Political Power of Nuisance Law: Labor Picketing and the Courts in Modern England, 1871-Present, The

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The Political Power of Nuisance Law: Labor Picketing and the Courts in Modern England, 1871-Present

RACHEL VORSPAN†

INTRODUCTION

After decades of decline, the labor movements in America and England are enjoying a resurgence. Unions in the United States are experiencing greater vitality and political visibility, and in 1997 a Labour government took power in England for the first time in eighteen years. This

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2. See Philip Webster, Landslide Victory for Labour, TIMES (London), May 2, 1997, at 1 (reporting on the Labour Party’s “sensational landslide victory”); Philip Bassett, Wary Leader in Search of Unity and Influence, TIMES (London), Sept. 6, 1997, at 30 (stating that Tony Blair’s victory was central to the effort of the Trades Union Congress to play “a new part in the life of Britain”); Philip
phenomenon has prompted renewed interest in both countries in the subject of labor law and the legal rights of unionists. Many Americans are not aware, however, that radically divergent historical developments in the two countries have produced markedly different legal frameworks governing industrial relations.

In contrast to organized labor in America, trade unions in England have traditionally eschewed legally enforceable rights to strike, picket and bargain collectively in favor of statutory immunities from legal liability. Between 1871 and 1906 Parliament created a self-regulating industrial relations system that provided the basic framework for English labor law until the 1980s. This regime of "abstentionism" or "collective laissez-faire" afforded unions legislative protection from various forms of criminal and civil liability crafted by the nineteenth and twentieth-century judiciary to hamper union activity.

Bassett, Blair Will Head "Holy Trinity" of TUC Speakers, TIMES (London), June 16, 1997, at 13 (observing that "the trade unions are back in from the cold").


For example, in the mid-nineteenth century the courts treated unions as criminal conspiracies in restraint of trade. See, e.g., Hornby v. Close [1867] 2 Q.B. 153; R. v. Bunn, 12 Cox C.C. 316 (Cent. Crim. Ct. 1872). However, Parliament prohibited such actions in the 1875 Conspiracy and Protection of Property Act. 38 & 39 Vict., ch. 86, § 3. In the 1890s and early twentieth
Although this standard portrait of English industrial relations is not inaccurate as far as it goes, it is incomplete and misleading. By focusing on the system of specialized common law liabilities and corresponding legislative immunities, scholarly writing on English labor relations has underestimated the extent to which the general law of nuisance—both civil and criminal—served to regulate industrial action in the late nineteenth and twentieth centuries. The abstentionist perspective, in other words, has obscured the consistent interventionism of judge-made century, courts turned their attention to the civil law, developing doctrines of civil conspiracy and union liability for the torts of members. See, e.g., Temperton v. Russell [1893] 1 Q.B. 715 (C.A.) (holding the officers of a union liable for a “conspiracy to injure”); Trollope v. London Building Trades Federation, 72 T.L.R. 342 (C.A. 1895) (holding unionists civilly liable for publishing blacklists); Quinn v. Leatham [1901] App. Cas. 495 (H.L.) (approving the principle in Temperton that a “conspiracy to injure” was actionable); Taff Vale Ry. Co. v. Amalgamated Soc'y of Ry. Servants [1901] App. Cas. 426 (H.L.) (holding unions liable in damages for the torts of their members). Parliament again intervened in 1906, reversing these decisions in the Trade Disputes Act. Trade Disputes Act, 1906, 6 Edw. 7, ch. 47, §§ 1, 3. After a lengthy period of judicial passivity, in the 1960s the judges developed new causes of action involving breach of contract. See, e.g., Rookes v. Barnard [1964] App. Cas. 1129 (H.L.) (finding tortious intimidation in a union's threat to call out members in breach of contract); J.T. Stratford & Son v. Lindley [1965] App. Cas. 269 (H.L.) (creating the tort of inducing breach of a commercial contract); Torquay Hotel Co. v. Cousins [1969] 2 Ch. 106 (C.A.) (developing the tort of interfering with the performance of a commercial contract). Common law civil actions for conspiracy, inducing breach of contract and intimidation became known as "economic torts." Parliament yet again responded with legislation that protected union members against these new civil liabilities. See Trade Disputes Act, 1965, ch. 48, § 4; Trade Union and Labour Relations Act (TULRA), 1974, ch. 52, § 14. Thus the immunities generally represented legislative attempts to reverse judicially-created union liabilities rather than an effort to confer "exceptional" privileges on unionists. See, e.g., KEITH EWING, WAIVING THE RULES 146-47 (1988) (observing that the notion of privileges was an illusion because in practice the torts applied only to unions and workers and Parliament intervened only to remove laws of special application); Richard Tur, The Legitimacy of Industrial Action: Trade Unionism at the Crossroads, in TRADE UNIONS 485, 486-86 (W.E.J. McCarthy ed., 2d ed. 1985) (remarking that parliamentary action merely restored the status quo ante in the face of judicial erosion of the immunities). See generally SECRETARY OF STATE FOR EMPLOYMENT, TRADE UNION IMMUNITIES, Cmnd. 8128, ¶¶ 34-101 (1981) [hereinafter TRADE UNION IMMUNITIES]; Keith Ewing, Rights and Immunities in British Labour Law, 10 COMP. LAB. L.J. 1, 1-10 (1988); Bob Simpson, Trade Union Immunities, in LABOUR LAW IN BRITAIN 161 (Roy Lewis ed., 1986); K.W. Wedderburn, Labour Law: Autonomy from the Common Law?, 9 COMP. LAB. L.J. 219, 239-42 (1988). This Article deals only with the application of general nuisance law to picketers, not with the fluctuating fortunes of the specialized economic labor torts.
nuisance law in determining the permissible bounds of trade union activity. This article attempts to correct the imbalance by exploring the significance of nuisance in the history of modern English labor law. It argues that scholars, by overlooking the general law, have exaggerated the protection that the immunities conferred on unionists in this period.

The impact of nuisance was especially decisive in relation to picketing, a pivotal labor tactic that workers embraced as their most powerful and galvanizing weapon. Originating as a social phenomenon rather than a legal concept, picketing was first used in a legal sense in 1867 to refer to men stationed by a trade union outside an employer's premises to publicize a strike and persuade employees not to work. Throughout the modern history of union action picketing has been a significant factor in determining the success or failure of strikes. Yet it was also nuisance law, as well as the doctrines of the abstentionist regime, that established the boundaries of lawful picketing. During two explosive periods of industrial conflict—the 1890s through the 1920s, and the 1960s through the 1980s—courts greatly undermined picketing by adapting and applying the general law of nuisance. By infringing significantly on the ability of unionists to picket effectively,
nuisance law played a critical and profoundly political role.

Nuisance doctrine presented several advantages as a mechanism for regulating labor picketing. Most important, it enabled courts to restrain unionists under the guise of enforcing generic rules that purportedly governed all segments of the population equally. Free from the taint of anti-unionism attaching to specialized labor doctrines, it proved uniquely serviceable to the government, police and employers. In addition to its ostensible neutrality, nuisance law proved extraordinarily malleable. As a legal category it embraced a number of disparate concepts connected only by indeterminate notions of "inconvenience" or "annoyance." Private nuisance, a tort, protected a landowner's enjoyment of property; public nuisance, a crime, safeguarded the public's right to passage along the street. The breadth and elasticity of these doctrines allowed courts to apply them to picketing in unprecedented and ingenious forms. For example, during the first period of militant picketing in the 1890s, courts created a novel form of nuisance predicated on the economic pressure that picketers exerted on employers. A century later, in the second major phase of industrial volatility, courts fashioned another type of nuisance to provide relief to strikebreakers who suffered harassment from unionists. Theoretically a generic rather than a labor doctrine, nuisance law nonetheless developed specialized forms uniquely tailored to the phenomenon of labor picketing.

As nuisance law evolved into an effective instrument to curtail picketing, the courts protected its expansion by ensuring that labor nuisances were not subject to the legislative picketing immunity. In other words, courts elaborated and extended nuisance law while concomitantly narrowing the statutory immunity precisely to place the new picketing nuisances beyond the scope of parliamentary protection. The focus of this Article is not the adverse judicial treatment of unions, which is itself not a matter of historical dispute. It is, rather, the complex process

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8. Historians are in general agreement that most legal decisions were antagonistic to unions in the nineteenth century and again after the 1960s. See, e.g., BRIAN ABEL-SMITH AND ROBERT STEVENS, LAWYERS AND THE COURTS 293-300, 307 (1967); NORMAN CITRINE, TRADE UNION LAW 7-20 (2d ed. 1960) (discussing nineteenth-century legal decisions); 1 H.A. CLEGG ET AL., A HISTORY OF BRITISH TRADE UNIONS SINCE 1889, at 305-25 (1964); ALAN HARDING, A SOCIAL HISTORY OF ENGLISH LAW 355-56, 408-11 (1966); OTTO KAHN-FREUND, LABOUR AND THE LAW 246 (2d ed. 1977); NORMAN MANCHESTER, MODERN
involving both common law adaptation and statutory interpretation that courts utilized to inhibit picketing and, further, the insufficiently appreciated role of nuisance in this development.

This inquiry, a comprehensive historical study of the impact of nuisance law on labor picketing in England, comprises six sections. Part I introduces general principles of labor law and nuisance law in the nineteenth century, particularly the legislative scheme of "collective laissez-faire" that emerged after 1871 and remained relatively intact until 1980. Part II examines the use of nuisance doctrines against picketers in the first phase of confrontational picketing from 1889 to 1906, when the appearance of militant unions representing unskilled workers stimu-

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*ENGLAND* 336-47 (1981); ROBERT STEVENS, LAW AND POLITICS: THE HOUSE OF LORDS AS A JUDICIAL BODY, 1800-1976, at 93-98, 603-05 (1978); John Saville, *Trade Unions and Free Labour: The Background to the Taff Vale Decision*, in *ESSAYS IN LABOUR HISTORY* 317, 344-50 (Asa Briggs & John Saville eds., 1967); Finkelman, *supra* note 7, at 68-69; Wedderburn, *supra* note 5, at 238; see also *infra* notes 13, 93, 169. Much of the relevant material is usefully summarized by Michael Klarmann, who substantiates the courts' anti-union animus and explores various causal hypotheses on the level of both "ideology" (the adherence of the courts to nineteenth-century individualist ideas) and "materialism" (the class bias of the judges). Klarmann, *supra* note 3, at 1487-90. He concludes convincingly that the judiciary was indeed wedded to a philosophy of unfettered individualism and that the adverse legal decisions also reflected at least the judges' unconscious class prejudices and possibly also a conscious desire to curb perceived threats to the established order. *Id.* at 1574-75. The motivation of the judges is beyond the scope of this Article, which, moreover, does not claim that the courts necessarily and in every instance exhibited hostility to unions. In addition to a prolonged period of judicial passivity from the 1920s to the 1960s, there were also pro-union decisions at other times, including *Connor v. Kent* [1891] 2 Q.B. 545 (C.A.) and *Allen v. Flood* [1898] App. Cas. 1 (H.L.) in the nineteenth century, and decisions by the House of Lords reversing adverse rulings of the Court of Appeal in 1979-1980. See, e.g., Duport Steels, Ltd. v. Sirs [1980] I.C.R. 176 (H.L.); Express Newspapers v. McShane [1980] I.C.R 42 (H.L.); N.W.L. v. Woods, [1979] I.C.R. 867 (H.L.). Nor were the judges necessarily out of step with public opinion; in both the 1890s and 1980s, for example, a majority of the population shared their perception that the unions were engaging in inappropriate and excessive behavior. See, e.g., Saville, *supra* note 8, at 344-45 (suggesting that the anti-union decisions of the nineteenth and early twentieth centuries reflected and indeed followed public opinion); DAVIES & FREEDLAND, *supra* note 4, at 457 (observing that in the 1980s there was widespread public concern at the use of picketing as an industrial tactic). The argument here is that the courts were consistently anti-union with respect to picketing particularly and that in volatile periods nuisance proved an effective and underestimated mechanism to circumscribe picketing activity.
lated inventive judicial responses in both private and public
nuisance. Part III investigates the much heralded judicial
and legislative "triumphs" that unions enjoyed in 1906, and
it argues that both successes rested on flawed foundations
that unnecessarily exposed picketers to the vagaries of
nuisance law. Part IV explores the judicial treatment of
picketers between 1906 and 1980, a period when courts
widened public nuisance law and correspondingly restricted
the picketing immunity to defeat a series of new picketing
tactics. Part V considers the Thatcher government's efforts
in the 1980s to dismantle the system of parliamentary
immunities and the extent to which the political
environment encouraged the judiciary to refine nuisance
law as a tool against labor picketing. Finally, the
Conclusion analyzes the broader implications of the
relationship between nuisance law and larger social and
political developments, suggesting that nuisance wielded
considerable political power in regulating various forms of
organized popular protest in nineteenth and twentieth-
century England.

