June 1978.
- DeAngelis, Joseph B. "Act 195 and the Pennsylvania Department of Education." Harrisburg, 4 August 1977.
- Gaber, Deborah R. "Brief for the Department of Education." Harrisburg, Pennsylvania, 1977. (Mimeographed)
- Gerlach, Harry K. "Clarification of Section 1504, as Amended by Act 80." Harrisburg, 29 August 1975.
- Graber, Edith E. "Michigan: The Warren Consolidated Schools Strike." Center for the Study of Law in Education, Graduate Institute of Education, Washington University, St. Louis, Missouri, unpublished, 1980a.
- Hartley, Roger. "Recommendations of the Governor's Commission to Revise the Public Employment Law of Pennsylvania: A Preliminary Assessment." University of Pittsburgh Law Review 30 (1968): 161-173.
- Kaschock, Alex Anthony. "The role of the local courts under Pennsylvania's Public Employee Relations Act: October 1970 to January 1972." Unpublished M.A. thesis, Cornell University, 1977.
- Pennsylvania. Department of Education. "Memorandum" from Frank S. Manchester. 15 August 1978.
- Pennsylvania. Department of Education. Teacher Strike Report 1977-78. Pennsylvania Public Schools. June 1978.
- Pennsylvania. Governor's Commission to Revise the Public Employees Law of Pennsylvania. Report and Recommendations of the Governor's Commission to Revise the Public Employees Law of Pennsylvania (Hickman Commission Report). 1968.
- Pennsylvania. The Governor's Study Commission on Public Employee Relations. Recommendations for Legislative and Administrative Change to the Public Sector Collective Bargaining Laws of Pennsylvania. (Jones Commission Report). 1 June 1978.
- Public Employee Relations Act (Act 195). PA. Stat. Ann., Title 43, sec. 1101.101 et seq.

Cases

Armstrong Education Association v. Armstrong School District. 291
A.2d 120, Pa. Cmwlth. Ct., 1972.

Bellefonte Area Board of Education v. Bellefonte Area Education
Association. 304 A.2d 922, Pa. Cmwlth. Ct., 1973.

Bristol Township Education Association v. School District. 322
A.2d 767, Pa. Cmwlth. Ct., 1974.

Butler Area School District v. Butler Education Association, PA.,
6 Butler L.J. 225 (C.P. Butler 1978).

Butler Area School District v. Butler Education Association. 391
A.2d 1295, Pa. Sup. Ct., 1978.

Commonwealth of Pennsylvania v. John Ryan et al. 327 A.2d 351
Pa. Sup. Ct., 1974.

Joint School District No. 1 v. Wisconsin Rapids Education Association.
234 N.W. 2d 289, Wisc. Sup. Ct., 1975.

Pennsylvania Labor Relations Board v. State College Area School
District. 337 A.2d 262 Pa. Sup. Ct., 1975.

Philadelphia Federation of Teachers v. Ross. 301 A.2d 405, Pa.
Cmwlth. Ct., 1973.

Pittenger v. Union Area School Board. 356 A.2d 866, Pa. Cmwlth.
Ct., 1976.

Root v. Northern Cambria School District. 309 A.2d 175, Pa. Cmwlth.
Ct., 1973.

School Committee of Westerly v. Westerly Teachers Association. 299
A.2d 441, R.I. Sup. Ct., 1973.

Timberlane Regional School District v. Timberlane Regional Education
Association. 317 A.2d 555 N.H. Sup. Ct., 1974.

CALIFORNIA: THE DALY CITY STRIKE

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CONTENTS

THE LEGAL CONTEXT 1

 The Winton Act 2

 Case Law 2

 New Legislation 5

 Additional Case Law 6

After San Diego Teachers Association 13

 The Deterrent Value of the Statutory and Case Law 15

THE SEPTEMBER, 1978 DALY CITY STRIKE 16

 Discussion 25

FOOTNOTES 28

REFERENCES 29

CALIFORNIA: THE DALY CITY STRIKE¹

In September of 1978, teachers at the Jefferson Union High School District in Daly City, California engaged in a strike which encompassed 17 instructional days (September 5-27). At issue was the contract for the 1978-79 school year, a contract which would have to be forged under the legal restrictions which had accompanied the passage of Proposition 13 in California. Also at issue was the request for a retroactive wage increase for the previous (1977-78) school year.

In this case, the issue of irreparable harm to the educational process by the strike was argued by Board plaintiffs in the Complaint and in supporting briefs and declarations to the court. But defendant teachers virtually ignored this issue; instead, they advanced one major argument--that the case should have been heard by the Public Employee Relations Board and that the court did not have jurisdiction in the matter. It was an argument that did not succeed in Daly City. Judge Lanam issued a temporary restraining order restricting picketing and, three days later, a preliminary injunction enjoining the strike and further restricting picketing. Still, the argument that PERB, not the courts, should have exclusive initial jurisdictions in teacher strikes won seven months later in the San Diego case and is now the law in California.

In addition to the use of the irreparable harm argument in the injunctive process, this report explores the issue of teachers striking in situations in which limited funds are available for salary increases; it also examines how the injunctive process may change when initial jurisdiction in teacher strikes is given to an administrative agency instead of the courts, with particular reference to implications for the argument of irreparable harm.

THE LEGAL CONTEXT

The state of California has taken the incremental approach to the task of providing legal regulation of labor-management relations in the public sector. Hooten suggests that "California public employees are currently covered by a patchwork quilt of laws regulating their rights to collectively negotiate, or at least meet and confer, with their employers in regard to wages, hours, and working conditions" (Hooten, 1974:473). For teachers in the elementary and secondary public schools, these statutes include the Winton Act of 1965, (Cal. Educ. Code Sections 13080-90, West 1973) the Educational Employment Relations Act of 1975 (Gov. Code Sections 3540-3549, West 1976), and the State Employer-Employee Relations Act of 1977 (Gov. Code Sections 3512-3524). These statutes consistently fail to address the question of whether public school teachers have the right to strike. However, until April 1979, a series of California court cases have affirmed the common law ban against strikes in the public sector. There is much dissatisfaction, both on the part of

school boards and teachers' organizations, with the current legal regulation. Indeed, Loren V. Smith, general manager of the California State Employees Association (CSEA) remarked in 1974:

Our golden state--the richest, most populous state in the nation--once in the forefront of progressive action, today trails virtually every other large state in dealing with its own employees (Smith, cited in Hooten, 1974:473).

The Winton Act

The Winton Act of 1965 provided an alternative to collective bargaining for teachers. It had been preceded by the George Brown Act of 1961, governing public sector employees of state agencies, colleges and universities. The latter was a "meet and confer" law. Employees were given the right to form, join and participate in employee organizations. Employers were directed to consider fully employee proposals but they were not required either to endeavor to reach agreement or to negotiate in good faith. No written memoranda of understanding resulted from the meet and confer sessions. The Winton Act applied to public school teachers; it was developed to recognize the "professional" nature of teaching and to give teachers a voice in the setting of educational policy and an opportunity to confer on wages and working conditions (Geiger, 1979:972-973). Provision was made for non-binding dispute settlement procedures such as mediation and fact-finding (but not for publication of the fact-finder's report). The amendment required parties to confer in a conscientious manner. The right to form, join and participate in employee organizations was extended to teachers; however, the Winton Act did not provide for exclusive representation for teacher organizations. It too was essentially a "meet and confer" law, preserving the unilateral decision-making powers of school boards.

Both the George Brown and the Winton Acts failed to address the strike question; they neither authorized nor prohibited strikes by teachers. However, both contained the following reference:

The enactment of this chapter shall not be construed as making the provisions of Section 923 of the Labor Code applicable to public employees (Cal. Educ. Code, sec. 13088 (Winton Act) and Gov. Code, sec. 3536 (George Brown Act)).

Section 923 has been interpreted by the courts as permitting concerted activities and strikes by private employees (Hooten, 1974:474). Such rights were therefore not available to public employees.

Case Law

Subsequently, a series of public sector employment court cases added case law interpretation to the statutes. In Almond v. County

of Sacramento (276 C.A.2d 32, 1969), the Court of Appeal addressed the question of whether county civil service employees were entitled to reinstatement where they had engaged in a work stoppage because their employer had both refused to negotiate with them in good faith and had refused to accept the state conciliation service as a mediating agency. The court cited a 1960 case (Los Angeles Metropolitan Transit Authority v. Brotherhood of R.R. Trainmen, 54 Cal.2d 684, 1960), to conclude that

In the absence of legislative authorization public employees in general do not have the right to strike....that statement is not an isolated indication of the thinking of our highest court....the Legislature, by enacting section 923, had not intended to include public employees within its purview....The rule that, absent an authorizing statute, a public employee has no right either to bargain collectively or to strike is well settled. It is settled by decisions of the Supreme Court itself and by that court's denial of hearings in Courts of Appeal decisions (Almond, 1969:35-36).

The court further found that a right to strike for all other public employees could not be inferred from the prohibition of that right to firemen and policemen.

In a 1970 case, City of San Diego v. AFSCME Local 127 (8 Cal. App. 3d 308, 1970), the issue again was whether public employees had the right to strike and whether an injunction against a strike by employees in utilities and public work departments should be sustained. The court cited the "California common law rule" that absent an authorizing statute, public employees did not have the right to strike. It found corroboration in the common law rules of 20 states and the federal government. The public employer-employee relationship, it said, "is the product of law--constitutional, legislative and decisional--rather than the product of a contract as in private employment" (City of San Diego, 1970:261). Such a relationship imposed a responsibility and resulted in the relinquishment of certain rights granted to private employees. The union had argued that the sanction against strikes should be reviewed in the light of the Fourteenth Amendment's guarantee of equal protection of the law. However, the court found the distinction between public and private employees was a valid classification. Differences between the two classes of employees were based not on types of jobs but upon differences in the employment relationship in which they were situated.

The legitimate and compelling state interest...is not solely the need for a particular governmental service but the preservation of a system of government in the ambit of public employment and the proscription of practices not compatible with the public employer-employee relationship (City of San Diego, 1970:263).

Nor was there a denial of equal protection in the fact that certain transit workers had been given the right to strike. That right had been conferred by statute. Absent such an enabling statute, the court held that the right to strike did not exist. It encouraged those advocating such a right in the public sector to take their case to the legislature.

The union had also argued that the issue of irreparable harm had not been confronted. The union held that although a strike by public employees could be enjoined, the lower court's refusal to issue such an injunction should be sustained. They cited School District for the City of Holland v. Holland Educational Association (380 Mich. 314, 1968) in which the Michigan Supreme Court had held that it was against public policy in that state to issue injunctions in labor disputes absent a showing of violence, irreparable harm or breach of the peace. The union argued that in the present case, there had been no showing of irreparable damage and an injunction was therefore not warranted. But the Court of Appeal noted that the trial judge had based his denial of injunctive relief not on a lack of irreparable damage but on an "erroneous conclusion public employees have the right to strike" (City of San Diego, 1970:264). The court concluded that in the case at issue, the evidence supported the issuance of injunctive relief at the trial court level.

In another 1970 case, Trustees of the California State Colleges v. Local 1352, S. F. State Federation of Teachers (92 Cal. Rptr. 134, 1970), the issue again was whether public employees had the right to strike. The Court of Appeal cited a 1968 decision, In Re Berry (68 Cal. 2d 137, 1968), in which the California Supreme Court had held that "whether strikes by public employees can be lawfully enjoined" was an open question; the Court of Appeal nevertheless found that

(1) California follows and applies the common law rule that public employees do not have the right to strike in the absence of a statutory grant thereof; (2) that no such grant exists; (3) that the strike at the college, enjoined by the present judgment was unlawful...and (4) that the judgment is accordingly valid in substantive respects and must be affirmed (Trustees of the California State Colleges, 1970:136).

The court cited the refutation of the equal protection of the laws argument in City of San Diego and the right to strike argument in Almond. It found further that the Thirteenth Amendment proscription of involuntary servitude did not apply; individual appellants were free to withdraw their labor by quitting their employment. And the court found that the picketing order issued by the lower court was not overbroad since it enjoined only picketing in support of the actual strike (as distinguished from informational picketing) and such picketing was enjoined only at the college itself, where violence had occurred.

In a 1972 case before the Court of Appeal, L.A. Unified School District v. United Teachers (24 Cal. App. 3d 142, 1972), the United Teachers of Los Angeles argued that teachers had a right to strike by statutory authorization, by the First Amendment right to free speech and association, and by the Fourteenth Amendment right to equal protection. They held that issuance of a temporary injunction by the lower court was in violation of the common law of the state, that it could not be issued absent a proper showing of irreparable injury and that an ex parte order was in violation of the Fourteenth Amendment. By this time, the court had little patience with these arguments. It asserted that it had dealt with these issues carefully and to the disfavor of defendants in Almond, City of San Diego and in Trustees of the California State Colleges. In each case, the state Supreme Court had denied a petition for a rehearing. The court concluded:

Thus, we can conceive of no benefit which would result from our reanalyses of the same issues which the three cited opinions have exhaustively treated, with extensive citation of authority. The order is affirmed (L.A. Unified School District, 1972:808).