I. LABOR LAW AND NUISANCE LAW IN VICTORIAN ENGLAND

A. The Legal Framework of Industrial Relations After 1871

In the United States and most western European
countries, workers have secured positive rights to strike
and engage in certain forms of industrial action.9 Con-
versely, labor law in England has traditionally been
premised on a series of legal immunities shielding parti-
cipants in trade disputes from various forms of civil and
criminal liability.10 Although industrial action outside the
scope of an immunity was not necessarily unlawful—it was
permissible if not prohibited by the general law—most
forms of industrial action were in fact illegal without the
immunities.11 The ability to organize, bargain, strike or
picket has never enjoyed affirmative protection in England
on either statutory or constitutional grounds.12

9. See supra note 3 and accompanying text.
10. See KAHN-FREUND, supra note 8, at 240.
11. See TRADE UNION IMMUNITIES, supra note 5, § 34.
12. See KAHN-FREUND, supra note 8, at 233; Bellace, supra note 3, at 136;
This unusual structure of English labor law reflected the harsh judicial treatment of unions in the nineteenth and early twentieth centuries and repeated efforts by Parliament to redress their unfavorable status at common law. During most of the Victorian period, the judiciary viewed organized combinations of workers as criminal conspiracies in restraint of trade and held individual picketers liable for violence, threats, obstruction, molestation and intimidation. Capturing the anti-union animus

Lord Wedderburn, Industrial Relations and the Courts, 9 INDUS. L.J. 65, 70-71 (1980). The fact that positive labor rights did not exist in England was not unusual in itself, because there also were (and are) no affirmative rights for freedom of speech, assembly or other civil liberties that enjoy constitutional status in the United States. Rather, "liberty" lay in the interstices of the law, in the sphere of behavior that was not prohibited. See Entick v. Carrington, 95 Eng. Rep. 807 (1765); Gay v. Powell, 52 L.T.R. (n.s.) 92, 94 (Q.B. 1884); K.D. Ewing & C.A. Gearty, Freedom Under Thatcher: Civil Liberties in Modern Britain 9 (1990); Kahn-Freund, supra note 8, at 254; A.V. Dicey, On the Right of Public Meeting, 1889 CONTEMP. REV. 508, 508. What was unique in the labor context was that unions themselves consistently rejected the creation of positive rights. Even in the 1970s, with the election of the third Labour government since World War II, the Labour Party never seriously considered replacing the immunities with a positive law approach. See Davies & Freedland, supra note 4, at 369; Wedderburn, supra note 5, at 240-42.

13. Between 1800 and 1825 unions were both criminal conspiracies in restraint of trade at common law and prohibited by the Combination Acts of 1799 and 1800. Combination Act, 1799, 39 Geo. 3, ch. 81; Combination Act, 1800, 39 & 40 Geo. 3, ch. 106. The Combination Act of 1825, however, protected unions against criminal conspiracy if they avoided five types of wrongful conduct—violence, threats, intimidation, molestation and obstruction—when committed with the intention of coercing the will of another. Combination Act, 1825, 6 Geo. 4, ch. 129; see Clegg et al., supra note 8, at 43-44; W. Mansfield Cooper, Outline of Industrial Law 302-04 (1947). Nonetheless, as the courts developed the principles of common law conspiracy, the existence of a combination to peacefully persuade workers to leave their employment converted an otherwise non-criminal act into a criminal threat, obstruction or molestation. See, e.g., R. v. Duffield, 5 Cox C.C. 404 (Cent. Crim. Ct. 1851); R. v. Rowlands, 5 Cox C.C. 436 (Cent. Crim. Ct. 1851). Thus, although combinations to raise wages and even to strike were technically lawful, it was unlawful to threaten an employer that such a strike would take place or even to persuade others by peaceful picketing to participate in it. See I.M. Christie, The Liability of Strikers in the Law of Tort 24-25 (1967); Citrine, supra note 8, at 8; W. Hamish Fraser, Trade Unions and Society: The Struggle for Acceptance, 1850-1880, at 186-87; K.W. Wedderburn, The Worker and the Law 211-12 (1965). The Molestation of Workmen Act of 1859 mitigated the rigor of the law by providing that no person merely by virtue of peaceably persuading another to refrain from working to obtain a higher rate of wages or lower hours of work was guilty of "molestation" or "obstruction." Molestation of Workmen Act, 1859, 20 & 21 Vict., ch. 43. However, judicial interpretation again
of the courts, Baron Bramwell declared in 1867 that picketing was lawful if it did not "coerce" or "annoy," but it was illegitimate if it had "a deterring effect on the minds of ordinary persons"—for instance, by exposing non-striking employees "to have their motions watched, and to encounter black looks." In the same year, however, the new electoral power of urban workingmen conferred by the Second Reform Act prompted the government to appoint a Royal Commission to investigate the status and activities of trade unions. Labor supporters ably presented their case, and when the Commission recommended a favorable legal status for unions, Prime Minister William Gladstone agreed to introduce pro-union legislation. The result was organized labor's first significant parliamentary success—the Trade Union Act of 1871.

Rather than declaring unions to be lawful entities, the Act confirmed that they were unlawful bodies in restraint of trade but granted them a special protective immunity. Beatrice and Sidney Webb explained that rendering unions legal in the usual sense would merely have brought them "under the general law, and subjected them to constant and harassing interference by the Courts of Justice." The legal position of the unions was thus precarious when the Royal Commission took up the matter in 1867.

15. The immediate precipitants of the appointment of the Commission were the growth in trade union membership, the occurrence of "outrages" by unionists at Sheffield and Manchester, and the adverse judicial decision of Hornby v. Close [1867] 2 Q.B. 153, which denied legal protection to union funds because unions were entities in unlawful restraint of trade. See, e.g., ASA BRIGGS, VICTORIAN PEOPLE 181-85 (rev. ed. 1970); CITRINE, supra note 8, at 10; CLEGG ET AL., supra note 8, at 44; MANCHESTER, supra note 8, at 337-38; HENRY PELLING, A HISTORY OF BRITISH TRADE UNIONISM 58-59 (3d ed. 1976).
16. The legislation was based on a Minority Report signed by Frederic Harrison, Thomas Hughes and the Earl of Lichfield. See BRIGGS, supra note 15, at 188-90; CLEGG ET AL., supra note 8, at 45; SIDNEY WEBB & BEATRICE WEBB, THE HISTORY OF TRADE UNIONISM 270 (rev. ed. 1935); Finkelman, supra note 7, at 78-79.
18. The 1871 Act prohibited prosecutions for criminal conspiracy in restraint of trade, id. § 2, and provided that internal agreements to which union members were a party, including collective bargaining agreements, were valid but legally unenforceable, id. § 3.
unions had grown despite the law and lawyers, and "the spirit of the one and the prejudices of the other were, and still are, alien and hostile to the purposes and collective action of the Trades Societies." Only an express statutory immunity, trade unionists believed, would remove the threat of legal action and provide sufficient independence from the courts.

The immunized status of unions as entities, however, came at a heavy price. To balance the new protection, Parliament increased the criminal penalties for individual picketers engaging in certain forms of industrial action. The Criminal Law Amendment Act (CLAA), also passed in 1871, prohibited the use of violence, threats, intimidation, molestation or obstruction with a view to coerce an employer or workman. The statute deemed molestation or obstruction to include unlawful picketing, technically known as "watching or besetting." Judges and magistrates, applying nuisance concepts of inconvenience and annoyance to interpret the statutory language, readily found picketers guilty of molestation or obstruction. For example, Mr. Justice Brett in Regina v. Bunn defined "molestation" as annoyance or interference that "would be likely, in the minds of men of ordinary nerve, to deter them from carrying on their business according to their own will." Similarly, Regina v. Hibbert held that a molestation would arise where picketing caused "feelings of annoyance" or "some apprehension of loss or ruin." These and other cases subjected picketing to so many legal constraints that they effectively prohibited it.

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20. Id. Mere legalization, they concluded, "would place the most formidable weapons in the hands of unscrupulous employers." Id.
22. Id. § 1. "Molestation" and "obstruction" were also deemed to include persistently following someone from place to place, hiding tools or other property and following a person with others in a disorderly manner through any street or road. The 1871 Act repealed the Acts of 1825 and 1859. Id. § 7.
24. Id. at 340. It found a threat to strike by London gas stokers to be, if not a criminal conspiracy in restraint of trade, nonetheless a conspiracy to coerce. Id. at 350. The court sentenced the union members to twelve months at hard labor. Id. at 351.
26. Id. at 87. The unionists were sentenced to a month in prison. Id.
27. See Christie, supra note 13, at 26-28; Fraser, supra note 13, at 192; Webb & Webb, supra note 16, at 283-85. According to the Webbs, in 1871 seven
As the influence of classical economic theory declined and unions gained in political strength, however, such restrictive judicial attitudes grew increasingly discordant with public opinion. Agitation from the new Trades Union Congress (TUC), particularly its Parliamentary Committee, helped induce the Conservative Government in 1875 to sponsor further remedial legislation.\footnote{28} The resulting statute, the Conspiracy and Protection of Property Act of 1875 (CPPA),\footnote{29} confirmed the ability of workers to organize and to strike. It introduced a “golden formula” providing that no combination to do or procure any act “in contemplation or furtherance of a trade dispute” was punishable as a criminal conspiracy unless the act itself was independently punishable as a crime.\footnote{30}

In the critical area of picketing, unions achieved another signal success.\footnote{31} Although section 7 of the CPPA reenacted the CLAA’s prohibition against “watching or besetting,”\footnote{32} it also created for the first time a wholly new and explicit exemption for peaceful picketing. A proviso to section 7 declared that “attending at or near” a house or place of work “in order merely to obtain or communicate information” should not be deemed an unlawful watching or besetting.\footnote{33} Moreover, by its terms section 7 was of general

women were imprisoned in South Wales under the statute merely for saying “Bah” to a blackleg, and innumerable convictions took place for the use of bad language. “Almost any action taken by Trade Unionists to induce a man not to accept employment at a struck shop,” they complained, “resulted, under the new Act, in imprisonment with hard labour.” Id. at 284.

\footnote{28} See Clegg et al., supra note 8, at 45; Pelling, supra note 15, at 68-69; Henry Pelling, Popular Politics and Society in Late Victorian Britain 72 (2d ed. 1979); Klarman, supra note 3, at 1497; H.W. McCready, British Labour’s Lobby, 1867-75, 22 Can. J. Econ. & Pol. Sci. 141, 148 (1956). The Trades Union Congress was formed in 1868, the Parliamentary Committee three years later. Pelling, supra note 15, at 65-66.

\footnote{29} Conspiracy and Protection of Property Act, 1875, 38 & 39 Vict., ch. 86.

\footnote{30} Id. § 3; see Wedderburn, supra note 13, at 214.

\footnote{31} The significance of picketing was underscored in an 1878 statement by George Howell, the first secretary of the TUC: “[I]t is very frequently resorted to in the event of a strike, or lockout, it is disliked and condemned by the masters, justified and practised by the men, and is constantly discussed in the press, and often the subject matter of a prosecution in our courts of law.” George Howell, The Conflicts of Capital and Labour 323 (London, Chatto & Windus 1878).

\footnote{32} 38 & 39 Vict., ch. 86, § 7(4).

\footnote{33} In view of its significance, section 7 is worth quoting in full:

Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority,—(1)
application and not confined to employees participating in a trade dispute, a feature that unions considered symbolically important. As the trade union leader George Howell declared, the statute had "liberated the working men of England from the last vestige of the Criminal Laws specially appertaining to labour." The CPPA engendered remarkable unanimity of approval in press and Parliament, and the TUC enthusiastically declared that the emancipation of the unions was "full and complete."

Uses violence to or intimidates such other person or his wife or children, or injures his property; or (2) Persistently follows such other person about from place to place; or (3) Hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof; or (4) Watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place; or, (5) Follows such other person with two or more other persons in a disorderly manner in or through any street or road; shall, on conviction thereof by a court of summary jurisdiction, or on indictment as hereinafter mentioned, be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour. Attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section.

Id. § 7 (repealed and replaced by Trade Union and Labour Relations (Consolidation) Act, 1992, §§ 241, 300(1)). The proviso to section 7 of the CPPA was later replaced with the more expansive section 2(1) of the Trades Disputes Act of 1906. 6 Edw. 7, ch. 47, § 2(1); see infra note 145 and accompanying text.

34. GEORGE HOWELL, LABOUR LEGISLATION, LABOUR MOVEMENTS AND LABOUR LEADERS 385 (1902); see R.J. Coleman, Sit-Ins and the Conspiracy and Protection of Property Act 1875, 1970 CRIM. L. REV. 610-11. On the symbolic importance of the general nature of the CPPA, see 225 PARL. DEB., H.C. (3d ser.) 1582-83, 1588 (Aug. 20, 1875); Klarman, supra note 3, at 1496; McCready, supra note 28, at 159. The Eighth Annual Trades Union Congress in 1875 carried a vote of thanks to the Home Secretary for steering the labor act through Parliament. HOWELL, supra note 34, at 385. As it turned out, however, the CPPA was virtually never applied outside the industrial context. Since 1875 prosecutions have been brought in only two reported cases involving non-industrial disputes. D.P.P. v. Fidler [1992] Crim. L.R. 91 (Q.B.) (anti-abortion protesters); D.P.P. v. Todd [1996] Crim. L.R. 344 (Q.B.) (demonstration against construction of motorway).

35. Quoted in McCready, supra note 28, at 160; see FRASER, supra note 13, at 195; PELLING, supra note 15, at 70. As the degree of legal emancipation exceeded what most employers or lawyers thought appropriate, Home Secretary Cross had to dissipate opposition from other cabinet members. The government supported the bill because Disraeli believed that it would gain for Conservatives the lasting affection of the working classes. See ROBERT BLAKE, DISRAELI 533
The TUC's view was hardly prescient. A strong individualist tradition inhering in the common law vigorously resisted the collectivist values communicated to Parliament through electoral pressures.\(^6\) Section 7's proviso, while immunizing peaceful picketing from the criminal penalties for watching or besetting set forth in the section itself, did not shield it from the operation of the general law. As a result, the general law of nuisance emerged as an effective vehicle by which courts could undermine the protection of the picketing exemption.

**B. The Law of Nuisance**

Two types of nuisance, public and private, delimited the scope of permissible picketing. Public nuisance consisted of "an act not warranted by law, or an omission to discharge a legal duty, which obstructed or inconvenienced the public in the exercise of rights common to all Her Majesty's subjects."\(^7\) The common right implicated by picketing, which typically took place on a "highway,"\(^38\) was the right to travel without interference along the street.\(^39\) This right to passage—probably the only positive English common law right\(^40\)—reached almost mythic proportions in the nine-
The right to passage was enforced both through the common law crime of public nuisance and various national statutes and local regulations. A common law charge of public nuisance for obstructing passage could be brought in three ways: by the Crown in a criminal proceeding; by the Attorney General in a civil suit for an injunction; or by a private individual (whether possessing an interest in land or not) in a tort action for "particular damage" based on infringement of the public right. The statutory equivalent of common law nuisance was the offense of willful obstruction under the Highways Act. All public nuisance actions required proof of an unreasonable obstruction, but this condition was easily satisfied. Any stationary activity in the street, even of a merely partial or potential nature, sufficed for obstruction, and conduct unrelated to "legitimate passage" was necessarily unreasonable.

Private nuisance, in contrast, was a common law tort involving interference with an owner or occupier's use and enjoyment of land. In picketing cases this generally meant a suit by an employer—the owner or occupier of the picketed premises—against strikers for physically blocking

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43. The statutory offense, contained in section 72 of the Highways Act 1835, 5 & 6 Will. 4, and substantially reenacted in section 121 of the Highways Act 1959, 7 & 8 Eliz. 2, ch. 25, and section 137 of the Highways Act 1980, ch. 66, prohibited anyone from willfully obstructing the highway without "lawful authority or excuse." Except for its remedies, the statutory violation was identical to the common law offense; the element of willfulness was a superfluity. See Arrowsmith v. Jenkins [1963] 2 Q.B. 561. References in this Article to common law nuisance should therefore be read broadly to include cases where judges interpreted the requirements of the Highways Act.
the facility's entrance. In the late nineteenth century, however, courts created a form of nuisance applicable only to picketing, one that wholly abandoned the requirement of even potential physical obstruction. This new conception of private nuisance was central in determining the legality of strike action, and it represented the judiciary's most inventive response to the "new unionism" that emerged in the century's final decade.

II. THE NEW UNIONISM AND THE POWER OF NUISANCE: 1889-1906

A. The "New Unionism"

For fifteen years, while craft unions dominated the labor landscape and an inhospitable economy buffeted the working classes, the CPPA provoked little controversy. As George Howell observed, between 1875 and 1890 there were "few complaints as to the operation of such laws." The Labour laws were accepted by the public as the rightful thing," he commented, "and they rejoiced that one irritating subject had been got out of the way." Strikes and picketing were infrequent, prosecutions were comparatively few, and neither employers nor unions felt any impetus toward law reform.

The period of quiescence dissolved, however, in the late
1880s. Encouraged by the revival of trade and the spread of socialist ideology, militant labor leaders mounted a successful campaign to organize semi-skilled and unskilled workers. In 1889 alone, 200,000 workers previously considered impervious to recruitment efforts—dockers, gas workers, tramwaymen and unapprenticed laborers—joined new unions. Between 1888 and 1890, the TUC membership increased by 650,000. The London dock strike of 1889 became the public symbol of the new unionism, and the following nine years saw eleven more substantial stoppages.

The new unionism spurred audacious and provocative strike tactics. As the President of the TUC told the Congress in 1891, “in many cases, the workman cannot get attention until he stops the wheels.” Stoppages were difficult to achieve in unskilled industries because replacement labor was readily available. Nonunion workers did not ordinarily pose a serious threat to skilled workers such as


52. See Eric J. Hobsbawm, The “New Unionism” Reconsidered, in The Development of Trade Unionism in Great Britain and Germany, 1880-1914, at 13, 17 (Wolfgang J. Mommsen & Hans-Gerhard Husung eds., 1985); Klarman, supra note 3, at 1499. The overall size of the trade union movement, including both new and old unions, increased from 750,000 at the beginning of 1889 to 1.5 million in 1892 and to 2 million in 1900. Clegg et al., supra note 8, at 97; see also Royal Commission on Labour, Fifth and Final Report, pt. I, 1894, C. 7421, ¶ 68 [hereinafter 1894 Royal Commission Report].

53. Clegg et al., supra note 8, at 55. According to Eric Hobsbawm, between 1889 and World War I British industrial relations underwent a qualitative transformation. In addition to the formation of “new” unions and eventually the Labour Party, these two decades saw the first effective employers’ organizations, the first national industrial disputes, the first central government intervention in strikes and the first public expressions of concern about the possible adverse effects of unions on the competitive position of the economy. Hobsbawm, supra note 52, at 15-16.

54. Trades Union Congress, Twenty-Fourth Annual Report 33 (1891). Similarly, Earl Wemyss told the House of Lords that whereas for the old unions a strike was a last resort, the new unions were of a totally different character: “So far from discouraging strife, the new Unionism fosters strife.” 351 Parl. Deb., H.L. (3d ser.) 351-52 (Mar. 6, 1891). Picketing inevitably involved abuses because it “represents the power of the Union that is at its back—the coercive will of those men by whom it is directed.” Id.
cotton spinners or boilermakers, but in casual or semi-skilled trades an effective strike required an elaborate system of militant picketers to obstruct the inevitable supply of alternative labor. In 1894 the Royal Commission on Labour reported that the unskilled laborers' lack of a natural monopoly promoted a tendency toward "violent methods of action" to prevent substitute workers, known as "free laborers," from replacing striking unionists.

Initially, public opinion was sympathetic toward more combative union tactics because of widespread recognition that unskilled laborers suffered from depressed working conditions. Tolerance soon waned, however, when unions became more disruptive and strikers began to inflict serious damage on the economy. Many contemporaries believed that work stoppages severely undermined Britain's economic struggle against German and American competition. As the conflict between "free labor" and the new unions accelerated in the 1890s, picketing law assumed a new importance. Employers sought relief in the courts, and the conservative judiciary, reflecting the altered mood, willingly came to their aid.

B. Judicial Response: Lyons v. Wilkins

Beginning in the 1890s judges decided a growing number of cases adversely to unions, developed new civil torts to replace the doctrine of criminal conspiracy, and

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55. See CLEGG ET AL., supra note 8, at 94; SIDNEY WEBB & BEATRICE WEBB, INDUSTRIAL DEMOCRACY 719 n.1 (1965); Kenneth D. Brown, Trade Unions and the Law, in A HISTORY OF BRITISH INDUSTRIAL RELATIONS, 1875-1914, at 116, 120-21 (Chris Wrigley ed., 1982); Saville, supra note 8, at 318-19.

56. 1894 ROYAL COMMISSION REPORT, supra note 52, ¶¶ 79, 95.

57. See, e.g., PELLING, supra note 15, at 106; Saville, supra note 8, at 322.

58. See Fox, supra note 35, at 180; PELLING, supra note 15, at 109-10; Hobsbawm, supra note 52, at 16; Saville, supra note 8, at 318-19.

59. John Saville has pointed out that in adopting an anti-union stance in the 1890s, the courts merely echoed public and parliamentary hostility toward the unions:

In the decade after 1889, the Courts followed, at only a short distance of time, the changes in public opinion towards the trade unions; and it is instructive to match, argument for argument, the attacks upon trade unions in the press and in Parliament, and the obiter dicta of the judges in decisions the result of which was the steady whittling away of the legal rights of the unions. Saville, supra note 8, at 344-45.
increasingly used injunctions to restrain strikes. Even more significant, the House of Lords, in its landmark Taff Vale decision, allowed employers to sue a union in a corporate capacity for damages allegedly caused by union officers. Judges also demonstrated continuing hostility toward picketing by harshly interpreting the criminal provisions of section 7 of the CPPA. Although in 1891 Baron Bramwell informed the House of Lords that there was “nothing unlawful in picketing provided that it is lawfully practised,” in his view it was never so practiced. Rather, it invariably inflicted an “intolerable wrong” on both non-striking workers and the community at large.

Responding to the judicial assault, the TUC passed annual resolutions demanding amendment of the CPPA to safeguard the right to picket. A speaker at the 1893 Congress insisted that the law must be modified because trade unionists “did not want to be at the mercy or will of any judge or any magistrate who might be prejudiced against them.” Similarly, the following year a delegate voiced a widely shared conviction of workers when he bitterly charged that the Act was “constructed almost in every case according to the wish, whim, or desire of the

60. For example, the Court of Appeal reformulated criminal conspiracy as a new civil tort of “conspiracy to injure.” The doctrine first appeared in Temperton v. Russell [1893] 1 Q.B. 715 (C.A.), where the court held officers of a union who boycotted a struck employer’s supplier liable for maliciously coercing others to break a contract and for forming a “conspiracy to injure.” See, e.g., Trollope v. London Building Trades Federation, 72 T.L.R. 342 (C.A. 1893) (holding unionists civilly liable for publishing lists of blacklegs); Quinn v. Leatham [1901] App. Cas. 495, 506 (H.L.) (approving the principle in Temperton that a “conspiracy to injure” was actionable); Christie, supra note 13, at 32; Clegg et al., supra note 8, at 308-09; Saville, supra note 8, at 345.


63. 351 Parl. Deb., H.L. (3d ser.) 371-72 (Mar. 6, 1891). He commented that it would not be worth the trouble to picket unless it “inspire[d] terror.” Id. at 372. Baron Bramwell’s view of picketing was received favorably by the Law Times, which observed that the “object of ‘picketing’ in every recorded case has been, not the collection of information, but the coercion of other men.” Comment, The Law and the Lawyers, 85 Law Times 333, 333 (1888).

64. See Trades Union Congress, Twenty-Sixth Annual Report 43-44 (1893); Trades Union Congress, Twenty-Seventh Annual Report 43 (1894); Trades Union Congress, Twenty-Ninth Annual Report 23, 37-38 (1896); Trades Union Congress, Thirtieth Annual Report 21-22, 43 (1897).

65. Trades Union Congress, Twenty-Sixth Annual Report 43 (1893).
Soon thereafter trade union anxiety turned to horror when the Court of Appeal handed down its 1896 and 1899 decisions in *Lyons v. Wilkins*. Addressing the interplay between nuisance, picketing and the CPPA, the court significantly altered the law in two respects. First, it expanded common law private nuisance to apply to peaceful picketing. Second, it simultaneously limited the section 7 picketing immunity for “attending to communicate information” to exclude precisely the peaceful conduct that it had designated a private nuisance. The court thus consigned all effective trade union behavior to the territory of nuisance at the same time that it interpreted nuisance in an unprecedented way to encompass the activity of peaceful picketing.

*Lyons* involved a strike by the Amalgamated Trade Society of Fancy Leather Workers against J. Lyons & Sons, a London leather goods manufacturer. Four picketers in relays of two approached persons entering and leaving the premises, persuading employees not to work for the company and distributing cards asking people not to apply for work pending resolution of the dispute. Despite the fact that the unionists did not issue threats or commit acts of violence, Mr. Justice North granted the company an interlocutory injunction restraining the picketing.

In March 1896 the Court of Appeal upheld the injunction on the theory that the picketers were present “not merely to obtain or communicate information,” which the section 7 proviso expressly permitted, but also to “put pressure” upon the employers by persuading people not to work for them. Sir Nathaniel Lindley conceded that the 1870s legislation did legalize strikes to a certain point, but in his view the union had gone beyond communication and

66. TRADES UNION CONGRESS, TWENTY-SEVENTH ANNUAL REPORT 43 (1894); see Brown, supra note 55, at 120-21.
67. [1896] 1 Ch. 811; [1899] 1 Ch. 255.
68. [1896] 1 Ch. at 812, 825.
69. Id. at 818. Although the CPPA was a criminal statute, employers could bring a civil action for an injunction to restrain threatened or continuing breaches of the section. See, e.g., Ward, Lock & Co. v. Operative Printers' Assistants' Soc'y, 22 T.L.R. 327, 329 (C.A. 1906) (stating that if unionists were guilty of a section 7 offense, “the plaintiffs would have a good cause of action by civil process”); R.Y. HEDGES & ALLAN WINTERBOTTOM, THE LEGAL HISTORY OF TRADE UNIONISM 120 (1930).
70. [1896] 1 Ch. at 825-26.
prevented the company "from carrying on their business upon such terms as they may choose." Parliamet had not conferred upon unions the power to exert such pressure, he insisted, even though a strike would likely fail without it. As he bluntly and pragmatically told the union's counsel at the argument, "[y]ou cannot make a strike effective without doing more than is lawful." The first Lyons decision thus interpreted the immunity literally to include "communication" but not "persuasion"—the latter being the essence of effective picketing—and found that acts of persuasion per se violated the CPPA's watching or besetting clause.

Three years later the second Lyons decision, which reviewed the grant of a perpetual injunction against the union, went beyond interpreting the CPPA and introduced a radical new theory of private nuisance. Lord Lindley, now Master of the Rolls, ruled that the picketers' peaceful conduct, by "seriously interfer[ing] with the ordinary comfort of human existence," supported a common law nuisance action. Such a nuisance was not immunized because section 7's proviso did not shield picketers from nuisance and in any event protected only communication and not persuasion. Further, even if the picketers had not committed a nuisance, they remained liable for the crime of watching or besetting under the CPPA. The unionists had argued that the prefatory language in section 7, which required that an alleged act be done "wrongfully and without lawful authority," contemplated that no person could be found guilty of a CPPA offense unless the same act also constituted an "independent illegality" such as nuisance. Rejecting that contention, the court held that the watching or besetting offense demanded only evidence that

71. Id. at 822. Lord Kay agreed that it was illegal to picket the company to persuade workers not to work "in order to compel Messrs. Lyons to come to their terms." Id. at 831.
72. Id.
73. Id. at 820. In a subsequent letter to The Times, Lord Lindley said that to speak of peaceful persuasion was little less than "cant and hypocrisy." 167 PARL. DEB., H.L. (4th ser.) 280 (Dec. 12, 1906).
74. Mr. Justice Byrne's judgment of February 1898 echoed the 1896 opinion. Picketing was lawful only if confined to obtaining or communicating information, and picketing to persuade was an actionable watching and besetting. [1899] 1 Ch. at 257.
75. Id. at 267.
76. Id. at 268-69.
proves the acts themselves."77

The second Lyons opinion thus encompassed two major issues, one involving construction of the CPPA and the other the scope of common law nuisance. On the CPPA issue, the majority concluded that the phrase "wrongfully" did not require an "independent illegality" such as nuisance to ground a section 7 offense. Further, it found that the immunity's protection extended only to communication but not persuasion.78 On the common law issue, the court found the picketers guilty of nuisance because peaceful picketing inevitably interfered with the "ordinary comfort of human existence." The majority thus agreed that picketing to persuade was per se an unlawful watching or besetting offense under section 7 and, in addition, per se a common law nuisance independent of section 7.