New Legislation

Various attempts were made over the years to pass comprehensive legislation covering all or major classes of employees in the public sector. These measures were repeatedly defeated. Given the failure of the across-the-board approach, the legislation set out to improve specific public sector negotiation statutes.² There was widespread agreement that the Winton Act needed to be replaced. Several reasons had been advanced for the increasing unworkability of this law: competition for dwindling financial resources required a stronger voice for teachers; the acknowledged change in the teacher-administrator relationship from collegiality to an adversary employer-employee relationship created an impetus for an exclusive representative for teachers alone; and a depressed labor market for teachers made traditional methods of pressure employed by the California Teachers' Association (CTA) against low paying districts all but ineffective (Geiger, 1979:973). Finally, in 1975, Senate Bill 160, sponsored by Senator Albert Rodda, was enacted into law. Its official name was the Educational Employment Relations Act (EERA) but it was more commonly called the Rodda Act. This act superseded the Winton Act, thus marking the end of a "ten year experiment with the Winton Act's professional approach" (California Public Employee Relations, 33:9. Hereinafter referred to as CPER). The legislature stated its intent to expand the act to include eventually all public employees in the state (CPER 33:9; Fiorello, 1976:956). The stated purpose of the act was to "promote improvement of personnel management and employer-employee relations within the public school systems." The act contains extensive impasse provisions, specifying voluntary mediation, advisory fact-finding and post-fact-finding mediation.

When an impasse is declared by either party, they may request the Educational Employment Relations Board (EERB, later renamed the Public Employment Relations Board or PERB) to appoint a mediator who may, in turn, request a fact-finding panel if he believes this is warranted. This panel issues recommendations; ten days after receipt, the employer must publicly disclose the fact-finder's report. The report, however, is advisory. The act was designated a "meet and negotiate" rather than a "meet and confer" law. It provided for exclusive representation, specified unfair labor practices and allowed agency shop. Agreement between the parties was to be reduced to a written document which was binding when accepted by both parties. The law was to be interpreted by the EERB. Again, however, the statute was silent on the right to strike, holding that Labor Code Section 923 was inapplicable to public employees.

EERA (or the Rodda Act) was supplemented in 1977 by the State Employer-Employee Relations Act (SEERA, effective July 1, 1978), which extended not only to the "teaching staff of schools under the jurisdiction of the Department of Education or the Superintendent of Public Instruction," but also to civil service employees of the state, the mandate to meet and confer in good faith and to endeavor to reach agreement on wages, hours and other terms and conditions of employment. Again, Labor Code Section 923 is construed as inapplicable to state employees (State Employer-Employee Relations Act, Chapter 10.3, Division 4, Title 1, Sections 3512-3524). Under the terms of SEERA, the state bargains only with organizations that have won exclusive bargaining rights for specific units of employees. The statute creates a compulsion on the state and on recognized employee organizations to attempt to reach agreement. But while the state appears to be inching toward collective bargaining, SEERA remains a "meet and confer" statute (CPER 36:41).

Additional Case Law

A 1977 case concerned the evidentiary standard to be used in judicial intervention in a public sector labor dispute (City and County of San Francisco v. Evankovich, 69 C.A. 3d 41, 1977). The trial court had issued a preliminary injunction against a strike of city employees. The city had alleged that the strike would cause irreparable harm to the city, its citizens and to the state. The complaint was verified by the city attorney. The Court of Appeal affirmed, contending that there were sufficient grounds for the trial court issuance of a preliminary injunction.

At issue was whether the newly enacted Code of Civil Procedure, California's 1975 anti-injunction act (sometimes called the "Little LaGuardia Act"), sets limits on the use of injunctive relief in the public as well as in the private sector (CPER 33:56). The challenged section of the law read

Nothing contained in this section shall be construed to alter the legal rights of public employees or their employers, nor shall this section alter the rights of parties to collective-bargaining agreements under the provisions of Section 1126 of the Labor Code (Stats. 1975, Chapter 1156, sec. 527.3 (d)).

The Court of Appeal contended that the entire act "is directly contrary to the existing law as to the collective bargaining rights of public employees" (San Francisco v. Evankovich, 1977:52). Hence, they held that the purpose of section (d) was to preserve the existing law of public employee relations. The court found additional corroboration for this position in noting that though the legislature had concluded in commission findings that public and private sector labor relations were sufficiently similar to warrant similar statutes, it had refused to enact such legislation. The court noted, "The only consistency we see is a failure to enact comprehensive legislation and administrative machinery for either sector and a piecemeal approach to both..." (San Francisco v. Evankovich, 1977:52-3). The court took judicial notice of the newly enacted 1975 Rodda Act, which provided only incremental change from previous legislation, and which failed to provide a comprehensive approach to public sector bargaining.

Also at issue was whether there had been sufficient grounds for the issuance of an injunction. The unions had urged that the applicable standard for such a showing was that set forth in Holland, which stated that it was contrary to the express public policy of Michigan to issue injunctions in labor disputes absent a showing of violence, irreparable injury or breach of the peace. The court noted, however, that while Michigan statutes prohibited public sector strikes, they also provided machinery for compulsory arbitration and mediation of grievances in advance of collective bargaining of individual contracts. The court went on:

As we have indicated above, the public policy of this State with respect to public employees is not as sophisticated. Los Angeles Unified School District v. United Teachers (citation omitted) is almost directly contrary to Holland. In Los Angeles School District, supra, the preliminary injunction was sustained on the grounds that the teachers' strike would result in a loss of state and federal funds to the district. In view of the Legislature's failure to enact legislation similar to that of Michigan and other states, and its rejection to date of the findings and recommendations of its 1973 advisory council on public employer-employee relations, we do not feel free to establish by judicial decision an evidentiary rule based on Holland (San Francisco v. Evankovich, 1977:55).

The court found that while affidavits containing specific factual allegations to supplement the complaint were desirable, "they are not

required; neither is a full evidentiary hearing with testimony from all sides" (San Francisco v. Evankovich, 1977:5). Interference with essential governmental services could be inferred from a reading of the complaint.

A final point raised on appeal, namely that the city had "unclean hands" since it had failed to meet and confer in good faith; was before the court in another appeal and need not be reached in this case. The order granting the preliminary injunction was affirmed. The Court of Appeal thus rejected the need for a showing of irreparable harm, of affidavits supporting the complaint or of a full evidentiary hearing with testimony from both parties.

Another 1977 case held that public employee unions who strike may be legally liable for any damages incurred (Pasadena Unified School District v. Pasadena Federation of Teachers, Local 1050, 72 Cal. App. 3d 100, 1977). The complaint sought damages "for interference with contractual relations" against the AFT local in Pasadena. The court found that it was unlawful for public school employees in California to strike. Enforcement of this prohibition did not infringe on constitutional rights of speech or advocacy by either employees or union. The union was not privileged to induce a breach of contract by calling an illegal strike. Since it had done so, it had incurred liability for the resulting damage. The court again refused to recapitulate all the arguments against the right of public sector employees to strike.

In Amador Valley Secondary Educators Association v. Newlin (151 Cal. Rptr. 724, 1979), the Court of Appeal began the process of distinguishing the functions of the PERB and the courts in the resolution of teacher strikes. The EERA (Rodda Act) specified that PERB had the power and the duty to investigate unfair labor practices. In Amador, the district had reemployed teachers for the 1976-77 school year but, during continuing negotiations on the salary schedule, had frozen all salaries for certified employees at the level of the previous year, thus denying teachers both step and class increases. The Court of Appeal held that the trial court erred when it granted a writ of mandate compelling the Board to raise teachers' salaries, since the Board's action was arguably an unfair labor practice. Respondents should first have exhausted their administrative remedies under the EERA before turning to the court. However, the appellate court found that for that part of the case that did not involve unfair practices, the trial court's finding that district officers had acted in an arbitrary and capricious manner justified awarding attorneys' fees to the teachers.

Clarification of the respective jurisdictions of PERB and the courts was finally addressed by the California Supreme Court in San Diego Teachers Association v. Superior Court (154 Cal. Rptr. 893, 1979). The issue was whether the restraining order and injunction granted by the trial court in a teacher strike were invalid because the district had failed to exhaust its administrative remedies under the EERA (Rodda

Act). Teachers had sought annulment of contempt orders growing out of their violation of the injunctions. The Court of Appeal denied review, but the California Supreme Court granted a writ of review and a hearing.

At the time the injunctions were issued, both the teachers and the Board had filed unfair labor practice charges with PERB, but that agency had taken no action. Contempt proceedings were initiated by the judge acting on his own motion; the School Board was not a party to the suit.

The trial court had based its opinion on the case law precedent that teachers did not have the right to strike. It also referred to the inclusion of the provision in the EERA that Section 923 of the labor code was not applicable to public employees.

Teachers held, however, that the EERA did not itself prohibit strikes. Further, they argued that that statute's provisions for public employment collective bargaining implied legality of strikes to make negotiation effective and meaningful. They noted that a prior court opinion, In Re Berry, had reserved opinion on "the question whether strikes by public employees can be lawfully enjoined" (Berry, 1968:151). In another case, City and County of San Francisco v. Cooper (13 Cal. 3d, 898, 1975), the court had held that local legislation fixing compensation of public employees was not invalid even though enacted as a result of an employees' strike. The Court of Appeal in that case had noted the varying positions of the parties on the right of public employees to strike and stated, "We have no occasion to resolve this controversy in the present action" (San Francisco v. Cooper, 1975:912). Hence, the Supreme Court here held:

Similarly it is unnecessary here to resolve the question of the legality of public employee strikes if the injunctive remedies were improper because of the district's failure to exhaust its administrative remedies under the EERA. (San Diego Teachers Association, 1979:897).

In dealing with this matter, the court raised three questions:

1. Could PERB properly determine that the strike was an unfair practice under the EERA? The Supreme Court found that if a strike was an illegal pressure tactic, it could constitute an unfair practice. Moreover, even if the strike was legal, a strike before exhaustion of administrative remedies could be an unfair practice.

2. Could PERB furnish relief equivalent to that available in a court action? Equal relief would be essential if administrative remedies were to replace judicial remedies. The Supreme Court found that PERB had power to petition the court for injunctive relief but only on issuance of a complaint that unfair practices were involved. The EERA "amply implies" that PERB has such authority.

But respondents argued that the EERA did not explicitly confer autonomous prosecutorial power upon PERB as did the National Labor

Relations Act (NLRA) at the federal level. The grant of such prosecutorial power would compromise the neutrality of PERB in subsequently hearing the unfair labor practice charge. But the Supreme Court found that the statute implied board power to delegate prosecutorial functions to its general counsel.

To provide equal relief, PERB's power would have to be invocable at the request of any party and the court found that the statute allowed this. However, it was argued that PERB's application for judicial relief would not encompass all the grounds included in a judicial order; particular attention was directed to the issue of irreparable harm.

It is argued that PERB's determination to seek an injunction, as well as its application to the court, would reflect only a narrow concern for the negotiating process mandated by the EERA and would ignore strike-caused harm to the public and particularly the infringement on the children's right to an education (San Diego Teachers Association, 1979:900).

The Supreme Court found that this argument assumed a disparity between the interests of the public and those of PERB. The interest of both was to minimize interruptions of educational services.

It does not follow from the disruption attendant on a teachers' strike that immediate injunctive relief and subsequent punishment for contempt are typically the most effective means of minimizing the number of teaching days lost from work stoppages...the question of appropriate sanctions for illegal strike activity is complex. Harsh, automatic sanctions often do not prevent strikes and are counterproductive (San Diego Teachers Association, 1979:900).

PERB's responsibility in administering the EERA required it to seek judicial relief "in ways that will further the public interest in maintaining the continuity and quality of educational services (San Diego, 1979:900). Hence, the court concluded that the remedy through PERB was equivalent to that obtainable through the courts.

3. Does the EERA give PERB exclusive initial jurisdiction over remedies against strikes that it properly could find were unfair practices?

First, the Supreme Court found there was an analogy between the functioning of the NLRB in the private sector and the PERB in California's public sector. The aim of both organizations was to bring expertise and uniformity to the task of stabilizing labor relations. Both employed general counsel, had rule making powers and authority to investigate unfair practices. Courts that reviewed the actions of both organizations were compelled to uphold them if supported by substantial evidence. Further, the EERA declared that alleged unfair practices fell within the jurisdiction of PERB:

The initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. (EERA, Section 3541.5).

In an amicus curiae brief, a PERB member had argued that the agency did not have initial jurisdiction over EERA violations other than unfair practices and that, since a strike was prohibited by the EERA reference to Labor Code 923, it was outside the agency's authority. But the Court found that that reference did not prohibit strikes but "simply excludes the applicability of Labor Code Section 923's protection of concerted activities." And the Court held that EERA does not separate unfair practices from other violations of the statute.

It had also been argued that

to require the district to apply to PERB before suing for injunctive relief would be to require an idle act because, if PERB had then refused to apply to a court for relief, the district would have been entitled to do so--on the theory that exhaustion of remedies is not required if completion of the administrative proceedings would result in irreparable injury (San Diego Teachers Association, 1979:901).

But the court found that EERA gave PERB discretion to pursue or withhold remedies in its mission of the long-range minimization of work stoppages. PERB could approach its task with greater flexibility than could the courts. PERB might determine that injunctive relief would hinder rather than help in resolving the impasse caused by a work stoppage.