Lyons was a ground-breaking decision in all respects. It interpreted the CPPA in a wholly unexpected and highly dubious manner, and it announced a novel departure in nuisance law. With respect to the CPPA, Lyons distorted the statute's purposes because Parliament's express objective in 1875 had been to immunize "peaceful persuasion." Lord James of Hereford, who had sat in Parliament during consideration of the bill, later clearly recalled the course of debate. When he and others moved an amendment to include an explicit exemption for peaceful picketing, the government assured members on the authority of the Lord Chancellor that the protection they sought "was to be found within the Bill."79 Indeed, the

77. Id. at 267. Lord Justice Chitty concurred. To watch and beset a man's house in the manner at issue, he announced, undoubtedly constituted "a nuisance of an aggravated character" as well as a section 7 violation. Id. at 271-72. Attending to persuade was not within the proviso, id. at 271, and watching or besetting was in itself unlawful, id. at 272. Sir Vaughan Williams concurred in the result because he felt bound by the earlier Lyons decision, but he dissented from the view espoused by the majority. In his opinion, persuasion in the form of communication was covered by the proviso if it was not a nuisance. In addition, the statute required an independent illegality to ground an offense under section 7; that is, "wrongfully" essentially meant committing a nuisance. Id. at 273. Finally, a common law watching or besetting might or might not amount to a nuisance, and there were no facts in the present case to indicate that persuasion was a nuisance. Id. at 273-74.

78. Id. at 272-73.

79. 166 PARL. DEB., H.C. (4th ser.) 718 (Dec. 4, 1906). Similarly, Lord Loreburn, the Lord Chancellor, recollected that Home Secretary Cross stated in the House of Commons that an amendment was "quite unnecessary" because, as the bill stood, "picketing would be lawful for the purposes of peaceful
administration in 1875 agreed to illustrate the Act’s purpose by circulating to magistrates throughout the country a recent jury charge by the Recorder of London, Mr. Russell Gurney, explicitly declaring persuasive picketing to be a lawful act. In 1906, when Parliament rectified the statutory ruling of Lyons by expressly adding the phrase “peaceful persuasion” to the picketing immunity, it viewed itself at a minimum as restoring the law enacted in 1875. The Solicitor General announced to the House of Commons that the new statute was necessary because the law on peaceful picketing had been “abrogated by the Law Courts.” Lyons thus disproved the general belief that peaceful picketing to persuade was already protected by the picketing exemption.
In addition to its revolutionary interpretation of the CPPA, Lyons introduced a radical view of nuisance. Prior to the decision private nuisance did not encompass economic pressure on employers. As an M.P. remarked, when the Court of Appeal declared in Lyons that peaceful picketing interfered with the ordinary comfort of human existence, it altered "what the whole legal profession had always believed to be the law." Indeed, the few authorities on which the court relied were wholly inapposite, involving noise from animals or the discharge of particles into the air. Lyons' definition of nuisance to include a peaceful attempt at economic pressure, even regardless of whether such pressure was successful, incorporated into the common law a new variety of nuisance peculiar to industrial relations. It extended a theory about the physical enjoyment of property into the entirely dissimilar territory of competitive activities interfering with commercial interests.

An obvious response to the new unionism, Lyons significantly enhanced the range of options available to employers by treating picketing as a section 7 violation and, more critically, by expanding the scope of nuisance. In limiting the immunity to "communication," it made acts of

suggested that peaceful persuasion was illegal. Id. ¶¶ 104, 110; Klarman, supra note 3, at 1515 (commenting that Lyons exploded the common understanding that peaceful persuasion was lawful); Case Comment, 12 L.Q. REV. 201, 201 (1896) (observing that Lyons' equation of persuasion with watching or besetting was "not the law Parliament intended to make").

84. 108 PARL. DEB. (4th ser.) 306 (May 14, 1902); see id. at 318-19, 326.
85. See, e.g., Walter v. Selfe, 64 Eng. Rep. 849 (Ch. 1851) (smoke, vapors and floating substances from burning bricks); Bamford v. Turnley, 122 Eng. Rep. 25 (Ex. Ch. 1862) ("corrupted air" from burning bricks); Crump v. Lambert [1867] 3 L.R.-Eq. 409 (Ch.) (noise, smoke and effluvia from neighboring iron factory); Broder v. Saillard [1876] 2 Ch. D. 692 (dampness and noise from adjoining stables); see also Carty, supra note 39, at 611; Davidson, supra note 39, at 349; Finkelman, supra note 7, at 97-99.
86. The almost metaphysical nature of this form of nuisance is underscored by the fact that in the area of industrial pollution, the damages required for a plaintiff to prevail in nuisance against a manufacturing enterprise in the nineteenth century reached virtually a trespass standard. It required direct and visible physical interference with property as well as a diminution in property value. Mental discomfort was not cognizable under the theory of "trifling inconveniences." See, e.g., Joel Franklin Brenner, Nuisance Law and the Industrial Revolution, 3 J. LEGAL STUD. 403, 413-14 (1974). The picketing cases accommodated industrial entrepreneurs in a converse fashion, by lowering the threshold of injury required for employers to sue strikers.
persuasion vulnerable to nuisance, and at the same time it redefined nuisance so that acts of peaceful picketing constituted nuisance per se. While scholars have devoted considerable attention to the holding that an "independent illegality" was not necessary to ground a section 7 CPPA offense,\(^8\) the court's rulings on nuisance law and the scope of the immunity were far more significant. The judicial approach of widening nuisance law and concomitantly restricting the picketing exemption became standard practice in the twentieth century, and it affected the right to picket far more broadly than did judicial construction of the rarely used CPPA offense of watching or besetting.\(^9\)

C. Nuisance Law in Action: From Lyons to the Trade Disputes Act of 1906

Trade unionists immediately recognized the serious threat that Lyons posed to picketing. In 1896 the TUC's Parliamentary Committee warned that judges "had seriously checkmated" accepted methods of picketing and recommended that trade unionists "lose no time and leave no stone unturned" to place the laws "on a sounder and more satisfactory basis.\(^{10}\) The following year a Congress resolution declared that recent legal decisions revealed "considerable bias on the part of some of our judges and juries" and that under the present state of the law it was

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\(^8\) See, e.g., Francis Bennion, Mass Picketing and the 1875 Act, 1985 CRIM. L. REV. 64, 67-69; Brian Bercusson, One Hundred Years of Conspiracy and Protection of Property: Time for a Change, 40 MOD. L. REV. 268, 275 (1977); Coleman, supra note 34, at 614-15; Charles D. Drake, The Right To Picket Peacefully: Section 134, 1972 INDUS. L. J. 212, 213-14; Finkelman, supra note 7, at 97-99; see also sources cited infra note 134.


\(^10\) TRADES UNION CONGRESS, TWENTY-NINTH ANNUAL REPORT 23 (1896). Counsel to the Parliamentary Committee of the TUC similarly stated that the decision made it "exceedingly difficult to conduct a strike with any degree of success without doing illegal acts." 108 PARL. DEB., H.C. (4th ser.) 298 (May 14, 1902). In the same vein, J. Macdonald, secretary of the London Trades Council, declared in 1901 that "the right to picket has been attacked, and, thanks to judge-made law, nearly abolished." HOWELL, supra note 34, at 478 (quoting Macdonald); see Brown, supra note 55, at 120-21; Rothschild, supra note 79, at 1341.
virtually impossible for union members to obtain "even-handed justice." Recognizing that "the most important point in the whole question was where did they stand in regard to picketing," the Parliamentary Committee determined to collect funds to appeal the case to the House of Lords. Lyons, union members agreed, was but the latest example of a pervasive anti-union bias on the part of judges.

90. TRADES UNION CONGRESS, THIRTIETH ANNUAL REPORT 34 (1897); see W.J. SHAXBY, THE CASE AGAINST PICKETING 9 (London, Liberty Review 1897). The 1897 Congress also passed a resolution that "the law as administered by the various judicial courts is totally opposed to the spirit of the Act." TRADES UNION CONGRESS, supra, at 43.


92. See id. The Chairman of the TUC, in his opening address in 1901, declared that a definite pronouncement was needed by the House of Lords on that most "vital question" of picketing. Id. at 298. Probably a solicitor's error—filing the petition a month too late—allowed the appeal to lapse. See CLEGG ET AL., supra note 8, at 317 n.1; PELLING, supra note 51, at 200; B.C. ROBERTS, THE TRADES UNION CONGRESS 165 (1958); Kidner, supra note 88, at 43 n.51. Many at the time believed, however, that the case was not pursued on advice of counsel. See 108 PARL. DEB., H.C. (4th ser.) 318 (May 14, 1902) (suggesting that the appeal was abandoned because the union could not prevail on the nuisance issue).

93. After Lyons the labor leader Keir Hardie stated in Parliament that "there is some confusion in the minds of the judges" concerning peaceful persuasion and that all labor asked was that the Act be amended so "that the judges shall not be able to misunderstand or misconstrue its meaning." 108 PARL. DEB., H.C. (4th ser.) 325 (May 14, 1902). He did not accuse judges of being consciously biased, but "we say emphatically that the judges, being human, are influenced by their environments, and that they unconsciously lean towards the employers in giving judgment...." Id.; see also LORD ASKWITH, INDUSTRIAL PROBLEMS AND DISPUTES 95 (1981, orig. 1905) (observing that judges found it difficult to overcome prejudices against unions and that unions were therefore reluctant to trust the courts); A.V. DICEY, LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND IN THE NINETEENTH CENTURY 199 (1920) (commenting that nineteenth-century judges "believed that the attempt of trade unions to raise the rate of wages was something like an attempt to oppose a law of nature"); FOX, supra note 35, at 160-61, 179 (remarking on the individualism of the judges); HENRY PELLING, POPULAR POLITICS AND SOCIETY IN LATE VICTORIAN BRITAIN 75-76 (2d ed. 1979) (noting the judicial bias against unions); Klarman, supra note 3, at 1576-77 (stating that trade unionists viewed Taff Vale, Quinn and Lyons as part of a judicial conspiracy to cripple union power). By 1900 most of the judges had been appointed by Lord Halsbury, who was well-known for his anti-union sentiments. He was so partisan in his appointment of judges that he was chastised by his own Conservative Prime Minister, Lord Salisbury. R.F.V. HEUSTON, LIVES OF THE LORD CHANCELLORS, 1885-1940, at 56-57, 75-76 (1964); STEVENS, supra note 8, at 90-98. "The keen Labour man," Clement Attlee, a Labour Prime Minister, later observed, "might well hang on his walls a portrait
Labor fears were soon realized as employers took advantage of the opportunities that Lyons created. After the first Lyons decision, a group of influential employers formed the Labour Protection Association and distributed to magistrates, employers and constables a handbook entitled *The Case Against Picketing*. The publication was aimed at bringing prominently to employers' attention the new strength of their legal position. In 1899 the employer campaign produced a flurry of civil suits over union resistance to the importation of free labor to break strikes. The resulting decisions uniformly confirmed that picketing was invariably unlawful as both a nuisance and a watching or besetting. *Charnock v. Court*, for example, involved a firm of Halifax master joiners that sought to break a strike by transporting replacement workers from Ireland. The union sent two men to the port of Fleetwood fifty miles away to await the Irish steamer and offer to pay the fares of the substitute workers if they went elsewhere to work. Relying on Lyons, the court held that the strikers picketed at the port not to communicate but to "hold out inducements" to the Irish to compel the masters "to conduct their business in accordance with the requirements of the [union] men." Similarly, *Walters v. Green*, a case decided a few months later also dealing with strikebreakers from Ireland, enjoined two union members from picketing a railway station in Hull because they attempted to compel the employers "to conduct their business in accordance with the views of the trade unions." The courts thus identified


94. SHAXBY, supra note 90, at 9; 1906 ROYAL COMMISSION MINUTES OF EVIDENCE, supra note 83, ¶ 3208; see FOX, supra note 35, at 192.

95. SHAXBY, supra note 90, at 38, 42; see PELLING, supra note 15, at 111.

96. See, e.g., TRADES UNION CONGRESS, TWENTY-Ninth ANNUAL REPORT 38 (1896) (expressing concern about civil actions for injunctions after the first Lyons decision); TRADES UNION CONGRESS, THIRTIETH ANNUAL REPORT 35 (1897) (same); see also FRANK BEALEY & HENRY PELLING, LABOUR AND POLITICS, 1900-1906, at 78-79 (1958); WEDDERBURN, supra note 13, at 233.

97. [1899] 2 Ch. 35. The court further found that "attendance" did not imply any lengthy period of time nor have to occur at a place habitually frequented by workmen. *Id.* at 39.

98. *Id.* at 36. Nine of thirteen men accepted the offer. *See* 1906 ROYAL COMMISSION MINUTES OF EVIDENCE, supra note 83, ¶ 116.

99. [1899] 2 Ch. at 38.

100. [1899] 2 Ch. at 696.

101. *Id.* at 702. The attorney for the plaintiffs stated that the action was
unlawful pressure upon employers in even the most peaceful interactions between strikers and their replacements.

While employers profited from the Lyons decisions on private nuisance, government officials exercised their power to prosecute on grounds of public nuisance. A TUC delegate remarked that recent civil decisions on picketing had given "a direct encouragement to all magistrates, policemen, and sheriffs throughout the country." For example, authorities frequently arrested picketers for highway obstruction during a major strike at the North Wales Penryhn quarries between 1900 and 1903. The police employed public nuisance and statutory obstruction more frequently than the CPPA because the evidentiary requirements were less rigorous, the offenses appeared more neutral, and the Highways Act—the statutory equivalent of common law public nuisance—contained a power of arrest. Magistrates invariably upheld police action against strikers brought on the basis of nuisance. Since 1898, an employer observed with satisfaction in 1904, the magistrates had adopted "a more wholesome and satisfactory method" of interpreting picketing law. Another employer agreed that after Lyons everything had "gone on quite smoothly." Indeed, the legal situation of the unions appeared grim in 1906.

founded on Lyons v. Wilkins, and the real injury “here, as there, is the common design to put pressure on the plaintiffs.” Id. at 700.

102. TRADES UNION CONGRESS, TWENTY-NINTH ANNUAL REPORT 38 (1896). Even before Lyons, the police relied on obstruction of the highway to restrain picketing by members of new unions. Evidence before the Royal Commission on Labour indicated that the police often charged unionists in unskilled industries who engaged in picketing activity with obstruction and annoyance. 1894 ROYAL COMMISSION REPORT, supra note 52, ¶¶ 164, 229.

103. See MORGAN, supra note 7, at 150.

104. Highways Act, 1835, 5 & 6 Will. 4, ch. 50, § 79(2); see MORGAN, supra note 7, at 151 (noting that the police failed to enforce the CPPA because they had no powers of arrest under section 7 and because necessary evidence was often unavailable after the fact).

105. WEBB & WEBB, supra note 16, at 597 n.1 (observing that magistrates sustained charges of obstruction of the highway against picketers).

106. 1906 ROYAL COMMISSION MINUTES OF EVIDENCE, supra note 83, ¶ 3208. He was pleased, in particular, that imprisonment with hard labor had become the rule in sentencing. Id.

107. Id. ¶ 3844.
III. The "Dramatic Victory" of 1906: Union Triumphs on Flawed Foundations

Facing a harsh legal environment, trade unions began to attract more sympathy in the early twentieth century as Liberals realized that significant political benefits would flow from the support of organized labor. Liberal politicians began to pay heed to labor complaints that judicial decisions, especially Lyons and Taff Vale, unfairly hamstrung union activity. As the future Liberal Prime Minister H.H. Asquith acknowledged, picketers must necessarily "persuade or solicit those whom they are trying to influence." Similarly, R.B. Haldane, a Liberal lawyer and future Lord Chancellor, complained that Lyons made it almost impossible to conduct a strike lawfully. A striker never imparted information for "any motive except that of persuasion," he declared, and Lyons thus made the

108. Taff Vale Ry. Co. v. Amalgamated Soc'y of Ry. Servants [1901] App. Cas. 426 (H.L.) compounded the unfavorable legal position of picketers under Lyons by making the unions themselves corporately liable for the unlawful acts of picketers. Indeed, Taff Vale itself was an action by a company against a trade union and two of its officials for an injunction to restrain picketing; that is, Lyons provided the substantive rule of liability applied in Taff Vale. Id. at 433. In fact, it was only the issuance of the Lyons decision that encouraged Ammon Beasley, the General Manager of the railway company, to seek an injunction against the picketers in August 1900. See PHILIP S. BAGWELL, THE RAILWAYMEN: THE HISTORY OF THE NATIONAL UNION OF RAILWAYMEN 220 (1963). George Howell observed in 1902 that Taff Vale "is the result of the New Unionism. It is, in fact, retaliation by the employers—a significant protest against the intensely militant spirit of modern trade unionism." HOWELL, supra note 34, at 479. Testimony before the Royal Commission indicated that employers attributed the passivity of the unions in the early twentieth century to Taff Vale. See 1906 ROYAL COMMISSION REPORT, supra note 6, ¶ 39; Klarman, supra note 3, at 1578. However, the case also generated substantial support for a political labor party and poisoned relations between the unions and the courts. See infra note 116.


110. R.B. Haldane, The Labourer and the Law, 82 CONTEMP. REV. 362, 369-70 (1903). Haldane added that, "[s]peaking for myself, I should be very sorry to be called on to tell a Trade Union secretary how he could conduct a strike lawfully. The only safe answer I could give would be that having regard to the diverging opinions of the Judges I did not know." Id. at 368-69. In addition to deploring the political and social biases of the judges, he lamented the lack of clarity in the law. Id. at 371; see 108 PARL. DEB., H.C. (4th ser.) 321 (May 14, 1902) (observing that after the split decision in Lyons, "nobody to this hour knows what is legal with regard to picketing, for there is obscurity as to whether the law allows even peaceful persuasion"); see also id. at 326 (recording Asquith's comment that the law was in "a confused and unsatisfactory state"); id. at 331 (containing Campbell-Bannerman's reference to the "state of
CPPA's protection a "mere trap." Even the official Liberal labor negotiator, R.G. Askwith, conceded that virtually every action trade unions could pursue in the course of a strike had been judicially tested "and not one of them has been held to be such as could be employed in the interests of labour."

With Liberal support, organized labor embarked on a campaign to counter the adverse judicial rulings with remedial legislation. In 1903 A.J. Balfour, the Conservative Prime Minister, bowed to a demand that he appoint a Royal Commission on the status of unions, but he failed to name any labor representatives among its members. His posture hardened unionists in favor of radical reform, including outright reversal of Taff Vale and the restoration of complete immunity for trade unions from damage suits.

confusion in which the law now stands").

111. Haldane, supra note 110, at 369-70.
112. 1906 ROYAL COMMISSION MINUTES OF EVIDENCE, supra note 83, ¶ 161.
113. See Shaxby, supra note 90, at 7. The Parliamentary Committee of the TUC recommended that the Congress focus on picketing in its campaign for new legislation, and a deputation lobbied the Home Secretary in February 1902 to amend the law. Sir Charles Dilke was influential in persuading the Liberals to agree to legislate in Labour's interest; he secured Asquith's support for the calling of a conference that led to a Liberal commitment to reform the CPPA. See ROY JENKINS, VICTORIAN SCANDAL: A BIOGRAPHY OF THE RIGHT HONOURABLE GENTLEMAN SIR CHARLES DILKE 394 (1965); 2 STEPHEN GWYNN, THE LIFE OF THE RT. HON. SIR CHARLES W. DILKE 344 (Gertrude M. Tuckwell ed., 1917). The TUC introduced private members' bills every year between 1902 and 1906. TRADES UNION CONGRESS, THIRTY-NINTH ANNUAL REPORT 56 (1906); see infra note 140.

114. As a result, workers refused to give evidence before the Commission and the Parliamentary Committee of the TUC declined to recognize its report. See TRADES UNION CONGRESS, THIRTY-NINTH ANNUAL REPORT 53 (1906); 1906 ROYAL COMMISSION REPORT, supra note 6, ¶¶ 6-7; see also Clegg et al., supra note 8, at 324-25; Pelling, supra note 15, at 124. The Commission's Report recommended that Parliament declare trade unions to be legal associations, extend the 1875 Act to secondary and sympathetic strikes, protect an individual from liability in tort for doing an act only on the ground that it interfered with a person's trade or employment, enable a union to shield itself against the unauthorized action of its agents, allow trade unions to become incorporated or enter into enforceable agreements and establish that an agreement or combination to do any act in contemplation of a trade dispute should not be the ground of a civil action. 1906 ROYAL COMMISSION REPORT, supra note 6, ¶ 66. With regard to picketing, the Report proposed replacing the watching or besetting provision with the phrase "acts in such a manner as to cause a reasonable apprehension in the mind of any person that violence will be used to him or his wife or family, or damage be done to his property." Id. ¶ 48.

115. See Fox, supra note 35, at 181; Roberts, supra note 92, at 202; Kidner, supra note 88, at 41. Some unions had originally been willing to consider some
In the 1906 Liberal victory, voters elected twenty-nine members of the newly formed Labour Party as well as twenty-five trade unionists, mostly miners, whom they returned as members of the Liberal Party. The change in government, the strong Labour Party presence, and a more favorable climate for labor's claims almost immediately produced two significant benefits for unions: the Court of Appeal took a fresh and more sympathetic look at picketing in *Ward, Lock & Co. v. Operative Printers' Assistants' Society,* and Parliament enacted the Trade Disputes Act of 1906.

A. "Victory" in Court: Ward, Locke & Co.

*Ward* resembled *Lyons* on its facts but, heard by a differently constituted panel in an altered political climate, reached radically different conclusions on both the interpretation of the CPPA and the law of nuisance. In *Ward* the Court of Appeal ruled that section 7 did, after all, require a finding of an "independent illegality" (essentially the commission of a nuisance) to support a charge of watching or besetting. More important, it held that picketing might not satisfy the independent illegality requirement because peaceful persuasion was not necessarily a common law nuisance. Far-reaching in its consequences, the decision was subsequently called "the form of legal responsibility. They rejected this approach not only because of the absence of any labor representatives on the Commission but also because of the settlement of the damages case in *Taff Vale* in January 1903 at an immense cost to the union of £42,000. See Bagwell, *supra* note 108, at 22; Clegg et al., *supra* note 8, at 322-23; Fox, *supra* note 35, at 181.

116. Anti-union legal decisions dramatically increased working-class support for an independent Labour Party. *Lyons* encouraged formation of the Labour Representation Committee in 1900, and the year following *Taff Vale* the number of affiliated unions increased from 65 to 127. Between 1902 and 1904 Labour Representation Committee membership rose from 469,311 to 969,800. R. Page Arnot, *The Miners: A History of the Miners' Federation of Great Britain, 1889-1910,* at 347 (1949); Stevens, *supra* note 8, at 95 n.105 ("It can thus be argued that *Taff Vale* 'made' the British Labour Party."). Stanley Baldwin, the Conservative Prime Minister, often referred to the folly of the decision, once remarking that "[t]he Conservatives can't talk of class-war: they started it." Quoted in Heuston, *supra* note 93, at 76.


118. 22 T.L.R. 327 (C.A. 1906).

119. 6 Edw. 7, ch. 47.
foundation of the modern right to picket.\textsuperscript{120}

An established firm of printers in the neighborhood of Lincoln’s Inn in London had for years refused to employ union workers. In July 1904 a printers’ union stationed picketers outside the company’s Botolph Printing Works to induce employees to join the union and, if the company did not raise wages to the union rate,\textsuperscript{121} to terminate their employment by proper notice. The picketing was more extensive than in Lyons, involving rotating shifts of three picketers each as well as the presence of discharged workers loitering in the neighborhood.\textsuperscript{122} In the company’s action for an injunction, a jury found that the picketers had caused a nuisance and violated the CPPA by watching or besetting the premises. After seven days of oral argument\textsuperscript{123} the Court of Appeal—apparently sensitive to charges of judicial prejudice against unions, the increasing electoral clout of labor and the contemporaneous legislative effort to reform the CPPA—held unanimously that the picketing at issue was entirely lawful under both the Act of 1875 and common law.

On the statutory issue, Lord Justice Vaughan Williams, who had reluctantly concurred in Lyons,\textsuperscript{124} declared that the CPPA did not (contrary to the Lyons ruling) introduce a new criminal offense of watching or besetting. Rather,

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  \item \textsuperscript{120} See G.R. Rubin, \textit{The Strengths and Weaknesses of the Picketing Law}, 4 INDUS. REL. J. 57, 59 (1973). The unions were naturally delighted with the decision, as the Trades Union Congress had supported the Operative Printers’ Assistants in their defense. See TRADES UNION CONGRESS, THIRTY-NINTH ANNUAL REPORT 119 (1906).
  \item \textsuperscript{121} The union rate of wages at the time was 22 shillings and sixpence, and the company was paying 18 or 19 shillings. See Law Report, TIMES (London), Feb. 12, 1906, at 15.
  \item \textsuperscript{122} According to the company, the picketers remained outside the premises in groups of 12 to 18, at times amounting to about 20, throughout the workday and sometimes through the night. See Master of the Rolls, Lord Justice Romer & Lord Justice Coles-Hardy, TIMES (London), Feb. 15, 1906, at 3. The attorney for the union claimed, however, that the picketing occurred only between July 8 and July 14, never attracted the attention of the police and was “carried on in such a way as to be valueless.” Id. In contrast, in Lyons Lord Lindley acknowledged that there were few picketers, [1896] 1 Ch. at 825, and the plaintiffs conceded that the picketers used no violence, intimidation or threats. [1899] 1 Ch. at 256. The picketing in Lyons, however, did extend for months during working hours. Id. at 270.
  \item \textsuperscript{123} See Supreme Court of Judicature, Court of Appeal, TIMES (London), Feb. 24, 1906, at 3.
  \item \textsuperscript{124} See supra note 77.
\end{itemize}
Parliament had included the words “wrongfully and without legal authority” in section 7 to limit the criminal provisions of the statute to cases already tortious. 125 Lord Justice Fletcher-Moulton agreed that the Act “legalizes nothing, and it renders nothing wrongful that was not so before” ; it merely visited certain acts with summary penal consequences. 126 He regarded the legislature as having inserted the word “wrongfully” to allow unions to “compel” in the sense of “persuade” so long as they did not commit a common law nuisance: “The right of the plaintiffs to try to persuade a man to accept [work] and the right of the defendants to try to persuade a man to refuse appear to me to be rights of freedom of individual action equally lawful. . . .” 127

On the common law nuisance issue, all the judges set aside the jury verdict in the plaintiff’s favor, concluding that there was no evidence of nuisance or serious interference with the comfort or ordinary enjoyment of the Botolph Printing Works. 128 According to Lord Fletcher-Moulton, no wrong would have been done “if the defendants had succeeded in persuading every printer’s assistant in the country to join the union and they had rendered it impossible for the plaintiffs to get men to work for them on the terms they desired.” 129 Ward thus held, first, that an independent illegality such as common law nuisance was required for a CPPA violation; and, second, that the exertion of economic pressure, even if successful, did not necessarily constitute such a nuisance. 130

Though Ward did not explicitly overrule Lyons, 131 the

126. Id.
127. Id. at 329-30.
128. Id. at 330.
129. Id.
130. The decision did not deal explicitly with the question whether the immunity extended to peaceful persuasion. It found that the effect of the proviso was to exempt certain acts that might otherwise be watching or besetting from additional penal consequences, leaving them exactly as they were before, whether torts or crimes. Inasmuch as peaceful picketing was in the court’s view neither a watching or besetting, a tort, or a crime, id. at 329, presumably it was not necessary to call the proviso into play.
131. Indeed, Lord Fletcher Moulton went so far as to say that he was following Lord Lindley in “restricting the application of the section to acts in themselves wrongful.” Id. at 329. Of course, he had a wholly different concept
decisions were patently inconsistent. Scarcely distinguishable on their facts, they were radically divergent on the law. Apart from disagreement as to the need for an independent illegality to ground a CPPA offense, the cases were irreconcilable on the common law status of peaceful picketing. The salient factual element in both cases was peaceful persuasion that imposed economic pressure on an employer. Lyons held such picketing to be per se a common law nuisance, whereas Ward held that it might be, and on the facts presented was, entirely lawful. Ward reflected not different facts but a different perspective responsive to the growing political strength of labor and broader changes in public opinion. In its overall approach to picketing, it anticipated the provisions of the Trade Disputes Act then under consideration in Parliament.