A court enjoining a strike on the basis of (1) a rule that public employee strikes are illegal, and (2) harm resulting from the withholding of teachers' services cannot with expertise tailor its remedy to implement the broader objectives entrusted to PERB (San Diego Teachers Association, 1979:901).

Since PERB had not declined to seek injunctive relief in this case, the court found it did not have to reach the question of whether the district would have been without a remedy had PERB declined to proceed to court.

The court limited the holding to public school employees who had been recognized or certified as exclusive representatives and concluded

The contempt orders are annulled on the ground that PERB had exclusive initial jurisdiction to determine whether the strike was an unfair practice and what, if any, remedies PERB should pursue. (San Diego Teachers Association, 1979:902).

The court was divided on the case. The Supreme Court, sitting en banc, had issued a 4 to 3 decision and Justice Richardson, writing for Justices Clark, Manual and himself argued vigorously in dissent that the legislature had "not conferred on PERB or any other administrative agency, the authority to deprive a public school employer of its right to seek and obtain injunctive relief" (San Diego Teachers Association, 1979:902). The district's complaint had alleged that the illegal teachers' strike would cause irreparable injury to the educational program of the district and a significant loss of state funds.

Under prior California case law it was well established that a public employer could obtain immediate injunctive relief from the courts to prevent or reduce such irreparable injury or loss (Citation to City and County of San Francisco v. Evankovich.) (San Diego Teachers Association, 1979:902).

Criticizing the majority's finding that "PERB not only has exclusive jurisdiction over strikes by public educational employees but even possesses discretion to refuse to enjoin such strikes consistent with its mission to foster constructive employment relations," the dissent also faulted the majority for refusing to address the question of whether the employer might seek relief in the courts if PERB refused to act. The dissenting justices specified three areas of disagreement with the majority opinion:

1. Public employee strikes are unlawful. Though the majority had cited five cases which held that public employees have no right to strike in California, it still asserted it was "unnecessary here to resolve the question of the legality of public employee strikes." But the dissent stated that no question remained to be decided. It cited the City of San Diego case at length on the common law, case law and logical reasons against such a right to strike. It noted that the Supreme Court had unanimously denied a hearing in the Pasadena case which concluded that "no benefit... would result from our reanalyses of the same issues which the... cited opinions have exhaustively treated, with extensive citation of authority."

The dissent noted that education ranks among the highest and most important of public purposes. We ourselves have said that public education is a fundamental interest (Serrano v. Priest, (1976))... which is "essential to the preservation of the rights and liberties of the people..." (San Diego Teachers Association, 1979:902).

Accordingly, a strike which might be allowed in the private sector would necessarily be held unlawful in the public sector since it would be directed against "the rights and liberties of the people."

2. Right to strike under the EERA. Conceding that the legislature could establish a right to strike in the public sector, the dissent noted that the reference in EERA to Labor Code Section 923 had been judicially interpreted as precluding such a right to strike.

Hence, EERA had affirmed the illegality of such strikes and the position of the majority on this point was "manifestly wrong."

B. PERB's exclusive jurisdiction over unfair practices. The dissent found that "nothing in EERA would support the view that the Legislature intended to divest courts of their traditional equitable jurisdiction over public strikes or any other unlawful activities which threaten irreparable injury" (San Diego Teachers Association, 1979:906). EERA nowhere defined a strike as an unfair labor practice and its reference to Section 923 "necessarily would preclude PERB from exercising jurisdiction over such strikes, or doing any act which might encourage or prolong such unlawful conduct" (San Diego Teachers Association, 1979:906). The dissent noted that by holding that a court could not tailor its remedy to implement the broader objectives of PERB, the majority permitted PERB to validate a particular strike by refusing to enjoin it, thereby sanctioning what the legislature had repeatedly refused to sanction. Public employers might therefore find the courtroom door closed to their search for a remedy. The majority opinion had refused to deal with the question of court relief if PERB did not act. Hence, even if irreversible harm was occurring, the district and the entire public school system and its programs might be "held hostage" to PERB's refusing to act. The dissent concluded

I cannot believe that the Legislature under such circumstances intended to strip from courts their traditional equitable powers, thereby leaving the public helpless and without a remedy to protect itself (San Diego Teachers Association, 1979:907).

After San Diego Teachers Association

It is the majority opinion which becomes the relevant case law. The highest court in California has given PERB exclusive initial jurisdiction to determine whether school employee strikes constitute an unfair practice. That much is clear. However, the legal community has found other parts of the decision ambiguous, obscure and overly terse (Bowen, 1979:2). Undoubtedly, the regulations and actions of PERB will begin to fill in the ambiguities in the decision and to evolve the new procedures for processing teacher strike cases. Given the strong language of the San Diego case, lower courts are likely to defer to PERB in its interpretation of its role.

Terry Filliman, associate general counsel for PERB, reflects on PERB's actions during the first two months after the San Diego decision (Filliman, 1979). He notes that PERB has declared a strong intent to rule that strikes initiated before completion of EERA-prescribed impasse procedures constitute an unfair practice. To the extent that this will move parties to exhaust impasse procedures, it will in itself constitute a change. Currier surveyed 16 school strikes which occurred in the eight and one half months immediately

after the effective date of the EERA (July 1, 1976). He reports that in none of those strikes did the employees fully utilize available impasse procedures (Currier, 1977:16).

Practical problems arise with PERB's new duties. Can it be a neutral agency, facilitating mediation and informal conferences, at the same time that it is a prosecutorial agency, representing the public interest in the maintenance of educational services and its own interest in ending public employee strikes? Filliman suggests that a separation of function within the agency may be necessary so that hearing officers do not perform prosecutorial functions (Filliman, 1979:9).

Another problem arises with the interposition of an additional procedure. Where time may be crucial in the processing of work stoppages, the intermediate step of reaching the courts through PERB and only after PERB's consideration of the case on its merits may add delay. Or PERB's processing may be handled in summary fashion, leading to an insufficient consideration of the issues and incomplete preparation by the parties. In one recent case, attorneys for one of the parties had only one hour's notice of a court hearing initiated by PERB.

Filliman also raises questions about the scope of PERB's jurisdiction. He suggests that court processing prior to San Diego focused on the unlawful nature of work stoppages but the injunctions encompassed a broad range of activities including violence, trespass and, occasionally, damages against offending parties. Drawing on the NLRA analogy urged by the courts, he asks whether PERB should restrict its action only to the unfair practice charges or whether they should also encompass the criminal and civil actions formerly handled by the courts. Filliman suggests that the latter will probably be the case; he contends that the courts probably "did not intend to allow a void wherein certain strike-related conduct could be enjoined under the EERA and other conduct left unstoppable by any means" (Filliman, 1979:10).

Another question relates to the grounds for granting an injunction. A court, in an equity action, normally requires that the plaintiff show a case that is likely to prevail on its merits, that other equitable or legal remedies are insufficient or lacking, that irreparable injury will occur if relief is withheld and that the public interest lies with the plaintiff. Filliman discusses the implication of two post-San Diego cases in which PERB sought an injunction from the courts.

The experience in Val Verde and Las Virgenes with two superior courts left an implication that the judges viewed PERB's authority to be granted an injunction as a statutory one rather than an equitable one. In the alternative, one might conclude that the judges found that a strike which PERB considered as a prima facie unfair practice constituted per se "irreparable harm" to the public interest (Filliman, 1979:10).

This would suggest that judges may rather routinely grant the injunctive relief which PERB requests without requiring adherence to equity standards, including the standard of showing irreparable harm.

While the San Diego Teachers Association decision has clarified public school impasse processing in some areas, it has considerably heightened confusion in others. The narrow nature of the Supreme Court decision (4 to 3) indicates that further clarification and amendment is likely to be hard-fought and narrow in scope. PERB is still evolving its adaptation to its new task and clarity is likely to be slowly incremental as case experience builds. Whether the present ambiguity and uncertainty will encourage parties to evade both PERB and the courts and to seek their own solutions to the resolution of their impasse, time alone will tell. In a strike in Oroville in June, 1979, an unfair labor practice charge was filed with PERB; however, PERB officials brought the parties together for additional negotiation and agreement was reached late in the week. Both teachers and Board gave high praise to PERB for its role (CPER 42:62-3). However, in the Las Virgenes district where teachers resumed their strike after the expiration of the temporary restraining order secured by PERB, both sides indicated displeasure with the way PERB had functioned in processing the impasse (CPER 41:39-40; CPER 42:58-9). The actions taken by PERB in the coming year will be closely scrutinized by districts.

The Deterrent Value of the Statutory and Case Law

Bonnie G. Cebulski conducted an analysis of 22 illegal public sector strikes occurring in California between January, 1969 and mid-July, 1972. In 19 of these strikes, a general or a limited temporary restraining order (TRO) was sought. In only one instance, was a TRO not granted by the court. Cebulski interviewed parties and studied documents relating to the strikes. She concluded that a TRO "clearly" resulted in the end of one strike and possibly did so in two others. Nine preliminary injunction hearings were held; two were not granted by the court. Again, the injunction "clearly" resulted in the end of one strike and possibly did so in two others. Employers sought enforcement of three general injunctions but, in all instances, the courts found the strikers not in contempt or dismissed the citations. Judges played the mediator role in five strikes, using legal sanctions as leverage; Cebulski judges that four of these attempts were successful.

Of significance is the comparison of the length of strikes with and without legal sanction. Strikes in which a general TRO was obtained lasted an average of 23.5 days; those without lasted only half as long for an average of 11.4 days. Cebulski remarks:

Legal sanctions may have no effect on strikes, or as suggested by some practitioners, may even prolong them by

strengthening the employees' resolve or by chilling negotiations. There is no evidence that strikes without orders were shorter simply because the employer assumed the strike would be short and therefore did not bother to seek an order. In all instances when no order was sought, the reason given by the practitioner was the ineffectiveness of court orders in settling labor disputes. The data obtained do not explain why strikes with legal sanctions should last so much longer, but the statistics suggest one definite conclusion: legal sanctions do not prevent, end, or even shorten strikes among public employees (Cebulski, 1973:8).

Only two of the 22 strikes studied by Cebulski involved public schools. In both, a TRO was sought and obtained. One district settled before the show cause hearing on a preliminary injunction. In the other, a preliminary injunction was obtained. Teachers did not comply, and contempt citations were sought but later dismissed. Cebulski concludes that while injunctive relief may have helped resolve the first strike, it did not do so in the second (Cebulski, 1973:6-7).

Cebulski conducted two follow-up studies. In one covering 1975-76, 64 public sector strikes took place with 19 of them occurring in the public schools. Court orders were sought in 18 but Cebulski found that only in two instances were these instrumental in ending the strike (Cebulski, 1977). Finally, in 1979, the author (now married and identified as Bonnie Cebulski Bogue) and Clara Stern surveyed the 1977-78 strikes (Bogue and Stern, 1979). They counted 87 public sector work stoppages, 35 of which took place in public schools. They note that school strikes included more employees than other public sector strikes and also they lasted longer. No information was given on the use of legal sanctions.

The number of public sector strikes in California over a nine-year period is as follows:

<u>1970</u>	<u>1971</u>	<u>1972</u>	<u>1973</u>	<u>1974</u>	<u>1975</u>	<u>1976</u>	<u>1977</u>	<u>1978</u>
21	15	19	17	43	44	20	60	27

(Bogue and Stern, 1979:20).

Given the annual average of 29.5 strikes over the nine-year period, it is interesting to note that that average was exceeded in three of the last five years. One does not know whether perhaps more strikes would have occurred if legal sanctions were not available to public sector employers. But it is difficult to conclude that California's legal sanctions are effectively deterring public sector strikes.

THE SEPTEMBER, 1978 DALY CITY STRIKE³

On Tuesday, September 5, 1978, the teachers in the Jefferson Union High School District in Daly City, California voted to strike.

It was the first public school strike in the state since Proposition 13 had been passed on June 6 three months earlier (San Francisco Examiner, September 7, 1978). The district had had a previous three-day walkout in 1968.

The contract at issue was for the 1978-79 school year. In addition, teachers were seeking a retroactive wage increase for the 1977-78 school year. But there was a dispute as to whether any wage increase could be given. Proposition 13, the property tax relief initiative, had resulted in substantial cuts in revenues for local governments and school districts. In late June, the state had subsequently allocated "bail-out" funds from state surplus monies to alleviate the budget pinch for the 1978-79 school year but the legislature had passed Government Code 16280, mandating that no local agency receiving such funds could use them for wage increases. (This legislation was subsequently declared unconstitutional but it was still in effect at the time of the Daly City strike.)

The district had received \$6 million in bail-out money. The position of district officials was that if raises were given, they would lose this bail-out money. But teachers contended that during fact-finding procedures they had found \$1 1/2 million in a bond fund holding account. District voters had approved the issuance of \$10 million for construction bonds in 1968; that money had all been spent. But teachers accounted for a total of \$11 1/2 million in the fund; the residue had been placed in a holding account. A fact-finding panel commissioned by negotiators had issued an August 25, 1978 report recommending that the district put this \$1 1/2 million into the general fund and that \$436,664 of it be used to grant teachers a 5.4% retroactive wage increase. Hence, there was a clear recommendation supporting the request of the teachers.

Further, teachers asserted they had received no wage increase at all in the 1977-78 school year. A member of the American Federation of Teachers bargaining team said

There was no raise last year, no legal way to get a raise this year and the impact of Proposition 13 will hit next year. It was a simple issue of economics to go on strike (Pacific Tribune, September 6, 1978).