While scholars have appreciated and indeed underscored the different perspectives between Lyons and Ward on the status of peaceful picketing, they have overlooked another far more critical point. The decisions were congruent in making nuisance the ultimate determinant of lawful industrial action. In their holdings on both issues—the construction of the CPPA and the status of picketing at common law—Lyons and Ward equally treated common law nuisance as the operative concept in determining the legitimacy of labor picketing. That common premise, obscured by the striking contrasts between the decisions, ultimately proved decisive. Indeed, it provided the key that future courts used to subvert Ward’s ostensibly pro-labor pronouncements and maintain the de facto supremacy of judicially-constructed common law nuisance doctrines.

On the statutory disagreement—whether the CPPA

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132. Some cases later tried to reconcile Lyons and Ward on their facts by suggesting that Lyons involved more substantial interference with enjoyment of property than Ward. See, e.g., Torquay Hotel Co. Ltd. v. Cousins [1969] 2 Ch. 106 (C.A.); Hubbard v. Pitt [1976] 1 Ch. 142 (C.A.). In the same vein, some commentators suggested that Lyons involved pressuring an employer whereas Ward dealt with persuading fellow workers. See, e.g., Benson, supra note 47, at 212. However, the picketing was substantially the same in both instances. Moreover, as the defendants in Ward were persuading the employees to give strike notice, they were clearly interfering with the employer’s conduct of business in the same fashion as the picketers in Lyons. The cases are simply not convincingly distinguishable on their facts.

133. See sources cited infra note 135.
required an independent illegality to ground a section 7 watching or besetting violation—most subsequent cases and commentators found Ward’s affirmative ruling to be both more authoritative and preferable as a policy matter. That dispute, however, could be obviated by Lyons’ alternate holding that peaceful persuasion was per se a common law nuisance. In other words, Lyons’ ruling that picketing of any kind would invariably constitute a nuisance meant that Ward’s requirement of an independent illegality would always be satisfied. Lyons’ broad conception of common law nuisance, then, could undermine picketing even if the more liberal Ward decision were followed on the statutory issue. On this view, the question of the CPPA’s construction ultimately collapsed into the other dispositive question whether Lyons was correct in its view that peaceful picketing was per se a nuisance at common law.

Regarding the common law issue, even Ward contained elements that did not bode well for labor. For one thing, it failed to expressly overrule Lyons, leaving the status of common law picketing unresolved and subject to inconsistent rules. Courts remained free when dealing with non-immunized picketing to apply the rule of either case.

134. For the position that Ward was the better decision, see CHRISTIE, supra note 13, at 19; DAVIES & FREEDLAND, supra note 39, at 852; WEDDERBURN, supra note 13, at 222-25; Bercusson, supra note 87, at 272-76; Coleman, supra note 34, at 615; Finkelstein, supra note 7, at 88-91; Richard Kidner, Picketing and the Criminal Law, 1975 CRIM. L. REV. 256, 264 (1975). Ward was followed in Fowler v. Kibble [1922] 1 Ch. 487, where Lord Sterndale declared, without mentioning Lyons, that “if what is done is not actionable apart from the section it is not made so by reason of it.” See also Elsey v. Smith [1983] I.R.L.R. 292 (Sh. Ct.); Galt v. Philp [1984] I.R.L.R. 156 (H.C.J.); Kenneth Miller, Comment, Galt v. Philp, 1984 INDUS. L.J. 111, 113-14. On the other hand, a number of cases approved Lyons. See, e.g., Thompson-Schwab v. Costaki [1956] 1 W.L.R. 335 (C.A.); Hubbard v. Pitt [1976] 1 Q.B. 142 (C.A.); Mersey Dock & Harbour Co. v. Verrinder [1982] I.R.L.R. 152 (Ch.). This led a commentator to observe in 1984 that it would be unwise to assume that Ward would be followed in the future. See Carty, supra note 39, at 611. Until the 1980s, in any event, there were few prosecutions under section 7, making the debate over its requirements insignificant. See supra note 88. The other area of disagreement with respect to the CPPA, whether peaceful picketing was included in the picketing exemption, was obviated by passage of the Trade Disputes Act shortly thereafter. It expressly added the phrase “peaceful picketing” to the immunity. See infra notes 144-45 and accompanying text.

Lyons’ survival became increasingly relevant in the late twentieth century when the statutory immunity narrowed significantly and growing numbers of picketers were relegated to common law status.

In addition, Ward never elucidated the analytic and factual bases of its ruling on common law nuisance. Although the court found no evidence of nuisance on the given facts, it declined to hold that peaceful persuasion could never be a nuisance. Lord Justice Moulton merely observed that persuasion would be unlawful “if the means employed are wrongful,” and that in the instant case there was “throughout a complete absence of evidence” of anything that would constitute a nuisance. Similarly, Lord Justice Vaughan Williams simply stated that “there is no evidence that the comfort of the plaintiffs or the ordinary enjoyment of the Botolph Printing Works was seriously interfered with.” Although the judges reversed a jury verdict, their opinions provided no specific guidance as to what constituted a nuisance.

The result of these ambiguities was that, if the boundaries of nuisance were coextensive with those of lawful picketing, those boundaries remained exceedingly elusive. This state of affairs derived not only from the unresolved conflict between Lyons and Ward over the status of peaceful picketing per se, but also from the further uncertainty under Ward as to what a court in any given case would consider a nuisance. The indeterminate contours of nuisance offered the twentieth-century judiciary considerable opportunity to adapt and reinterpret nuisance law to erode statutory protections for picketing, a development reinforced by the equally ambiguous nature of the legislative “success” also attained by the unions in 1906.

351-52; Finkelman, supra note 7, at 87-91; Roy Lewis, Picketing, in LABOUR LAW IN BRITAIN 195, 199 (Roy Lewis ed., 1986).


137. Id.

138. Id. at 329.

139. One can only speculate as to the reasons for the lack of specificity. Perhaps it was the desire to minimize conflict with a recent precedent, a belief that nuisance suits required case-by-case adjudication or a reluctance to seek precision while the issue was before Parliament.
B. "Victory" in Parliament: The Trade Disputes Act of 1906

In terms of clarifying the relationship between peaceful picketing and nuisance, Parliament fared no better than the Court of Appeal when it considered the issue later that same year. Responding to the showing of electoral strength by the Labour Party in 1906, the new Liberal government quickly drafted a bill recognizing the unions as legal entities. Initially, it followed the Royal Commission's recommendation and introduced a bill allowing certain suits against a trade union for the torts of its agents. However, Labour Party and union pressure on Parliament's Liberal members, as well as the fact that many Liberals had pledged support to the union position during the election campaign, forced the cabinet to abandon its own bill and endorse instead the TUC's proposed version.  

The resulting Trade Disputes Act of 1906 (TDA) reversed Taff Vale by restoring the total immunity from liability of trade unions as entities. In addition, it protected individuals from "economic torts" (judicially-created civil liabilities for civil conspiracy, intimidation and inducement to break contracts) provided the act complained of was committed "in contemplation or furtherance of a trade dispute." Continuing experience with adverse judicial lawmaking had only reinforced the unions' suspicion of positive legal rights and their preference for settling conflicts through negotiation rather than formal regulation. The 1906 Act reaffirmed the fundamental tenet that industrial conflicts should be resolved by the parties rather than subjected to judicial interference. Its passage was

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140. See Fox, supra note 36, at 183; Pelling, supra note 15, at 125-26; Roberts, supra note 92, at 201-02; Brown, supra note 55, at 126-27. The TUC rejected corporate status for the unions because they desired to "have as little to do with the Law Courts as possible." 1906 Royal Commission Report, supra note 6, ¶ 20. The TUC bill was presented as a private member's bill every year between 1902 and 1905. It was defeated in 1902 and 1903 but passed its second reading by a majority of 39 in 1904 and by a majority of 122 in 1905. See Trades Union Congress, Thirty-Ninth Annual Report 56 (1906); Jenkins, supra note 113, at 396.

141. 6 Edw. 7, ch. 47.

142. Id. § 1; see, e.g., Simpson, supra note 5, at 162-63.

143. The "golden formula" covered sympathetic strikes, secondary disputes, and eventually recognition disputes. See Kahn-Freund, supra note 8, at 241. Again, a strike outside the statutory immunity was not necessarily illegal; its lawfulness then became a question of the general law. Id. at 244.
immediately hailed as a "dramatic victory" for unions.\textsuperscript{144}

In regard to picketing, the TDA gave unionists increased protection from legal liability by replacing the proviso to section 7 of the CPPA with a new section:

It shall be lawful for one or more persons acting on their own behalf or on behalf of a trade union or of an individual employer or firm in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works or carries on business or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working.\textsuperscript{145}

This formulation was narrower than the 1875 Act in one respect: it created an immunity only for actions undertaken during a "trade dispute," leaving the legality of non-industrial picketing wholly to the common law. However, in all other respects the Act was more expansive. In addition to reversing \textit{Lyons} by expressly restoring for industrial

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\item \textsuperscript{144} WEBB \& WEBB, supra note 16, at 608; see ASKWITH, supra note 93, at 95 (claiming that the Act was regarded as a "charter of liberty" by trade unionists); KAHN \textsl{et al.}, supra note 6, at 36 (describing the statute as the "cornerstone of trade dispute law"); MORGAN, supra note 7, at 185 (stating that unions saw the TDA as their "magna carta"); HENRY PELLING, A SHORT HISTORY OF THE LABOUR PARTY 22 (4th ed. 1972) (commenting that the Act was one of the two "Labour successes" of 1906); EWING, supra note 5, at 6 (declaring that the 1906 Act was the basis of the "freedom to strike" in Britain); William E. Forbath, \textit{Courts, Constitutions and Labor Politics in England and America: A Study of the Constitutive Power of Law}, 16 \textit{L. \& SOC. INQUIRY} 1, 31 (1991) (noting that the TDA gave English labor "an extraordinary freedom from legal restraints"); Kidner, supra note 88, at 34 (stating that the Act was a statute of "fundamental importance" often considered "an immutable foundation of principle based on well debated theory"). Lord Halsbury, on the other hand, not surprisingly said of the Act that "anything more outrageously unjust, anything more tyrannical, I can hardly conceive." \textit{Quoted in ROBERTS, supra note 92, at 202.}
\item \textsuperscript{145} 6 Edw. 7, ch. 47, § 2(1). The TDA did not repeal the CPPA except for the proviso, which it replaced with section 2. \textit{Id.} Though the basic principle of immunity for picketers remained unchanged after 1906, there was later a change in language; whereas the Trades Disputes Act stated that it "shall be lawful" to attend, the Industrial Relations Act, 1971, ch. 72, § 134, used the formulation that attendance "shall not of itself constitute an offence." The Trade Union and Labour Relations Act, 1974, ch. 52, § 15, reenacted the "it shall be lawful" language. Although the "it shall be lawful" formulation appears more expansive, arguably providing a "right" to picket, courts have rejected this interpretation, the House of Lords concluding that the choice of language did not involve a change in meaning. See Broome v. D.P.P. [1974] App. Cas. 587, 601 (H.L.).
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picketers the peaceful persuasion exemption that Parliament had intended in 1875, it provided in clear and affirmative language that "attending" for peaceful persuasion "shall be lawful" in both a civil and criminal sense. The new statute thus went beyond the CPPA in immunizing picketing not only against CPPA criminal penalties but also, presumably, against forms of nuisance as well.\(^\text{146}\) As a judge observed in the first reported case to arise under the Act, the effect of this section was "perfectly clear": "It legalized for the first time, by positive enactment, a course of action which might otherwise, if carried out in a certain manner, have amounted to a nuisance at common law... .\(^\text{147}\)

The statute, however, contained the seeds of its own undoing. Although the addition of the phrase "peaceful persuasion" expressly overturned Lyons and thereby immunized private nuisance in the form of economic pressure, the statute failed to define "peaceful picketing" or to clarify what other types of nuisance, if any, would enjoy statutory protection. Further, in creating an immunity for certain unspecified acts of peaceful picketing within a trade dispute, the TDA failed to resolve the Lyons-Ward conflict over whether peaceful picketing outside the immunity—for example, picketing for an unprotected purpose—was necessarily a common law nuisance.\(^\text{148}\) Ostensibly promoting the objective of "abstentionism," the statute in fact left critical matters to judicial elaboration.

Ironically, the Act's failure to delineate legitimate

146. See Citrine, supra note 8, at 445; Hedges & Winterbottom, supra note 69, at 128.

147. Larkin v. Belfast Harbour Commrs [1908] 2 Ir. R. 214, 225 (K.B.); see, e.g., 1906 Royal Commission Report, supra note 6, ¶ 48 (stating that the proposed bill would legalize attendance of any number of persons even though it might constitute a nuisance); M.A. Hickling, Police Interference with Peaceful Picketing, 28 Mod. L. Rev. 707 (1965) (noting that section 2 legalized conduct that might otherwise be a nuisance).