Finally, teachers argued that Proposition 13 should not be considered as a factor in the retroactive raises because the requested increase was for a period which ended before Proposition 13 was passed on June 6 and the funds were also on hand before that date. The legal counsel of the American Federation of Teachers had advised that there was no legal barrier to the use of the money in the bond fund.

District Superintendent Floyd Gonella made requests from government lawyers and the County Office of Education about the propriety of the retroactive raises; they advised him that such raises would violate the provisions of Government Code 16280. In addition, Jacques T. Ross of the State Department of Education had written, in answer to a query:

...I must advise the San Mateo County Superintendent and the Superintendent of Public Instruction that your proposed action does violate the provisions of G.C. 16280, and if the district adopts this proposal, it runs the risk of losing the State support to the (sic) block grant for 1978-9 (Ross, September 6, 1978).

The strike had begun on September 5, an orientation day for teachers. For September 6, the first full instructional day, the district had hired 130 substitute teachers and classes were held on a limited schedule. No buses rolled for bus drivers were supporting the teachers. In addition, members of AFSCME voted to request strike sanction from the San Mateo Central Labor Council in support of the teachers.

On September 6, Superintendent Gonella announced that \$436,664 from the bond fund money be supplemented with \$200,000 already in the budget for negotiation and the \$636,664 be used for salary talks "pending removal of legal restrictions." The district offered a 4% raise retroactive to February 1. The teachers found this offer "insulting" since they contended the district had the \$1½ million with which to negotiate. Still, they found the offer "significant" because it was the Board's first firm money offer.

Superintendent Gonella indicated to the press that the district was "caught" in Proposition 13. "We're coping and we hope we can get money for the teachers. They deserve it." He also indicated that "nobody wins a school strike. It's very detrimental to the entire system - students, teachers, district." (San Francisco Examiner, September 7, 1978). Gonella asserted that he was considering court action as a last level of appeal to get the money for teachers and the faculty back in school "before the strike gets nasty."

Side issues served to keep tension between the parties high. One teacher picket reported that he had been struck by a school van and carried some distance into the school lot; however, he indicated that he was not injured. Students conducted walkouts at two of the district's six high schools. A week later, students conducted a sit-in, taking no sides but simply appealing for an end to the impasse. The sit-in ended when the principal told them they were subject to arrest for trespassing.

On Monday, September 11, Deputy District Attorney George Camerlengo filed a Complaint for the School Board, requesting a temporary restraining order against picketing. The district did not request an order against the strike itself. The Complaint alleged interference with egress and ingress to and from district facilities, the threat of violence and coercion, and irreparable harm:

...the unlawful acts of defendants and each of them has caused and continues to cause substantial and irreparable harm to the plaintiffs. By turning away substitute employees, students, and suppliers, defendants have caused substantial and irreparable harm to the educational process for the

students of the District including, but not limited to, disrupting classes, causing excessive student absenteeism and preventing completion of school work necessary for graduation. As a direct and proximate result of the interference by defendants' strike activities, the District has been unable to provide adequate educational services to the students of the District. In addition, defendants' strike activities have caused the District to incur actual damages of \$5,000 per day since the strike began (Complaint for Temporary Restraining Order, Preliminary Injunction, Permanent Injunction and Damages, Jefferson Union High School District v. American Federation of Teachers, Local 1481, Superior Court, San Mateo County, September 11, 1978:3. Case hereinafter referred to as Jefferson Union).

Attorney Camerlengo also filed, for the Board, a Plaintiff's Memorandum of Points and Authorities and Declarations in Support of Temporary Restraining Order and Preliminary Injunction (Jefferson Union, September 11, 1978). In this document, it was argued that teachers were engaged in an "unlawful strike"; in earlier cases of this kind, appellate courts had upheld the propriety of injunctive relief and, indeed, had found that failure to grant such relief was an abuse of discretion. The Memorandum cited a recent case in which striking county employees had appealed the grant of a preliminary injunction, contending that an evidentiary hearing should have been held before injunctive relief was granted. The Court of Appeal found a section of the Code of Civil Procedure dispositive:

An injunction may be granted at any time before judgment upon a verified complaint, or upon affidavits if the complaint in the one case, or the affidavits in the other, show satisfactorily that sufficient grounds exist therefor. (Cited in San Francisco v. Evankovich, 1977:53).

The properly verified documentation of an actual strike was thus sufficient basis for granting the injunction. The declaration of Superintendent Gonella, submitted with the Complaint, showed that the educational program had been disrupted, the use of substitute teachers had impaired the learning program and that as many as 56% of the total student population had been absent, thus "receiving no education at all." Further, the strike interfered with support services for the district and there had been both threatened and actual violence as evidenced by declarations of three school personnel. Hence, while arguing that there was no need to adduce harm in order to obtain injunctive relief, the district went ahead to argue that harm was occurring.

In conclusion, the Memorandum of plaintiffs cited City of San Diego v. AFSCME (1970) to the effect that the employer-employee relationship in the public sector was the product of law rather than of contract. This was especially true in the present instance where school officials were legally prevented from offering the raise requested by teachers.

The District is, on the Horns of a dilemma here--on the one hand it faces loss of its state funding if it grants any raises, and on the other hand, the teachers will continue to strike without a pay increase. This points out the need for an order restraining the strike until other steps, including a possible challenge to the prohibition against salary increases, can be made...In the meantime, the district is helpless and the education of 6,870 suffers. Plaintiff's Memorandum, Jefferson Union, 1978:6).

Accompanying the Memorandum are three Declarations by school personnel, alleging the difficulties which striking and picketing teachers are causing. Two Declarations describe the incident in which a teacher picket came into contact with a van as it was entering a school lot; they contend that the teacher positioned himself in front of the van and refused to move as the van "inched slowly forward." The Declaration of the district supervisor of buildings and grounds also stated the following:

Since the strike has begun, I have been unable to complete the necessary deliveries of goods to various district schools and facilities. I have also been unable to deliver the mail to various locations without interference by the picketers. Windows at the schools have been broken. Delivery trucks have been turned away and the police were called in in order to permit several female employees to pass through the picket lines on Friday, September 8, 1978. In addition, numerous picketers have taken photographs of myself and other district personnel while at work (Declaration of John Angle, Jefferson Union, September 11, 1978:2-3).

These documents are making the case for the injunction against picketing which the Board requested from the court.

The hearing on the temporary restraining order was held on Tuesday, September 12 with both parties represented in court. Judge William Lanam of the Superior Court, San Mateo County, issued a Temporary Restraining Order banning teachers from blocking or obstructing entrances or exits or interfering with movements of vehicles or persons, from intimidating or threatening any persons attempting to enter the property, and from having more than four pickets at any one entrance or exit of school property. He did not enjoin the strike as the Board had requested. Parties were ordered to appear before the court again at 9:00 a.m. on September 14 for a show cause hearing.

Press reports about the hearing indicated that the judge felt the district had failed to show an "overwhelming amount of violence" necessary to ban picketing. Further, he was reluctant to grant additional relief without a full hearing of the case (Pacifica Tribune, September 13, 1978; San Francisco Chronicle, September 12, 1978).

A temporary restraining order is issued for a limited duration, often no more than five days. However, at the scheduled show cause hearing, the petition for a preliminary injunction would be considered. If granted, it would be of longer duration and might enjoin both picketing and the strike. Thus, a more persuasive marshalling of authorities of law, facts of the case and supporting arguments was needed. Hence, lawyers for both Board and teachers filed additional documents with the court.

The following day, the attorney for defendants, Robert J. Bezemek, filed a Memorandum of Points on Behalf of Defendants (Jefferson Union, September 12, 1978); it summarized arguments in support of the strike and against court action. Defendants' case incorporated the following arguments:

1. This matter was pre-empted by the Public Employment Relations Board (PERB); the local court therefore did not have jurisdiction in the case. The EERA which took effect in 1976, had given employees the right to form, join and participate in employee organizations. It had also created PERB and given it power to investigate unfair practice charges and to apply for injunctive relief in order to enforce its orders, decisions or rulings. There was no evidence that the school district had filed any request for injunctive relief with PERB.

An analogy was made comparing state action in such strikes and the jurisdiction of the National Labor Relations Act. Where the NLRB had jurisdiction, state courts were prevented from acting. Defendants cited Russel v. Electrical Workers Local 569 (1966) in which the Supreme Court had found that in a jurisdictional dispute between the National Labor Relations Board and the state courts; the party seeking injunctive relief was required to demonstrate that the case was one which the Board had declined to hear. While the Russell case did not actually require that application be made, the party bringing the suit had the burden of showing that the administrative agency would not decide the case. Similarly, the school board, in this case should have taken their request to PERB. PERB had a mechanism for receiving injunction requests. Defendants were confident "that the Petitioners will be able to come up with a single case or regulation showing that the PERB would decline to hear an injunction request" (Defendants' Memorandum, Jefferson Union, 1978:4).

Finally, defendants stressed that state courts had routinely deferred to the administrative process before hearing disputes. And PERB had indicated reliance on the analogy of state court-NLRB relations in interpreting state law; in a previous hearing, PERB had concluded:

While we are not bound by NLRB decisions, we will take cognizance of them, where appropriate. Where provisions of California and federal labor legislation are parallel,

and California courts have sanctioned the use of federal statutes and decisions arising thereunder, to aid in interpreting the identical or analogous California legislation (Los Angeles Unified School District, PERB Decision No. 5 November 27, 1976.)

Thus, the court thus did not have jurisdiction.

2. A strike by public school employees in California may not be enjoined. Peaceful picketing and "other non-coercive truthful efforts to communicate the facts of the labor dispute to the public" had been given First Amendment protection under case law.

3. The present strike was an unfair labor practice strike which should not be enjoined. Teachers were bargaining not only this year's contract (for which the district contended it could not grant a wage increase) but also over the contract of the 1977-78 school year when no wage increase had been granted. The actions of the district constituted a refusal to bargain in good faith, an unfair labor practice over which the court did not have jurisdiction.

4. The injunction sought by plaintiffs was overbroad and based on insufficient facts. Not only was the injunction violative of First Amendment rights but it also failed to cite any specific activity "allegedly violative of public policy". A "clear and detailed showing of specific facts specifying broad injunctive relief" had not been made.

A case then pending before the state Supreme Court would determine the range of PERB's jurisdiction in such strikes. Hence, it was premature for this court to act. And the court had no jurisdiction to enjoin lawful picketing protected by the First Amendment (Defendants' Memorandum, Jefferson Union, 1978).

A Supplemental Memorandum in Support of Request for Preliminary Injunction (Jefferson Union, September 13, 1978) responded to arguments of teachers, indicating that the question of the First Amendment protection of public employee strikes and the definition of the strike as an unfair labor practice had adequately been answered in the opening Memorandum. The present document addressed itself to defendants' argument that the "matter is preempted by the Public Employment Relations Board."

The memo of plaintiffs detailed the standard of review for injunctive relief. The two essentials were determination of inadequacy of legal remedy and a showing of irreparable harm. The court must examine all material before it to determine "whether a greater injury will result to the defendant, and to third parties, from granting the injunction than to the plaintiff in refusing it" (Plaintiff's Supplemental Memorandum, Jefferson Union, 1978:2). One factor in such determination would be the probability of plaintiff's ultimately succeeding in the case. Courts thus balanced the equities to assess

whether defendants should be restrained from exercising the rights they were asserting, pending a trial on the merits.

Since there was clear provision for the securing of injunctive relief through the courts, plaintiffs argued that PERB did not have exclusive jurisdiction to seek injunctive relief. /The delay in seeking such relief through PERB would in itself cause irreparable harm to the district. The Russell case cited by defendants involved a strike by private sector employees and was thus inapplicable to the instant case. Further, the analogy to NLRB was inappropriate, for federal statutes gave that Board exclusive authority to grant injunctive relief in certain labor disputes. PERB did not have such exclusive jurisdiction; and nothing in the Educational Employment Relations Act (the Rodda Act) took injunctive authority away from a superior court. "The law simply does not and should not require such a circuitous method of seeking judicial redress" (Plaintiff's Supplemental Memorandum, Jefferson Union, 1978:5).

The memo concluded:

The union's strained interpretation of the Rodda Act and the Russell case fails to address the real issues at this stage of the proceeding, i.e., has there been a showing of irreparable harm, and is the legal remedy inadequate. We have presented declarations to the court, without any opposition from the union, showing that such irreparable harm is currently taking place and will continue without judicial intervention by way of an injunction. Damages are clearly inadequate since no amount of money can make up for the on-going harm to the district's educational program. Further declarations and/or testimony, within the court's discretion, will be presented at the hearing on the preliminary injunction (Plaintiff's Supplemental Memorandum, Jefferson Union, 1978:5).

Also included in the court files was a new declaration by Superintendent Gonella asserting that the strike has "disrupted district operations and made it difficult to accomplish the day-to-day running of the district schools" (Declaration of Dr. Floyd Gonella, Jefferson Union, September 13, 1978:2). The "following added damage" was also occurring:

1. Hundreds of instructional hours "may be forever lost".
2. Block or full-year instructional programs may not be completed.
3. The use of substitutes has necessitated the shortening of the school day and the significant altering of the instructional program.
4. The strike has required extensive administrative planning.