148. It was arguable on the one hand that a statutory immunity for peaceful persuasion in the context of a trade dispute would not have been necessary if picketing were lawful at common law; on the other hand, it was also arguable that express mention of "peaceful persuasion" was required simply to make clear that Lyons did not represent the law, statutory or otherwise. Most subsequent commentators treated the issue as simply unresolved. See sources cited supra note 135. The TDA also did not resolve the problem addressed in Lyons and Ward whether the CPPA, which remained in force, should be interpreted to require an independent illegality to ground a section 7 offense. See supra note 134.
methods of picketing or to clarify the impact of the statute
on nuisance law was regarded at the time as a victory for
unions. The government bill had originally provided that
picketers could attend "peaceably and in a reasonable
manner" rather than "for the purpose of peacefully
persuading." Labour members, however, rejected this
formulation because they distrusted judicial interpretation
of the phrase "reasonable manner." One Labour member
explained that "in the Courts of law they would have in the
interpretation of this Act to face a body of men . . . whose
sympathies on all these points were not with them."148 Even
the Liberal Home Secretary conceded that there might be
"decisions as to what was 'reasonable' as various as the
tribunals invoked."150 The Labour Party preferred a clause
based on "purpose," that is, one that would immunize any
method of attendance so long as the purpose was peaceful
persuasion or communication. Under pressure from the
Labour Party and the TUC, the government reversed itself
and adopted the unions' "purpose" approach.151

The rejection of any consideration of the "manner" of
picketing meant, however, that Parliament declined to
commit itself to defining what types of nuisances the
statute immunized. Ambiguities surrounding this question

149. 164 PARL. DEB., H.C. (4th ser.) 891-92 (Nov. 9, 1906) (Mr. David
Shackleton); see 162 PARL. DEB., H.C. (4th ser.) 197 (July 27, 1906) (stating that
they "had had experience to show that any loophole of the kind provided by the
words 'peaceable and reasonable manner' was used to make picketing
impossible altogether") (Mr. Keir Hardie); 163 PARL. DEB., H.C. (4th ser.) 1436-
37 (Nov. 1, 1906) ("For the purpose of defining 'reasonably' there was no test of
the word except the opinion of the Judge or the jury
... one Judge might find a
certain set of facts reasonable to-day, and another Judge might find the same
set of facts unreasonable to-morrow.") (Mr. Rutus Isaacs); id. at 1473 ("use of
the words 'in a reasonable manner' was a trap") (Mr. L. Atherley-Jones); 164
PARL. DEB., H.C. (4th ser.) 893 (Nov. 9, 1906).

150. 163 PARL. DEB., H.C. (4th ser.) 1420 (Nov. 1, 1906). Similarly, Sir
William Robson, the Solicitor General, acknowledged that trade unionists were
not likely to receive fair consideration from the courts, noting that if persons
thought trade unions to be "cruel and evil organizations" their minds would be
15, 1906); see 205 PARL. DEB., H.C. (5th ser.) 1556-57 (May 3, 1927) (stating that
"legal people had their prejudices against trade unions and could not
prevent their judgments being coloured by those prejudices") (Sir William
Robson); 167 PARL. DEB., H.L. (4th ser.) 286 (Dec. 12, 1906) (declaring that the
Commons struck out "in a reasonable manner" because "it would open the door
for very wide construction by different tribunals as to what was a reasonable
manner") (Lord Coleridge).

151. Kidner, supra note 88, at 49.
were exacerbated by strategically motivated and obviously misleading statements on the floor of the House, illustrating the unreliability of rhetorical debate as a true measure of legislative intent. The Labour Party obviously supported a "purpose" approach because it would offer greater latitude for picketers than would a "reasonable manner" test. During the debate, however, many Labour members attempted to assuage their opponents by reassuring them that the clause barely affected existing law. They insisted that the bill was merely remedial, abrogating Lyons and restoring the exemption for peaceful persuasion intended in 1875 but not providing any broader immunity against nuisance. For example, David Shackleton, who had repeatedly introduced the TUC version as a private member's bill prior to 1906, proclaimed that Labour's objective was merely to sweep the legal decisions aside and institute a "re-statement of the law as they understood it to be and as everybody else understood it to be up to six years ago."

Conversely, the Tories, who shortly after the Act's passage would press for its narrow construction, warned during the debates that an exemption based on "purpose" would legitimate a multitude of nuisances. They suggested that in addition to authorizing the private nuisance of economic pressure, it would immunize from legal action such public nuisances as obstructing the highway through "mass" picketers. A "reasonable manner" test would imply a "reasonable number," a Conservative member from Lambeth insisted, but a test based on purpose would make it impossible to prevent ten thousand or even two million people from "attending" in front of a man's house. Indeed,

152. See, e.g., 155 PARL. DEB., H.C. (4th ser.) 49 (May 30, 1906) (stating that a hundred men picketing one "would be a nuisance and could be dealt with by the common law. It was not proposed to abrogate the common law but to remove the limitation imposed on picketing by the law courts.") (Mr. Keir Hardie); id. at 1504 (May 25, 1906) (claiming they "were not asking for any privilege in regard to the common law") (Mr. David Shackleton); 163 PARL. DEB., H.C. (4th ser.) 1430 (Nov. 1, 1906) (insisting that Labour did not desire to remove common law penalties on picketers who committed an annoyance) (Mr. Richard Bell); id. at 1472 (stating that the bill did not legalize anything now unlawful); id. at 1478 (declaring the purpose of Act was to reverse Lyons) (Mr. Clement Edwards).

153. 155 PARL. DEB., H.C. (4th ser.) 1498 (Apr. 25, 1906) (Mr. Stewart Bowles); 162 PARL. DEB., H.C. (4th ser.) 188 (July 27, 1906) (declaring that it was "monstrous" for the bill to give power to any number of persons to attend and that a considerable number of persons attending would be an annoyance)
one peer conjured up the fearful prospect that the phrase would allow a gathering of a thousand people to assemble outside a house “to persuade a footman to leave his employment.” The secretary to the Employers’ Parliamentary Council, in testimony before the Royal Commission on Trade Disputes, put the argument dramatically and succinctly. If Parliament accepted the bill, he declared, “the common law of nuisance in any case of picketing would be abrogated.”

The Liberal government for its part attempted to appease all parties and ended up taking inconsistent positions on the issue of the legislation’s effect on existing law. On some occasions it soothed Tory concerns, countering the argument that the bill accorded labor “exceptional privileges” by asserting that, on the contrary, it only restored rights that the judges had snatched away. For example, Sir Henry Campbell-Bannerman, the Prime Minister, contended that it was unfair “to taunt the unions who have been deprived of their legal rights by this action of the Judges with seeking a privilege when they come to this House in search of a remedy.” Similarly, the Solicitor General announced that the bill did not confer any exceptional immunity on trade unions but only removed “exceptional disabilities” contrary to the general spirit of the law. According to Lord Loreburn, the Lord Chancellor,

(Viscount Turner).

154. 167 PARL. DEB., H.C. (4th ser.) 278 (Dec. 12, 1906). According to Lord Russell, the phrase “it shall be lawful” would authorize industrial picketers to do what others could not do, namely, commit the public nuisance of street obstruction. He noted that the authorities had dealt very severely with a small gathering of suffragettes outside Mr. Asquith’s house. Id.; see 163 PARL. DEB., H.C. (4th ser.) 1495-96 (Nov. 2, 1906) (claiming that the TDA legalized what the suffragettes were doing, which was a common law nuisance) (Mr. John Rawlinson). The Conservative Unionist Sir Edward Carson similarly complained that by focusing on the purpose of the picketing rather than its manner, the clause legalized both public and private nuisances. 163 PARL. DEB., H.C. (4th ser.) 1425 (Nov. 1, 1906); id. at 1428-29 (stating that a “great nuisance” was not forbidden by this clause) (Mr. A.J. Balfour); id. at 1498 (observing that if the clause was passed they could not in future deal with common law nuisances) (Mr. A.J. Balfour); id. at 1470 (noting that “under cover of this clause it would be lawful for a large number of people to come outside the house of any man”) (Lord Cecil).

155. 1906 ROYAL COMMISSION MINUTES OF EVIDENCE, supra note 83, ¶ 3208.


157. Id. at 1483; see, e.g., 108 PARL. DEB., H.C. (4th ser.) 309-10 (1902) (pointing out that trade unions were only asking for the restoration of what
the purpose of the bill "is to place the law in the position in which every Englishman thought it was from the Norman Conquest onward."\(^{158}\)

It was difficult, however, for the government to argue that the clause did not immunize a broad range of nuisances because it had originally supported the phrase "reasonable manner" in its own bill precisely on the ground that such wording was both necessary and sufficient to prevent the authorization of nuisances such as mass picketing. Early in the debates, Attorney General Sir John Walton defused attempts to amend the Liberal bill to limit expressly the number of permissible picketers by assuring members that "reasonable manner" implied "reasonable number."\(^{159}\) The government’s turnabout in scrapping its carefully defended "reasonableness" clause and adopting the TUC’s "purpose" language placed him in an untenable position. Indeed, his opponents charged him with "absolute misrepresentation."\(^{160}\) Nonetheless, Walton subsequently assured members that the bill was "as stringent in its present form as it was in the form in which the Government originally proposed it."\(^{161}\) If an excessive number of people

\[^{158}\] See 162 Parl. Deb., H.C. (4th ser.) 196 (Aug. 3, 1906). A member moved that it should be lawful for persons "not exceeding three" to attend peaceably and in a reasonable manner. 162 Parl. Deb., H.C. (4th ser.) 183 (July 27, 1906) (Mr. Stewart Bowles). The Attorney General responded that he did not want to put a fixed limit on the number of picketers because it would depend on the circumstances; he was not opposed to the phrase "reasonable number," but he thought that the words "reasonable manner" governed the question of numbers. Id. at 196; see Trades Union Congress, Thirty-Ninth Annual Report 57-58 (1906).

\[^{159}\] See 162 Parl. Deb., H.C. (4th ser.) 1608 (Aug. 3, 1906). A member moved that it should be lawful for persons "not exceeding three" to attend peaceably and in a reasonable manner. 162 Parl. Deb., H.C. (4th ser.) 183 (July 27, 1906) (Mr. Stewart Bowles). The Attorney General responded that he did not want to put a fixed limit on the number of picketers because it would depend on the circumstances; he was not opposed to the phrase "reasonable number," but he thought that the words "reasonable manner" governed the question of numbers. Id. at 196; see Trades Union Congress, Thirty-Ninth Annual Report 57-58 (1906).

\[^{160}\] 160. 164 Parl. Deb., H.C. (4th ser.) 883 (Nov. 9, 1906); see 163 Parl. Deb., H.C. (4th ser.) 1418, 1422-24, 1460 (Nov. 1, 1906) (complaining that the Attorney General had refused amendments because words were in the bill, "yet he was now prepared to abandon the position by which he prevented Amendments being moved") (Mr. Clavell Salter, Sir E. Carson & Sir Frederick Banbury).

\[^{161}\] 161. 164 Parl. Deb., H.C. (4th ser.) 914 (Nov. 9, 1906); see 163 Parl. Deb., H.C. (4th ser.) 1433, 1500 (Nov. 2, 1906) (describing the new test as "more effectual" and a "better guarantee for individual liberty and public order") (Attorney General Walton). G.R. Askwith, the Liberal conciliator, testified to
embarked on the mission of persuasion, he declared, it could be inferred that the object was not "peaceful persuasion" but rather intimidation or coercion.\footnote{162}

In contrast, on other occasions the government conciliated Labour and insisted that the bill indeed protected picketers against charges of nuisance. Sir Charles Dilke, one of the most prescient members of Parliament and a major supporter of the Trade Disputes Bill, moved the addition of a clause stating that attendance for the purpose of picketing should not constitute either a private or public nuisance.\footnote{163} The amendment ultimately failed by a narrow margin,\footnote{164} but only because the Attorney General insisted during the debate that, though picketing was a common law nuisance, the bill "put picketing upon an entirely new footing."\footnote{165} It contained not a mere proviso but "a distinct declaration" that certain actions—unfortunately unspecified—were invulnerable to nuisance law.\footnote{166}

the Royal Commission in 1904 that legalizing peaceful persuasion would not prevent persons from suing in nuisance. 1906 ROYAL COMMISSION MINUTES OF EVIDENCE, supra note 83, \textit{\textsuperscript{190}} 120, 122.

\footnote{162} 162 PARL. DEB., H.C. (4th ser.) 1421 (Nov. 1, 1906). Mr. Atherley-Jones similarly stated that the section merely reiterated the law in \textit{Lyons} and that men who committed a nuisance could be "rigidly dealt with." \textit{Id.} at 1429-30; see \textit{id.} at 1436 (insisting that picketers who obstructed the street were not attending merely for the purpose of peacefully persuading or communicating) (Mr. Rufus Isaacs).

\footnote{163} 163 PARL. DEB., H.C. (4th ser.) 1655 (Aug. 3, 1906). Dilke claimed that the amendment was necessary because Mr. Askwith, testifying before the Royal Commission, had indicated that picketing might be a public or private nuisance. \textit{Id.} at 1655-56. Similarly, referring to court decisions, David Shackleton stated that the "whole danger of the situation" was that without the amendment certain powers conferred by the clause "could be knocked out by a charge of nuisance." \textit{Id.} at 1657. Mr. Atherley-Jones agreed that without the amendment the "clause was perfectly illusory and afforded no protection in respect of nuisance." \textit{Id.} at 1658.

\footnote{164} The amendment failed by only five votes, 127 to 122. See 162 PARL. DEB., H.C. (4th ser.) 1660 (Aug. 3, 1906); TRADES UNION CONGRESS, THIRTY-NINTH ANNUAL REPORT 59 (1906). Keir Hardie claimed that the Chief Government Whip sought to induce members to vote against the amendment by threatening to thwart progress on the bill and by insisting that anyone who voted for the bill was "playing this fellow's [Hardie's] game." 162 PARL DEB., H.C. (4th ser.) 1661 (Aug. 3, 1906); see Kidner, \textit{supra} note 88, at 50 (suggesting that at a meeting on October 24, 1906, Labour members decided to support the amendment in order not to wreck the bill).

\footnote{165} 165. 162 PARL. DEB., H.C. (4th ser.) 1657 (Aug. 3, 1906); see GWYNN, \textit{supra} note 113, at 367.

\footnote{166} 166. 162 PARL. DEB., H.C. (4th ser.) 1657 (Aug. 3, 1906); see GWYNN, \textit{supra} note 113, at 367; TRADES UNION CONGRESS, \textit{supra} note 164. The Attorney
With the government equivocating on the statute's impact on nuisance and Conservative and Labour members further muddying the waters for political reasons, Parliament ultimately left the precise meaning of section 2 to judicial resolution. Although the addition of "peaceful persuasion" obviously immunized union picketing against a Lyons claim of private nuisance, it was unclear whether it also insulated picketers against such nuisances as creating noise, blocking access, or obstructing the highway. For A.J. Balfour, the leader of the Conservative Party, the question of nuisance "was a difficult point, because lawyers were not always clear or agreed upon it, and when the experts were both obscure and contradictory the unfortunate layman was placed in a very embarrassing position."