5. The district has had to develop extensive health and safety plans for students, particularly because bus transportation is not available. The Superintendent had been told "by many parents that they refuse to allow their minor children to attend school during the strike period."

6. School calendars, involving testing and special activities, had been disrupted.

7. Final examinations, student projects and assignments could not be supervised or graded; final grades could not be assigned.

8. Students were missing "the most critical part of the year's instructions, namely, summary, review and preparation for examination."

9. Teacher absenteeism might cause student truancy; summer school enrollment and summer employment were in jeopardy.

10. Federal funds for the free lunch program were in jeopardy.

11. Co-curricular programs had been stopped (Declaration of Gonella, Jefferson Union, 1978:2-4).

These consequences came as a direct result of the teacher strike.

George Camerlengo, attorney for plaintiffs, filed a declaration indicating that he had spoken with Mr. William P. Smith, general counsel for the PERB (Declaration of George Camerlengo, Jefferson Union, September 13, 1978). Smith indicated that the Board had not taken an official position on whether a teacher strike was an unfair labor practice per se. That question was before the Board in another case (Fremont U.S.D. SF-CO 19 and 20) and it would be some time before the decision was made. Smith described to Camerlengo the process involved in seeking injunctive relief through PERB, indicating that the process took approximately one week. Smith also indicated that PERB had never enjoined a strike in the past.

On September 15, after a full hearing of the case on the previous day, Judge Lanam issued a preliminary injunction, this time enjoining both the strike and picketing in advocacy of a strike, but exempting informational picketing. However, teachers vowed to continue the strike; Local AFT President Marcy Ballard asserted that the injunction violated teachers' constitutional rights (San Diego Union, September 15, 1978).

The strike continued for another two weeks. On Wednesday, September 27 teachers met at 8:00 a.m. and after 90 minutes of explanation, gave a "roaring vote of approval" to the new negotiated one-year contract. The pact gave them a 7.5% salary increase retroactive to February, 1978 and extending to the current year; it also included improvements in life insurance, early retirement and sabbatical leave. And it included a no reprisal clause for strikers. Finally, in case there were state attempts to deny funds to the

school because of the contract, both district and union would jointly institute court action to challenge the denial of funds.

Discussion

Several observations can be made about the way in which the irreparable harm issue was handled in the Daly City strike.

1. The Board argued that it need not show irreparable harm to secure injunctive relief. Having made that point, it then proceeded to show that irreparable harm was occurring. The Complaint which initiated legal action alleged that irreparable harm to freedom of movement was taking place because of teacher picketing. Plaintiff's Memorandum accompanying the complaint contended that teachers were engaged in an "unlawful" strike and cited a recent case to argue that an evidentiary hearing need not take place before injunctive relief was granted. The memo cited the Code of Civil Procedure to the effect that only a verified complaint and/or affidavits were necessary to show that sufficient grounds existed for injunctive relief. The district had provided such a showing in its Complaint and in the three affidavits or "declarations" which accompanied that Complaint. The case for injunctive relief had thus been properly and sufficiently made.

However, the Board then went on to argue the existence of irreparable harm in the latter part of plaintiff's Memorandum, in the hearing on the temporary restraining order, and in the memo in support of the Board's request for a preliminary injunction. They indicated that they were prepared to offer additional testimony and declarations regarding harm at the hearing on the preliminary injunction. Further, a new declaration by Superintendent Gonella dealt extensively and exclusively with damage occurring as a result of the strike.

Why do boards make a case which they insist does not need to be made? One reason may be that it is a requisite step in the court procedure. A California attorney indicated that it is necessary to adduce irreparable harm in order to invoke the equity jurisdiction of the court.

Another reason may well be that board attorneys are outlining the case they intend to make in court. Cebulski notes that "facts not in the affidavits may not be proved in the proceeding" (Cebulski, 1973:15). Hence, board attorneys will want to anticipate the case they plan to make or may be called upon to respond to in court. By case law and ancient traditions of equity, injunctions may issue upon a showing that irreparable harm is occurring and will continue to occur absent such relief. A board attorney is thus wise to outline a persuasive showing of harm as a base on which to build court testimony and supplemental documentation.

In addition, a lawyer does not know what factors in the case will ultimately weigh in the decision of the judge. In strike site

studies conducted in the project, it appears that the decisive factor may vary from standards of equity (such as the irreparable harm standard), statutory factors (such as the illegality of the strike), failure to exhaust administrative options (mediation, fact-finding, or discipline of teachers), personal factors (such as a tilt toward teachers, perhaps because the wife of the judge may be a teacher or a tilt toward boards because the judge may have been involved in school administration), political factors (such as expressions of concern of pressure from third parties), or some aspect of the fact situation which symbolizes for the judge that the strike must be brought to a halt. As an illustration of the latter, a judge in one of our strike site studies was persuaded that the strike must end when he heard testimony that a student was carrying a sign reading "Fire my teacher." That incident symbolized for the judge the harm occurring because of the strike (Graber, 1980a).

Because attorneys do not know which of these (or other) factors will ultimately sway the judge, it becomes prudent practice to include a multitude of arguments in the legal documents and in court testimony. This offers a fail-safe approach; if one argument does not move the judge, another may. Certainly, in this arsenal-of-weapons approach, it is important to include documentation of harm. Even if this approach does not ultimately persuade the judge, it would certainly be unwise to omit it.

2. Teachers did not confront the issue of irreparable harm at all. In a small number of strikes in our research, the issue of whether harm was occurring at all and, if so, whether the harm was irreparable was vigorously argued in the court (Graber, 1980a). However, in Daly City, the teachers did not respond to the issues outlined in plaintiff's legal documents. Instead, they focused briefly on the constitutionality of the strike prohibition (and even argued that strikes were not prohibited). However, their memoranda dealt almost entirely with the argument that the case ought to be before PERB and that the court did not have jurisdiction in the strike.

This issue was of some relevance because it was before the California Supreme Court in the San Diego Teachers Association case. The San Diego strike had taken place on June 6-9, 1977. The Superior Court of San Diego County had issued contempt orders against teachers. The Court of Appeal had denied application for a writ of review in April, 1978. The Supreme Court, however, had granted a hearing and, on April 10, 1979, issued the decision giving PERB exclusive initial jurisdiction to determine whether a strike was an unfair labor practice and to determine what remedies, if any, PERB should pursue (including the option of applying to a court for an injunction). Since the state supreme court had decided to hear the case after unfavorable action against teachers in the lower courts, the teachers' attorney in Daly City may have felt that the chances for success of the argument that only PERB had jurisdiction were good. Whatever the reason, the attorney for teachers chose to launch the case chiefly on this one argument. And although teachers did not prevail in court in the Jefferson Union High School District case, (Judge Lanam issued preliminary injunctions both against picketing and against

the strike itself), the argument did prevail in the San Diego case. Thus, while teachers may have lost the battle, they appear to have won the war.

3. The conversion of the injunctive process, at least in its initial stages, from a judicial to an administrative procedure, is likely to affect the use of the irreparable harm standard. Terry Filliman, associate general counsel for California's PERB has suggested that judges may treat cases brought by PERB as constituting per se evidence of harm and that they may use proper adherence to administrative procedures rather than standards of equity in deciding such cases (Filliman, 1979:10). Filliman based this assessment on the first two cases handled by PERB after the San Diego Teachers Association decision was handed down. This is a very small base on which to generalize but there are additional reasons which add credence to the generalization. Where there is a clear legal mandate for administrative procedures, courts are reluctant to intervene unless there has been some violation of due process or a lack of adherence to specified procedures. This practice arises partly because of a concern for the separation of powers and functions between the three branches of government. In the San Diego case, the Supreme Court has clearly specified that only PERB may determine whether a strike constitutes an unfair labor practice. If a strike is found to constitute such a practice and PERB's mediating and negotiating functions have been unable to resolve the impasse, a court is not likely to deny the contribution it can make to such resolution, particularly when its help is sought by another governmental agency and when there are, in addition, grounds in equity and law for the requested injunction. It will be interesting to observe the grounds the courts give after San Diego for the injunctive relief which they grant.

4. The teachers in Daly City hailed their strike as the most successful in California history. Evidently the achievement of success breeds the desire for more. On September 4, 1979, teachers again voted to strike for the second September in a row. The argument about whether such strikes should be enjoined and on what grounds goes on.

FOOTNOTES

1. This report has been prepared by Edith E. Graber.
2. The Meyers-Miliias-Brown Act of 1968, governing employees of local governments provided for more rigorous "good faith negotiation," for voluntary mediation and for non-binding "memorandum" agreements. But reliance on Labor Code section 923 was again expressly excluded for public employees by a provision of the act (Cal. Gov't. Code, section 3500-3511, West 1976).
3. Sources, in addition to those cited, include September 1978 issues of the Record, San Mateo Times, San Francisco Examiner, Coastal Chronicle, San Diego Union, The Post, Redwood City Tribune, and Pacifica Tribune.

REFERENCES

- Bogue, Bonnie Cebulski and Stern, Clara. "A 1977-78 tabulation of strikes in California's public sector." California Public Employee Relations 40 (March, 1979): 20-24.
- Bowen, David J. "Supreme court strike case - injunction authority shifts to PERB." California Public Employment Relations 36 (March, 1978): 16-20.
- California Public Employee Relations, Vols. 18, 28, 29, 33, 36, 37, 38, 40, 41, 42.
- Cebulski, Bonnie G. "A 1975-6 tabulation of strikes in California's public sector." California Public Employee Relations 33 (June, 1977): 2-8.
- Cebulski, Bonnie G. "An analysis of 22 illegal strikes and California law." California Public Employee Relations 18 (August, 1973): 2-17.
- Currier, Richard J. "A case study: 16 public school job actions and the use of impasse procedures." California Public Employee Relations 33 (June, 1977): 16-20.
- Educational Employment Relations Act (1975: also known as the Rodda Act or SEERA). Cal. Gov. Code, sec. 3540-3549 (West 1976).
- Filliman, Terry. "Enjoining school strikes - a new direction for PERB." California Public Employee Relations 42 (September, 1979): 2-11.
- Fiorello, Thomas M. "Public employee legislation: an emerging paradox, impact, and opportunity." San Diego Law Review 13 (1976): 931-959.
- Geiger, Martha. "The Right to Strike and the Rodda Act: A Shift in Bargaining Power." Pacific Law Journal 10 (1979): 971-990.
- George Brown Act (1961; expired 1968). Cal. Gov. Code, sec. 3525-3536 (West 1976).
- Graber, Edith E. "Michigan: The Warren Consolidated Schools Strike." Center for the Study of Law in Education, Graduate Institute of Education, Washington University, St. Louis, Missouri, unpublished, 1980a.
- Hooten, Michael E. "California Assembly Advisory Council Recommendations on Impasse Resolution Procedures and Public Employee Strikes." San Diego Law Review 11 (1974): 473-491.

Labor Code, Stats. 1975, Chapter 1156, Sec. 527.3.

Meyers-Miliias-Brown Act (1968). Cal. Gov. Code, sec. 3500-3511 (West 1976).

Ross, Jacque T. Letter from Jacque T. Ross, Associate Superintendent and Chief, Division of Financial Services, State of California Department of Education to Floyd Gonella, Superintendent, Jefferson Union High School District, September 6, 1978.

State Employer-Employee Relations Act (1977). Cal. Gov. Code, sec. 3512-3524.

Winton Act (1965; expired 1 July 1976). Cal Educ. Code, sec. 13080-13090 (West 1973).

Cases

Almond v. County of Sacramento. 276 Cal. App. 2d 32, Cal. Ct. of Appeal, 1969.

Amador Valley Secondary Educators Association v. Newlin, 151 Cal. Rptr. 724, Cal. Ct. of Appeal, 1979.

City and County of San Francisco v. Cooper, 13 Cal. 3d 898, Cal. Sup. Ct., 1975.

City and County of San Francisco v. Evankovich, 69 C.A. 3d 41, Cal. Ct. of Appeal, 1977.

City of San Diego v. AFSCME Local 127. 8 Cal. App. 3d 308, Cal. Ct. of Appeal, 1970.

In Re Berry. 436 P.2d 273 Cal. Sup. Ct., 1968.

Jefferson Union High School District v. American Federation of Teachers, Local 1481, Superior Court, San Mateo County, California, September 11, 1978.

Los Angeles Metropolitan Transit Authority v. Brotherhood of R.R. Trainmen. 54 Cal. 2d 684, Cal. Sup. Ct., 1960.

Los Angeles Unified School Dist. v. United Teachers, 24 Cal. App. 3d 142, Cal. Ct. of Appeal, 1972.

Pasadena Unified School District v. Pasadena Federation of Teachers, Local 1050, 72 Cal. App. 3d 100, Cal. Ct. of Appeal, 1977.

San Diego Teachers Association v. Superior Court, 154 Cal. Rptr. 893, Cal. Sup. Ct., 1979.

School District for the City of Holland v. Holland Educational Association, 380 Mich. 314, Mich. Sup. Ct., 1968.

Trustees of the California State Colleges v. Local 1352, S.F. State Federation of Teachers. 92 Cal. Rptr. 134, Cal. Ct. of Appeal, 1970.

SURVEY OF 1978 - 1979 TEACHER STRIKES

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CONTENTS

METHODOLOGY 1

ANALYSIS OF FINDINGS 2

 Request for Third-Party Assistance 2

 Table 1 2

 Administrative Options Considered and Used 3

 Table 2 3

 Board Views in Considering Court Action 4

 Table 3 5

 Table 4 6

 Action on the Request for Injunctive Relief 7

 Table 5 7

 The Role of the Judge 9

 Table 6 9

 Evaluation of Court Assistance 10

 Table 7 10

 Table 8 11

 Use of Mediator 12

 Table 9 12

 Characteristics of Strikes 13

 School Functioning During Strike 13

 Table 10 13

 Length of Strike 14

 Table 11 14

 Table 12 15

 Third-Party Plaintiffs 15

Characteristics of Districts 15

 Number of Teachers 15

 Table 13 16

 Table 14 16

 Location of Strikes 17

 Table 15 17

APPENDIX 18

FOOTNOTES 22

REFERENCES 23

SURVEY OF 1978 - 1979 TEACHER STRIKES

When teachers strike, how often do boards seek the assistance of courts? What factors do boards weigh in determining whether to file a complaint and to seek an injunction? What types of self-help administrative options do they pursue in seeking to resolve the impasse? When petitions for injunctive relief are filed with the court, how often do judges grant an injunction? Once the impasse is over and teachers are back in school, what recommendations would superintendents make about using courts in the event of another strike?

There is very little in the teacher strike literature which even suggests answers to these questions. Of the few statistical studies available, most cover a limited area, e.g., the studies on teacher strikes in California by Cebulski (1973; 1977) and by Bogue and Stern (1979). Studies on the injunctive process itself are instructive but few give statistical measurements of variables in the injunctive process. Hence, we set out to ascertain the answers to our questions.

METHODOLOGY

This report summarizes the results of a survey of all elementary and secondary strikes in the nation in a twelve-month period from July 1, 1978 to June 30, 1979. Strikes were located by consulting the following sources:

- a.) a newspaper clipping service from the Bureau of National Affairs;
- b.) the annual list of fall strikes compiled by the Bureau of National Affairs and published in the Government Employee Relations Report;
- c.) the Bureau of Labor Statistics, which graciously supplied a copy of all questionnaires on teacher strikes which were returned to them during the twelve-month period in question;
- d.) the strike lists which some state departments of education publish giving strikes in their jurisdiction, e.g., Michigan and Pennsylvania. These were used to confirm and correct information from other sources.

A teacher strike was defined as a work stoppage at the elementary or secondary level which was initiated by teachers and which was of one or more days duration. A strike in which teachers honored a picket line in a work stoppage begun by non-teaching employees was not included in our group of strikes since the work stoppage was not over teachers' issues and concerns. We included work stoppages which occurred on days normally scheduled for instruction as well as those that occurred on planning, orientation and in-service training days so long as the concerted work stoppage was by teachers over issues of direct concern to them.

The above criteria and the sources furnished us with a list of 158 strikes. A questionnaire was prepared which could be reduced and printed on both sides of one sheet of legal-sized paper (see Appendix). This was sent to superintendents of the districts in which strikes had been reported. Of the 158 strikes, we received returned questionnaires from 129 districts, a return rate of over 81 percent. Twenty-nine districts did not respond.

Of the 158 strikes located through our sources, Michigan had the highest number with 29 strikes. Pennsylvania was second with 22 strikes. Ohio had 20, Illinois had 19 and Washington State had 10. (For a breakdown of strikes by state, both for the 158 strikes located and for the 129 strikes on which we have information from our respondents, see page 16.)

ANALYSIS OF FINDINGS

Request for Third-Party Assistance

Respondents were asked whether they had requested third-party assistance from a list of labor-dispute-resolving institutions. Fifty-one districts (39.5 percent of respondents) sought the assistance of the courts. The most commonly used form of third-party assistance was mediation; 104 districts (80.6 percent of the total) used the services of a mediator. This was more than twice as many districts as had sought court assistance. Table 1 gives the percentages of respondents using each of the forms of dispute resolution.

Table 1

Forms of Third Party Assistance Requested

Third parties	Districts Requesting Assistance		Districts Not Requesting Assistance		Total
	Number	Percentage	Number	Percentage	
Court	51	39.5%	78	60.5%	100.0%
Mediation	104	80.6	25	19.4	100.0
Factfinding	41	31.8	88	68.2	100.0
PERB or PERC ^a	36	27.9	93	72.1	100.0
Arbitration	17	13.2	112	86.8	100.0
Other	9	7.0	120	93.0	100.0

^aPublic Employee Relations Board or Commission
N = 129

Types of third-party assistance specified by respondents under "Other" included two uses of consulting services, two of professional negotiators, two of impasse panels, one of the state office of education, one of the state association of school boards and one of a citizens' group.

Administrative Options Considered and Used

One of the principles of equity is that injunctive relief be granted only if no other legal remedy is available. Hence, in one of our strike site studies, Collinsville, Illinois, the attorney for teachers argued in court that the board had not exhausted its legal remedies; therefore, the injunction should not be issued. He contended that the board could have dismissed the striking teachers; there were 20,000 surplus teachers in the state and the board could have hired replacements from that group (Colton, 1980a).

We were thus interested to learn whether boards had considered, approved or implemented administrative options open to them instead of or in addition to seeking remedy in the courts.

Table 2

Use of Administrative Options

Board Action	Administrative Options					
	Dismiss Teachers	Suspend Teachers	Rescind Union Chetkoff	Rescind Insurance Coverage	Other	
	%	%	%	%	%	
Approved and implemented	2(1.6)	1(0.3)	11(8.9)	13(10.5)	17(13.7)	
Approved, not implemented	26(20.8)	9(7.3)	13(10.5)	18(14.5)	3(2.4)	
Not approved	22(17.6)	21(16.9)	18(14.5)	23(18.5)	1(0.8)	
Not considered	75(60.0)	93(75.0)	82(66.1)	70(56.5)	103(83.1)	
	125 100%	124 100%	124 100%	124 100%	124 100%	

No responses: four on "Dismiss teachers", five on all other options.

If the two categories of "Approved" are combined (approved and implemented, approved but not implemented), the administrative option most often approved was the rescinding of insurance coverage; 31 districts had given assent to such action. The option with the next highest rate of approval was that of dismissing teachers. However, districts seem to have viewed this as an action of last resort and

as a threat; only two of the 28 districts which had approved this option actually implemented it. Twenty-four districts had approved of rescinding union checkoff privileges. Unions often have an arrangement with the school administration that union dues will be deducted from teachers' paychecks and transferred to the union treasury. Recision of this arrangement during a strike is at least an inconvenience for teachers. Finally, the option least often approved was the suspension of teachers.

Under "Other," the option most often considered was that of pay deduction for days missed. This was approved by 16 districts and actually implemented by 15 of them. In two New York state districts where the law so mandates, teachers were penalized two days of pay for each day out. And in an Ohio strike, teachers lost both pay for days missed and the opportunity to make up those days. Other options implemented in individual strikes were the revoking of leaves of absence and the suspension of eight classified employees. One district approved rescinding of the grievance procedure for teachers but did not implement this recision. Administrative options considered but not approved included the passing of a resolution that "unauthorized leave may result in the initiation of dismissal procedures" and, in a Vermont strike, the statutorily permitted execution of a unilateral contract after factfinding. If teachers had then not returned, they could have been dismissed.

Board Views in Considering Court Action

A good many of our respondent districts considered using the courts but then either did not approve or did not implement the action. More than two-thirds, 91 districts or 70.5 percent of the total, gave consideration to going to court but only 58 districts (45.0 percent) formally authorized such action and only 51 districts (39.5 percent) filed a complaint or petition requesting an injunction.

Of interest, then, is the assessment by our respondents of the position of their board of a series of statements which a board might weigh in considering court action. The statements were as follows:

The dispute would be settled before a court could effectively intervene in the dispute.

Threatening or pursuing legal action would facilitate a settlement prior to the actual court hearings.

Threatening or pursuing legal action would result in delaying the resolution of the dispute between the parties.

The teachers would abide by the court's decision.

The court would grant the requested relief.

The court's orders would be effectively enforced.

Respondents were asked whether, to the best of their recollection, the position of the board strongly agreed, agreed, disagreed, or strongly disagreed with the above statements.

Table 3

Board Views on Pursuing Court Action
(As Assessed by Respondents)

Board Positions	Views on Results of Court Action					
	Dispute would be settled	Court action would help	Court action would delay	Teachers would comply	Court would issue order	Order would be enforced
Strongly agree	20.0%	5.3%	4.2%	7.4%	16.8%	14.7%
Agree	30.5	31.6	20.0	36.8	46.3	38.9
Disagree	18.9	30.5	35.8	29.5	10.5	17.9
Strongly disagree	10.5	9.5	12.6	5.3	2.1	4.2
No position	20.0	23.2	27.4	21.1	24.2	24.2
Total	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Number of cases in table	= 95
Not applicable	= 32
No response	= 2
Total	129

We begin, in these assessments of the positions of boards, to gain access to the considerations which may have resulted in a decision to go to court or to refrain from doing so. But we gain additional clarity if the "No Position" responses are eliminated, if the categories of "Strongly agree" and "Agree" are collapsed (and the same is done for the two "Disagree" categories), and if we separate those who went to court and those who did not. The results are shown on Table 4.

One would predict that boards which went to court (filed a complaint or petition for an injunction) would agree that court action would facilitate settlement, that teachers would comply with court orders, that the court would issue the order and that the order would be enforced. It would be expected that they would disagree with the statement that court action would delay resolution of the dispute. And indeed, the preponderance of respondents in districts which went to court answered in this fashion.

What is surprising is that respondents reflected that 23 boards believed that the dispute would be settled before a court could

Table 4

Board Views on Pursuing Court Action
(Eliminating "No Position")

Board Positions	Views on Results of Court Action					
	Dispute would be settled	Court action would help	Court action would delay	Teachers would comply	Court would issue order	Order would be enforced
Filed complaint	23	22	5	28	38	34
AGREE						
Did not file	25	13	18	14	22	17
Total	48	35	23	42	60	51
	(63.2%)	(48.0%)	(33.3%)	(56.0%)	(83.3%)	(70.8%)
Filed complaint	21	20	34	15	5	10
DISAGREED						
Did not file	7	18	12	18	7	11
Total	28	38	46	33	12	21
	(36.8%)	(52.0%)	(66.7%)	(44.0%)	(16.7%)	(29.2%)
Total N=	76	73	69	75	72	72
	(100.0%)	(100.0%)	(100.0%)	(100.0%)	(100.0%)	(100.0%)

Numbers vary because respondents reported a position on some statements but not on others.

effectively intervene but they filed a complaint nevertheless. It is possible that, for these districts, the filing of the complaint was intended to communicate that the board was serious about court action and to give teachers additional inducement to settle out of court. Or they may have been motivated by pressure from patrons as one respondent indicated: "...community pressure will require board injunctive action after a time.

One would also expect that the preponderance of those who did not go to court might agree that the dispute would be settled before a court could intervene and that court action would delay resolution of the impasse. They might be expected to disagree that court action would

facilitate settlement, that teachers would comply with the court order, that the court would issue the order and that the order would be enforced. That expectation is borne out in the statistics except in the case of those statements which have to do with the court order. Those who did not go to court believed that the court would issue the injunction (22 agreed, 7 disagreed) and that the order would be enforced (17 agreed, 11 disagreed). Despite this favorable assessment of the probabilities of court action, they still did not go to court. These districts evidently relied more heavily on judgments that court action would result in delay and would not facilitate settlement and/or that their impasse would be settled before court action could begin.

Action on the Request for Injunctive Relief

Requests for injunctive relief were heard either in an ex parte proceeding or in a show cause hearing or both. An ex parte proceeding is held upon the application of the board without giving teachers a chance to argue their case or, in some instances, to be notified of the petition. In a show cause hearing, teachers have the opportunity to argue why the injunction should not be issued. Of the 51 districts which went to court with their teacher strike impasses, eight had an ex parte hearing only, 26 had a show cause hearing only and 14 had both an ex parte and a show cause hearing. There were thus a total of 22 ex parte hearings and 40 show cause hearings. In two ex parte hearings, the request for court assistance was withdrawn before the judge issued a decision; this also occurred in three show cause hearings. This meant that judges issued decisions in 20 ex parte hearings and in 37 show cause hearings. Table 5 gives the results.

Table 5
Results of Court Action on Injunctive Relief

Type of Proceeding	Total hearings	Requests withdrawn	Decisions issued	Denials	Grants	Percent granted
<u>Ex parte</u> proceedings	22	2	20	3	17	85.0%
Show cause hearings	40	3	37	7	30	81.1%
Total	62	5	57	10	47	82.5%

The high rate of "success" here is what boards expected. Of those taking a position, 83.3% agreed that "The court would grant the requested relief." And in 81% and 85% of the cases, the court did so.

In 28 instances, judges issued orders restricting picketing; in 14 instances (50%), teachers complied. In 31 instances, judges ordered teachers to return to the classroom; however, here teachers complied in only 11 instances (35.5%). In 20 districts (64.5%), teachers defied the orders of the court. It is the latter pattern of non-compliance which led the Washington Star to editorialize during the recent teacher strike in Washington, D.C. that there is "an increasing presumption that public-sector unions will defy the courts..." (Washington Star, March 7, 1979: A14). Non-compliance with picketing orders has relatively little effect on the community;

it is administrative personnel and non-striking teachers who may be blocked from entering school property. But non-compliance with orders to return to the classroom means that the strike continues, now in defiance of the orders of the court. From the standpoint of the community, the situation has thus become more intractable than it was before, for teachers are demonstrating their resolve to continue their work stoppage even though a court has determined that equity lies with their return to the classroom. The court, heretofore neutral, has thus joined the board in standing in opposition to the action of teachers. And in our group of districts, this happened in nearly two of every three instances in which a judge ordered teachers to return to work.

The predominant response of boards is to turn again to the courts for assistance. Of the 20 instances of non-compliance with back-to-work orders, boards authorized contempt proceedings in 18 and filed contempt motions with the court in 16 instances. In 11 cases (68.8 percent of the contempt motions filed), the judge found the teachers in contempt. In nine instances (56.3 percent of motions filed), teachers were fined and in five instances (27.8 percent) defendants were jailed.

The contempt procedure is somewhat time-consuming. A motion must be authorized by the board and then filed with the court. The date for a hearing on contempt is set, usually several days hence. Impasses are often settled during this time period. Teachers may be uneasy about defiance of back-to-work orders but may refuse to comply to acquire additional bargaining leverage. But they may be reluctant to chance being found in contempt with the possibility of fines and and jailing in the offing. Thus, it is possible and probable that the imminence of settlement reduced the number of contempt judgments and/or mitigated the punishments considered by the judge. It is nevertheless interesting that in more than one-fourth of the cases in which contempt motions were filed, a teacher (sometimes a union leader or leaders) or a group of teachers were jailed. This reflects the seriousness with which the court views defiance of its orders.

The court may also find teachers in contempt on its own motion. In two additional instances in our group of work stoppages, judges instituted such contempt proceedings. In both cases, teachers were fined and in one instance, teachers were jailed.

Judges may perceive that the legitimacy of the courts is in question in such instances. The initial work stoppage is illegal in many states, either on the basis of statutory prohibition, case law, or common law (see Colton, 1980d). When teachers then engage in an illegal work stoppage and, in addition, defy the law by continuing their illegal activity, judges may be moved to protect the integrity and legitimacy of the courts. Defiance has taken place on a very public stage for teachers' strikes are usually given wide media coverage. Strong judicial action may seem appropriate. On the other hand, teachers are generally law-abiding citizens and perform an

important function in the community. Jailing them may seem too severe a remedy. Further, jailing often has the consequences of creating teacher martyrs and of hardening resistance and defiance. Thus, too severe a remedy may exacerbate rather than ameliorate the situation. It is not a simple dilemma for the judge.

The Role of the Judge

Our site studies indicate that one reason why boards are reluctant to take teachers to court in a work stoppage is that by placing the impasse in the hands of a third party, the board may lose control over both the process and the outcome of the case from that point on (Graber, 1980b, 1980c). If judges would confine themselves to ruling on the motions brought by boards and on the narrow questions posed, the recourse to court action would seem clearly advantageous. But in an equity action, a judge or chancellor has considerable discretion in seeking a solution which will balance the equities and assist in resolving the impasse. Hence, from the point of view of the board, a case brought to court may take a life of its own. The focus in the courtroom or in the judge's direction of the case may center on issues not brought by the parties or lead to remedies they do not desire.

Some of our questions were directed to determining the role of the court in aspects of the case other than determining whether to issue the injunction. Table 6 gives respondents' answers.

Table 6

Role of the Court in Negotiations

Did the court:

-direct parties to engage in additional negotiations?	Yes = 25
When? Prior to acting on board's request?	Yes = 7
In conjunction with that request?	Yes = 16
Both of the above?	Yes = 2
-order the parties to clarify issues?	Yes = 12
-suggest approaches not previously considered?	Yes = 9
-set up alternative or neutral meeting sites?	Yes = 11
-require the board to do anything else it had not requested?	Yes = 7

In some instances, the court appointed a representative to oversee negotiations on the court's behalf. In one instance, this person was designated a "Master of the Court." In another, it was a state mediator.

In several instances, the court specified times and places (or both) for negotiations. In one district,

Instead of slapping an injunction on the striking NFI, Judge X reserved a conference room on the sixth floor of the Y County Superior Court building and ordered the teachers and the Z Board of Education to negotiate immediately and to give him regular progress reports.

In one district, the court ordered all-night bargaining while parties were locked in the courthouse, isolated from the press. In another, parties were ordered to negotiate daily from nine to five and to submit daily reports to the court. In still another, parties were required to negotiate over the Labor Day weekend, much to the discomfiture of the parties.

In two strikes, the court directed the boards to fire teachers who had been found in contempt of court. The superintendent of one of these districts reported that "The chancellor has taken under advisement damages (actual and punitive) because the Board of Education didn't fire 3,000 teachers." In this instance, court action certainly lead to a remedy the board did not desire and which it refused to implement, even when ordered to do so by the judge.

In another district, the court required the board to reinstate the contract of the previous year while negotiations continued.

Evaluation of Court Assistance

Superintendents were asked to designate which of the following statements best described the contribution of the court to the resolution of their dispute.

Table 7

Evaluation of Court Action

The court:

was indispensable to the resolution of the dispute.	11 (23.4%)
was of substantial assistance but not indispensable.	11 (23.4%)
was of some assistance.	17 (36.2%)
was of no assistance.	5 (10.6%)
complicated negotiations and made resolutions difficult.	3 (6.4%)
	Total 47 (100.0%)

No response = 4

Of the districts which replied, 39 respondents felt that the court was of at least some assistance; this is 83.0 percent of the 47 respondents reporting. Nearly half (22 of the 47) reflected that the court was of at least substantial assistance. On the other hand, eight districts reflected a negative experience.

Respondents were also asked whether, if their school district were involved in a teacher work stoppage next year, they would recommend that the board seek judicial relief. Table 8 gives their replies.

Table 8

Would Superintendents Recommend
Court Action in Next Strike?

Response	Districts which filed complaint	Districts which filed no complaint	Total
Definitely yes	22 (44.0%)	11 (15.5%)	33 (27.2%)
Probably yes	19 (38.0%)	19 (26.8%)	38 (31.4%)
Probably no	6 (12.0%)	30 (42.2%)	36 (29.8%)
Definitely no	3 (6.0%)	11 (15.5%)	14 (11.6%)
Total	50 (100.0%)	71 (100.0%)	121 (100.0%)

No response = 8 (one in districts which went to court and seven in those which did not)

In those districts which went to court, a substantial majority of superintendents would "definitely" or "probably" recommend a similar course of action in another strike (41 districts or 80.4 percent of those who filed a complaint). Given that in 81 to 85 percent of those cases, the district received an injunction either restricting picketing or ordering the teachers back, such a finding is not surprising.

Similarly, one can understand the rationale of those superintendents whose districts did not go to court in their recent strike and who would not recommend such a course of action again. Comments by respondents indicate the reasoning behind such a decision. One wrote that the problem with going to court was that the board was concerned over possible court attempts to enter into bargaining. Another indicated that the board had been forced by the court to sue the county commission and to dismiss teachers, a move which the board had resisted. Two districts indicated that their local courts were pro-union; in these instances, the request for an injunction could well be denied. Two respondents reflected that the decision to go to court was one of timing; recourse to court would be likely only in a lengthy strike. And one respondent indicated that the decision would depend on the strength of the teachers' organization; "a quick

injunction stops settlement in a weak unit, although community pressures will require board injunctive action after a time." All of these positions are based on variables in the strike situation; and future action would depend on the character of the next strike.

A surprising finding is that a strong minority of respondents in districts which did not file a complaint this time would recommend that the board do so next time; 11 would definitely make such a recommendation and 19 would probably do so. Together, they comprise 30 districts or 42.2 percent of those who did not go to court. On the other hand, in the districts which went to court, only nine respondents (18.0 percent) would not advise going to court next time. Thus, dissatisfaction with the recent decision on whether to go to court is higher among those who chose not to go than among those who did go.

Use of Mediator

In 104 districts, mediation was used in an attempt to solve the impasse which had given rise to the teacher work stoppage. Our study focused on the injunctive process in the courts. However, it is instructive to compare respondents' evaluation of mediation with their evaluation of the court process. Table 9 gives the results.

Table 9

Comparison of Evaluation of Court Action and Mediation

	Court	Mediation
Third-party was:		
-indispensable to resolution of dispute.	11 (23.4%)	18 (17.3%)
-of substantial assistance but not indispensable.	11 (23.4%)	26 (25.0%)
-of some assistance.	17 (36.2%)	44 (42.3%)
-of no assistance.	5 (10.6%)	8 (7.7%)
-complicated negotiations and made resolution more difficult.	3 (6.4%)	8 (7.7%)
	<u>47 (100.0%)</u>	<u>104 (100.0%)</u>

No response = 4 districts on court evaluation.

A greater percentage of respondents rated courts as indispensable than gave mediators such a rating. In both instances, responses clustered around the middle value. If responses are weighted

("indispensable" = 5, "of substantial assistance" = 4, etc.), the weighted average evaluation of courts is 3.47 and that of mediation is 3.37. The greater use of mediators thus does not appear to be explained by a higher evaluation of this form of third-party assistance. Rather, there are legal and strategic determinants which favor mediation. As our study of statutes shows, mediation is specified in some states as one of the forms of impasse resolution which must have been exhausted before districts turn to the courts. In other states, mediation is recommended (Colton, 1980d). In addition, it is a form of impasse resolution which leaves the decisions and resolution of the dispute firmly in the hands of the parties. Mediation is a voluntary, consensual process and not a coercive one with the power of the state behind it as is court action. Therefore, one would expect that districts might well want to attempt to resolve the impasse with this "softer" approach before turning to the courts.

Characteristics of Strikes

School functioning during strike. Respondents reported that 123 strikes (95.3 percent) occurred on at least some days which were scheduled for instruction; only six strikes were not on instructional days.

Of the 123 strikes in which instructional days were involved, respondents reported as follows to the question whether schools remained open for pupil attendance:

Table 10

Were Schools Open During the Work Stoppage?

	Number	Percent
All schools remained open	39	31.7
Schools were closed	57	46.3
Some schools remained open	5	4.1
Schools were opened and closed at different times	22	17.9
	<u>123</u>	<u>100.0</u>

Not applicable = 6

In nearly half the strikes (46.3 percent), schools were closed. In the rest, schools were open at least part of the time. The most common pattern in this group was to keep all schools open (31.7 percent of the cases), thereby necessitating the hiring of substitutes for striking teachers and/or the use of administrative personnel in the classroom.

Length of strike. The length of the strikes is measured in instructional days. More than half of the strikes surveyed were five days in length or shorter. Fifteen were one day strikes. Exactly 75 percent were 10 days or shorter. The longest were two fifty-day strikes. The breakdown of strike duration is given in Table 11.

Table 11

Strike Duration

Number of Days	Number of Strikes	Percent
0 - 5 days	63	52.5
6 - 10 days	27	22.5
11 - 15 days	11	9.2
16 - 20 days	12	10.0
21 - 25 days	2	1.7
26 - 30 days	1	0.8
31 - 35 days	0	0.0
36 - 40 days	1	0.8
41 - 45 days	1	0.8
46 - 50 days	2	1.7
	120	100.0

No response = 9

There were a total number of 992 strike days in the 120 strikes for an average strike length of 8.27 days.

Respondents were asked whether their district had experienced other teacher initiated work stoppages. Twenty-seven had had one previous strike, nine had had two, and ten had had more than two for a total of 46 previous strikes. The earliest of these had occurred in 1967. More than half (27 of the 46 or 58.7 percent) had occurred in the last five years, 1974 to 1978. Some limited information is available on the length of previous strikes. It is interesting to compare this with the length of the strikes in our survey (see Table 12).

From this information, it would appear that strikes are getting longer; however, this can be nothing more than an interesting hypothesis to test, since the number of previous strikes is small and does not constitute a random sample.

Table 12

Average Length of Recent and Previous Strikes

Year[s]	Strikes	Number	Average Length
1978-1979	Strikes in our survey	120	8.27 days
	Previous strikes (beginning with most recent strike):		
1967-1978	Strike No. 1	19	7.63 days
1964-1972	Strike No. 2	11	4.91 days
1964-1971	Strike No. 3	7	2.71 days

Third-party plaintiffs. While the interests of students and parents are directly affected by a teacher strike, they seldom appear in court except as spectators. Traditionally, courts have held that they do not have standing to appear as parties to an injunction action. Boards have a statutory duty to provide for the education of children and they hire teachers to provide instruction. The labor dispute is between these parties.

However, there have been limited instances in which either parents or students have been allowed to participate, either as third-party plaintiffs or as interested parties (see Colton, 1980c and 1980b). Respondents report that in 10 districts, parents became a party to the action and in three districts, students did so. In one of the districts, both parents and students became a party to the action.

Characteristics of Districts

Demographic characteristics of districts are included below:

Number of teachers. The smallest district had 20 teachers; the largest had 13,000. The breakdown by categories follows in Table 13.

Teachers in 103 districts (86.6 percent of those reporting) were affiliated with the National Education Association; in 13 districts (10.9 percent) teachers belonged to the American Federation of Teacher Teachers. In three districts, affiliation was with some other group. And for ten districts, no information on professional association or union affiliation was available.

Table 13

Number of Teachers

Category	Number of Districts	Percent of Total
0 - 100 teachers	22	17.2
101 - 200 teachers	34	26.6
201 - 300 teachers	21	16.4
301 - 400 teachers	13	10.1
401 - 500 teachers	7	5.5
501 - 1,000 teachers	11	8.6
1,001 - 5,000 teachers	15	11.7
5,001 - 13,000 teachers	5	3.9
	<u>128</u>	<u>100.0</u>

Missing observation = one district

Size of district can be further ascertained by the number of students. The smallest district reporting had 246 students; the largest had 259,222 students. Table 14 gives some indication of the effect of size of district on whether the district considered taking their teacher work stoppage to court.

Table 14

Number of Students as Related to
Consideration of Court Action

Number of Students	Number of Districts	Percent of Total	Considered	Did Not
			Court N of Districts	Consider Court
1 - 299	1	0.8	0 (0.0%)	1 (2.8%)
300 - 599	1	0.8	0 (0.0%)	1 (2.8%)
600 - 999	8	6.3	4 (4.4%)	4 (11.1%)
1,000 - 2,499	21	16.5	12 (13.3%)	9 (25.0%)
2,500 - 4,999	37	29.1	28 (31.1%)	9 (25.0%)
5,000 - 9,999	31	24.4	25 (27.8%)	5 (13.9%)
10,000 - 24,999	15	11.8	12 (13.3%)	3 (8.3%)
25,000 - 259,222	13	10.2	9 (10.0%)	4 (11.1%)
	<u>127</u>	<u>99.9^a</u>	<u>90 (99.9%)</u> (71.4%)	<u>36 (100.0%)</u> (28.6%)

Number of missing observations:

2 districts for number of students

3 districts for consideration of court action

^aRounding errors

There was no consideration of going to court in the two smallest districts with less than 599 students. Further, based on the percentage of their category, districts with less than 2,499 students were less likely to have considered going to court (only 4.4 percent and 13.3 percent of districts of from 600 to 2,499 student considered going to court as compared with 11.1 percent and 25.0 percent of districts who did not consider court action). However, in all districts with from 2,500 to 24,999 students, districts were more likely to consider court action. It is interesting to note that even in the group of largest districts, there were still four districts which did not consider court action.

Location of Strikes

Table 15

Location of Strikes by State.

Rank Order by State	Strikes Located Through Sources	Returned Questionnaires	No Returns
Michigan	29	26	3
Pennsylvania	22	15	7
Ohio	20	17	3
Illinois	19	17	2
Washington	10	9	1
Indiana	9	7	2
New Jersey	9	7	2
California	8	7	1
Massachusetts	4	2	2
Maine	3	2	1
New York	3	2	1
Oregon	3	2	1
Vermont	3	2	1
Connecticut	2	2	0
Louisiana	2	2	0
Missouri	2	1	1
Rhode Island	2	2	0
Tennessee	2	2	0
Arizona	1	1	0
Washington D. C.	1	1	0
Delaware	1	1	0
Idaho	1	0	1
Kentucky	1	1	0
Minnesota	1	1	0
	<u>158</u> strikes	<u>129</u> strikes	<u>29</u> strikes



The Center for the Study of Law in Education at Washington University is conducting a study of third-party involvement in teacher work stoppages. Our records indicate that the school district of which you are Superintendent was involved in a teacher work stoppage during the 1978-1979 school year. Your response to the enclosed questionnaire will help us create an information base which will contribute to the improvement of public policy and practice concerning future teacher work stoppages.

Our project is funded under a grant from the National Institute of Education, a division of the Department of Health, Education, and Welfare. In addition to analysis of data from this questionnaire, other aspects of the project include categorizing and comparing state collective bargaining statutes, reviewing court decisions on requests to enjoin teacher work stoppages, and conducting in-depth field studies of teacher work stoppages in eight states throughout the nation. In order to give a useful and accurate reflection of third-party assistance in such work stoppages, it is important to receive responses from all questionnaire recipients.

In keeping with the conventions of social scientific research, we will maintain the confidentiality of information which we receive from you. Data from the questionnaire will be aggregated statistically so that individual districts cannot be identified. Any written comments you may want to make (and we invite such comments) will be used in such a fashion that they will not be traceable to any individual or to a specific strike site.

Please return the completed questionnaire to us in the enclosed self-addressed, stamped envelope. (If your school district has not been involved in a teacher work stoppage, we apologize for having sent you this letter and questionnaire. To insure that you do not receive further communications from us, please write your name and address on the questionnaire, print "NO STRIKE" on the top of the questionnaire, and send this back to us in the enclosed self-addressed, stamped envelope.)

If you have any questions concerning the project or the questionnaire, please do not hesitate to write or call us (collect). The usefulness of this study to you and others concerned with teacher work stoppages depends on the return of the questionnaire. We will provide all respondents with a short summary of our findings at the conclusion of the project.

Our most sincere thanks for your cooperation!

Sincerely,

David L. Colton, Director

DLC: bbw
Enclosure



In answering this questionnaire, please place an X in the blank spaces provided to indicate your response to our questions.

1. Please indicate whether the school board in your district requested third-party assistance from any of the following:

YES NO
() ()
() ()
() ()
() ()
() ()
() ()
() ()

Court
Fact-finding commission or group
Mediator
Arbitrator
Public Employees Relations Board (PERB) or Commission
Other (Please specify) _____

2. Did the teacher work stoppage encompass any days originally scheduled for pupil instruction?

YES NO
() ()

If YES, please continue with question 3.
If NO, please skip to question 4.

3. Please place an X next to the one description which best describes whether schools in your district remained open for pupil attendance during the teacher work stoppage.

All schools remained open. Schools were closed.
 Some schools remained open. Schools were opened and closed at different times.

4. Below is a list of options that are sometimes considered by school boards when they have been faced with a work stoppage by the teachers. Please indicate whether the options were approved and implemented (A&I) by the school board, approved but not implemented (A), not approved (NA), or not considered (NC).

A&I A NA NC
() () () ()
() () () ()
() () () ()
() () () ()
() () () ()

Dismiss teachers
Suspend teachers
Rescind teachers' union checkoff privileges
Rescind insurance coverage
Other (Please specify) _____

5. Did the school board ever use or consider using the assistance of the court in dealing with the teacher work stoppage?

YES NO
() ()

If YES, please continue with question 6.
If NO, please skip to question 15.

6. Below is a list of statements which reflect school board views about pursuing court action. Please indicate, to the best of your recollection, whether the position of the board was that it strongly agreed (SA) with the statement, agreed (A), disagreed (D), strongly disagreed (SD), or whether the board had no position (NP) regarding the statement.

SA A D SD NP
() () () () ()
() () () () ()
() () () () ()
() () () () ()
() () () () ()
() () () () ()
() () () () ()

The dispute would be settled before a court could effectively intervene in the dispute.
Threatening or pursuing legal action would facilitate a settlement prior to the actual court hearings.
Threatening or pursuing legal action would result in delaying the resolution of the dispute between the parties.
The teachers would abide by the court's decision.
The court would grant the requested relief.
The court's orders would be effectively enforced.

7. Did the school board, at any time, formally authorize the option of pursuing court action?
YES NO
() ()

8. Was a complaint or petition requesting an injunction filed with the court?
YES NO
() ()

If YES, please continue with question 9.
If NO, please skip to question 15.

9. How far into the legal process did the school board's request for injunctive relief proceed?

a. Did the board request that the judge consider its complaint or petition *ex parte* (that is, without giving the teachers an opportunity to argue the opposite position prior to the judge's order)?
YES NO
() ()
If YES: Did the judge issue the order? Yes No Request withdrawn

b. Was there a court hearing (that is, both parties argued their positions) to consider the board's request for legal action?
YES NO
() ()
If YES: Did the judge issue the order? Yes No Request withdrawn

10. Did any of the court's orders:

a. restrain picketing?
YES NO
() ()
If YES: Did the teachers comply with the picketing order? Yes No

b. require the teachers to return to the classroom and/or terminate their work stoppage?
YES NO
() ()
If YES: Did the teachers comply with the order? Yes No

11. Did the school board, at any time, authorize instituting contempt proceedings against the teachers?

YES NO
() ()
If YES: Were any contempt motions filed? Yes No
If YES: Did the court find any teachers in contempt of court? No
Were fines assessed? Yes No
Was anyone imprisoned? Yes No

12. Did the judge, on the court's own initiative, institute penalties for failure to comply with a court order despite the absence of a request from the school board?

YES NO
() ()
If YES: Were fines assessed? Yes No
Was anyone imprisoned? Yes No

13. Did the court:

YES NO
() ()
direct the parties to engage in additional negotiations?
If YES: Was it prior to acting on the board's request for relief?
() () in conjunction with granting the board's request for relief?
() () Order the parties to clarify the issues they were advancing before the court?
() () suggest approaches and resolutions to the issues not previously considered by the parties?
() () set up an alternative or neutral meeting site for the parties?
() () require the school board to do anything else that it had not requested? (Please specify) _____
() () Other (Please specify) _____

14. Which is the one statement which best describes the contribution of the court in resolving the dispute between the parties?

- _____ The court was indispensable to the resolution of the dispute.
_____ The court was of substantial assistance but was not indispensable.
_____ The court was of some assistance.
_____ The court was of little assistance.
_____ The court complicated the negotiations and made the resolution of the dispute more difficult.

15. If your school district was involved in a teacher work stoppage again next year, would you recommend that the board seek judicial relief?

_____ Definitely yes _____ Probably yes _____ Probably no _____ Definitely no

16. Sometimes third-party plaintiffs enter injunction proceedings. In your district:
YES NO
() () Did any parent (or parent group) become party to any court action?
() () Did any student (or student group) become party to any court action?

17. Was a mediator involved in attempting to settle the work stoppage?
() ()

If YES, please continue with question 18.
If NO, please skip to question 21.

18. What type of mediator was involved?
_____ Federal _____ State _____ Private party

19. Did the mediator:
YES NO
() () clarify issues presented by the parties?
() () advance approaches not previously considered by the parties?
() () assist in conducting a bargaining unit election?
() () provide a neutral site for the parties to meet?
() () serve as a spokesperson to the press for the parties?
() () help set up an ongoing grievance procedure for use after the work stoppage ended?
() () Other? (Please specify) _____

20. Which is the one statement which best describes the contribution of the mediator in resolving the dispute between the parties?

- _____ The mediator was indispensable to the resolution of the dispute.
_____ The mediator was of substantial assistance but was not indispensable.
_____ The mediator was of some assistance.
_____ The mediator was of no assistance.
_____ The mediator complicated the negotiations and made the resolution of the dispute more difficult.

21. We would appreciate knowing the name and address of the chief attorney for the school board so that we may contact him or her for additional legal information.

Name(s): _____
Address: _____

22. Has your school district ever experienced other teacher initiated work stoppages?
YES NO
() ()

If YES: How many other teacher initiated work stoppages have there been in your district?

_____ 1 _____ 2 _____ more than 2

Please indicate the year of the most recent teacher initiated work stoppage prior to the 1978-1979 school year. 19 _____

Your name and title _____
School district _____

Please feel free to use another piece of paper to expand or clarify any of your answers or to provide us with additional pertinent information which we have not asked elsewhere in this questionnaire. Thank you for filling out this questionnaire. A self-addressed, stamped envelope is enclosed for your convenience.

Number _____

FOOTNOTES

¹This report was prepared by Edith E. Graber with the assistance of Alan Tomkins, Mary Ann Campbell and Alan Frelich.

REFERENCES

- Bogue, Bonnie Cebulski and Stern, Clara. "A 1977-78 tabulation of strikes in California's public sector." California Public Employee Relations 40 (March 1979): 20-24.
- Cebulski, Bonnie G. "An analysis of 22 illegal strikes and California law." California Public Employee Relations 18 (August, 1973): 2-17.
- Cebulski, Bonnie G. "A 1975-6 tabulation of strikes in California's public sector." California Public Employee Relations 33 (June 1977): 2-8.
- Colton, David L. "A Teacher Strike in Collinsville, Illinois." Center for the Study of Law in Education, Graduate Institute of Education, Washington University, St. Louis, Missouri, unpublished, 1980a.
- Colton, David L. "Two Missouri Strikes: Hazelwood and St. Louis." Center for the Study of Law in Education, Graduate Institute of Education, Washington University, St. Louis, Missouri, unpublished, 1980b.
- Colton, David L. "State of Washington: Four Courts." Center for the Study of Law in Education, Graduate Institute of Education, Washington University, St. Louis, Missouri, unpublished, 1980c.
- Colton, David L. "Statutory Provisions for Injunctive Relief in Teacher Strikes." Center for the Study of Law in Education, Graduate Institute of Education, Washington University, St. Louis, Missouri, unpublished, 1980d.
- Graber, Edith E. "Michigan: The Warren Consolidated Schools Strike." Center for the Study of Law in Education, Graduate Institute of Education, Washington University, St. Louis, Missouri, unpublished, 1980a.
- Graber, Edith E. "California: The Daly City Strike." Center for the Study of Law in Education, Graduate Institute of Education, Washington University, St. Louis, Missouri, unpublished, 1980c.