In later decades, courts restrained picketing by capitalizing on the vagueness of both Ward and the TDA, neither of which had resolved the critical question of the relationship between the labor statutes and nuisance law. Regrettably for unions and their allies, both "dramatic victories" of 1906 rested on flawed foundations.

IV. "VICTORY" UNDONE: JUDICIAL EXPLOITATION OF NUISANCE, 1906-1980

Between 1906 and 1980 the judiciary, continuing to embody a nineteenth-century individualist ethic unsym-
pathetic to unions, expanded the range of picketing that constituted a nuisance and correspondingly contracted the TDA immunity to exclude the behavior so defined. It accomplished this result by exploiting the flexibility in nuisance law as well as the open texture of the TDA. Hardly coincidentally, the widening scope of nuisance and reinterpretation of the 1906 Act exactly paralleled the evolution of new picketing stratagems.

169. The continuing bias against labor was noted in a famous speech by Winston Churchill as Home Secretary in 1911, when he told the House of Commons:

[W]here class issues are involved, it is impossible to pretend that the courts command the same degree of general confidence. On the contrary, they do not, and a very large number of our population have been led to the opinion that they are, unconsciously no doubt, biased . . . . It is not good for trade unions that they should be brought into contact with the courts, and it is not good for the courts.

26 PARL. DEB., H.C. (5th ser.) 1021-22 (May 30, 1911). Similarly, Lord Scrutton, speaking before the University Law Society in 1920, acknowledged the partiality of the courts in issues regarding labor: "I am not speaking of conscious impartiality; but the habits you are trained in, the people with whom you mix, lead to your having a certain class of ideas. . . . It is very difficult sometimes to be sure that you have put yourself into a thoroughly impartial position between two disputants, one of your own class and one not of your class." The Work of the Commercial Courts, 1923 CAMBRIDGE L.J. 6, 8 (1923); see, e.g., H.J. Laski, Actors in the Drama, in THE MARTYRS OF TOLPUDDLE 148-50 (W.M. Citrine ed., 1934) (referring to "the persistent inability of English judges to understand the very nature of Trade Unionism" and the fact that "any judge who does not take the greatest care to guard himself against bias may easily find himself interpreting the issues of a labour case upon assumptions which condemn Trade Unionists before the issue is heard"). Though judicial antagonism muted between the mid-1920s and mid-1960s, when unions were weak or war was in progress, it reasserted itself after 1965 when organized labor again posed a serious threat to the social order. See Wedderburn, supra note 5, at 238, 241 (referring to the "refusal or inability (or both) of the judges to bow the knee of the common law to a balance of power that offends its philosophy"); Wedderburn, supra note 12, at 78 (noting that the eras of judicial creativity against the unions were coterminous with periods when the middle classes perceived unions as a threat to the social order, especially in the 1960s and between 1976 and 1979); Lord Wedderburn, The New Politics of Labour Law, in TRADE UNIONS 497, 511-12 (W.E.J. McCarthy ed., 2d ed. 1985) (commenting that "many of today's judicial hearts still beat in rhythm with the 1891 declaration of Lord Bramwell"). Though the House of Lords reversed a series of extreme anti-union opinions issued by the Court of Appeal in 1979-1980, the Law Lords nonetheless viewed the immunities as "repugnant" and "unpalatable" and invited the government to propose appropriate legislation. Id. at 512.
A. Nuisance Law and Picketing from the Trade Disputes Act to the General Strike of 1926

1. Legal Doctrine: Contracting the Immunity. After 1906 the courts reverted to the restrictive judicial approach of the 1890s, soon targeting the seemingly broader immunity of the TDA. Inasmuch as the new Act reversed Lyons and conferred immunity on strikers who inflicted "economic pressure" during a trade dispute, the picketing cases now generally involved charges of public nuisance by obstructing the highway. Any stationary activity in the street was indisputably a nuisance, and the operative question was therefore only whether the act of obstruction fell within the statutory immunity. Given the ambiguity surrounding the scope of the statute in relation to nuisance, judges were able to interpret "attending for the purpose of communication or peaceful persuasion" to strip unionists of any meaningful protection. In the guise of an analysis based on "purpose," courts circuitously reintroduced the notion of "reasonable manner" that Parliament had explicitly rejected in 1906. If strikers used "unreasonable" means—for example, gathering in numbers considered excessively large to accomplish a permitted purpose—courts inferred that the picketers' purpose must be coercion or intimidation rather than peaceful persuasion. Moreover, though Parliament had specifically eschewed a numerical limitation on picketers, constables and judges increasingly adopted a highly restrictive quantitative definition of "reasonable" picketing.

In addition to resurrecting the concept of "reasonable manner" as a test of "legitimate purpose," courts further restricted the immunity by narrowly construing the right to "attend" for permissible objectives. Larkin v. Belfast Harbour Commissioners, for example, held that "attendance" included neither trespassing on private company property nor violating local property regulations directed against nuisances. Jim Larkin, an Irish labor leader, addressed a strike meeting on the quayside during the Belfast dock

170. See Vorspan, supra note 41, at 976. The authorities frequently employed nuisance in this period to curtail the activities of groups such as the suffragettes. Id. at 982-90.
171. See supra note 159 and accompanying text.
172. See infra note 184.
173. [1908] 2 Ir. R. 214 (K.B.).
strike of 1907. Although he was in fact exhorting a crowd of one hundred and fifty men to return to work, the justices convicted him of violating a harbor bylaw banning unauthorized meetings and nuisances.\textsuperscript{174} Relying on the 1906 Act, Larkin urged that attendance “at” a house or place included the word “in.” In other words, he claimed that the Act conferred a power to enter private premises to effectuate the statutory purpose of peaceful persuasion. Pressed in oral argument, Larkin’s attorney conceded that such a statutory construction would permit picketing not only in an open area such as the dock but also in an enclosed yard or workshop. Mr. Justice Wright thought that contention so absurd as to be “incapable of argument.”\textsuperscript{175} His colleagues agreed that the peaceful picketing exemption might immunize some nuisances but did not permit the violation of local bylaws or picketing on company property.\textsuperscript{176} Larkin was the first of many cases where courts construed the TDA’s statutory authorization to permit only bare “attendance,” defined narrowly as an exceedingly limited physical presence rather than as encompassing reasonable efforts to persuade. Whereas Larkin employed such an analysis to remove trespass from the immunity, later cases would use it to exclude nuisance as well.

\textbf{2. Official Action: Common Law Nuisance Prosecutions.} In the two decades following the TDA's passage, authorities were minimally hampered by the immunity and frequently resorted to public nuisance or Highways Act prosecutions to control “mass picketing.” This labor tactic was especially ubiquitous in the volatile years preceding World War I,\textsuperscript{177}

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\textsuperscript{174} The bylaw, promulgated in 1881 pursuant to the Harbours, Docks, and Piers Clauses Act 1847, stated: “No person shall, without permission in writing from the secretary, preach, read aloud, lecture, address any crowd or assembly of persons, sing, or perform on any musical instrument, nor shall any person commit any nuisance . . . .” \textit{Id.} at 215.

\textsuperscript{175} \textit{Id.} at 228. He further conceded in oral argument that taking his position to its logical conclusion, an employer could “attend” in the home of his workmen or at union meetings. \textit{Id.} at 230-31.

\textsuperscript{176} \textit{Id.} at 221, 226, 232; see \textit{McCusker v. Smith [1918] 2 Ir. R. 432 (K.B.)} (finding it unlawful for a picket to enter the hall of a pub to persuade customers not to patronize it). The \textit{Larkin} court did not specify what types of nuisance would be immunized by the statute.

\textsuperscript{177} The Prime Minister stated in 1927 that in the past twenty years there had been a movement “from constitutional action to direct action” and that individual picketing had “at times given place to mass picketing.” \textit{205 Parl.}}
when escalating tension between workers and employers and an upsurge of rank and file activism fueled a major wave of strikes. The government played an increasingly interventionist role, using the doctrine of highway obstruction as an effective prosecutorial instrument for dispersing or limiting picketers. For example, when the military was sent to preserve order in the South Wales coal mines in 1910, General Nevil Macready warned the local strike committee either to limit the picketers at mine entrances or risk having them "moved on" for causing an obstruction. Many strikers, he noted, were surprised to learn that it was illegal to congregate on the highway. Similarly, during the general unrest of 1911, the Home Office issued a circular to local police chiefs essentially dismissing Parliament's decision in 1906 to reject a "reasonable manner" test. Relying on an opinion of the law officers, the government directive maintained that when the number of picketers was "disproportionate in size to what is needed for lawful purposes," union members forfeited their statutory protection. During the dock strike that same year, the Home Office again advised the police to circumvent the TDA by finding picketers so numerous as to cause an obstruction. When national miners' and dockers' strikes again posed major public order problems for authorities in 1912, the Home Secretary directed constables to make "full use of the law on street obstruction." In this period police adopted for the first time the numerical standard of six to distinguish protected from unprotected

DEB., H.C. (5th ser.) 1655 (May 4, 1927).


179. See 1 NEVIL MACREADY, ANNALS OF AN ACTIVE LIFE 147-48 (1925).

180. See MORGAN, supra note 7, at 158.

181. Id. at 168, 181.

182. See BARBARA WEINBERGER, KEEPING THE PEACE?: POLICING STRIKES IN BRITAIN, 1906-1926, at 105 (1991). The police also defended their action against picketers during the seamen's strike in Cardiff in 1911 by claiming that large crowds caused obstruction outside the shipping office. Id. at 81.

183. Quoted in MORGAN, supra note 7, at 175. He reminded the police that picketers were not allowed to congregate in unlimited numbers and should not obstruct the highway. Id.
picketing and regularly arrested larger groups of picketers on obstruction charges.\textsuperscript{184}

The use of nuisance offered the government many advantages. A generic doctrine not formally related to labor law and lacking the public order implications of more serious crimes, it allowed authorities to characterize strike action “neutrally” as a simple street offense. Further, obstruction had minimal requirements—proof of the presence of a few stationary picketers in the street was sufficient—and thus avoided evidentiary problems raised by charges under the CPPA. In 1911 the Home Office specifically instructed the Metropolitan Police to use the common law on obstruction rather than the 1875 Act because it was less cumbersome to apply.\textsuperscript{185} Finally, nuisance allowed the government and police to claim that rather than inhibiting workers, they were simply vindicating an important right of public passage.\textsuperscript{186} Although industrial picketers were better situated than political picketers in this period—suffragettes were not permitted to obstruct the highway even as individuals\textsuperscript{187}—the numerical restriction to six or fewer operated as a significant constraint on picketing operations.

World War I temporarily dammed the torrent of strikes,\textsuperscript{188} but industrial conflict quickly reasserted itself

\textsuperscript{184} See Roger Geary, Policing Industrial Disputes: 1893-1985, at 39 (1985); Macready, supra note 179, at 147-48; Morgan, supra note 7, at 179; Trades Union Congress, Forty-Sixth Annual Report 238 (1913); Weinberger, supra note 182, at 60; see also, e.g., 12 Parl. Deb., H.C. (5th ser.) 1435-36 (Nov. 1, 1909) (stating that a large group of union picketers were marched to the police station and fined for obstruction); id. at 1809 (Nov. 3, 1909) (noting that additional picketers in the same dispute were charged with obstruction).

\textsuperscript{185} See Weinberger, supra note 182, at 113; see also Morgan, supra note 7, at 179, 185-86, 196-98 (observing that in the period 1910-1912 the Home Office turned its back on the 1875 and 1906 labor laws).

\textsuperscript{186} See Vorspan, supra note 41, at 988-89.

\textsuperscript{187} See id. at 982-88.

\textsuperscript{188} See Weinberger, supra note 182, at 105.

\textsuperscript{189} During the war itself, the first year saw an industrial truce but in 1915 industrial unrest reappeared. The Munitions Act in July of that year introduced a new governmental policy of compulsory arbitration, and in 1916 Parliament created a Ministry of Labour that appealed to the trade unions to renounce strikes for the duration of the war. Although strikes continued, most were of short duration and the government made little use of its power to prosecute even munitions workers for their participation. See M.B. Hammond, British Labor Conditions and Legislation During the War 230-37 (1919).
After the peace. A succession of strikes in 1919-1920, a national mining lockout in the spring of 1921, and sporadic disputes in the engineering, shipbuilding, docks, and coal mining industries from 1922 to 1926 generated substantial social unease. This widespread unrest culminated in the extensive but ultimately ineffectual nine-day General Strike of May 1926. All the strikes in the 1920s involved significant amounts of picketing, and authorities continued to treat massive groups of picketers as outside the scope of the TDA immunity. For example, the Home Secretary, observing that unemployed men assembled in large numbers near dock entrances during the General Strike, declared that the presence of a large body of men was inconsistent with peaceful persuasion. "There is a very clear distinction to be made," he announced, "and it is made in law between peaceful persuasion, an individual act, and mass intimidation, which is quite a different thing." Similarly, the Solicitor General maintained that "when a very great number of people are brought together, far greater than is necessary to persuade individual workmen," such conduct was not "peaceful picketing at all." Based on this premise, authorities made effective use of the law on "large-scale obstruction" throughout the General Strike.

The twenty years following the TDA thus saw courts and the government institute techniques for dealing with the statute that would dominate official responses to labor

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190. See Morgan, supra note 7, at 188, 197; Margaret Morris, The General Strike 52-53, 64-69, 308-11 (1976); Weinberger, supra note 182, at 6.
191. 196 Parl. Deb., H.C. (5th ser.) 820 (June 2, 1926). The Home Secretary even took the position that the TDA did not immunize against any obstruction at all. As he announced to the House of Commons, under the Act of 1906 there was "no right at all to hold meetings upon or otherwise to obstruct the highway." Id. at 819.
193. Morgan, supra note 7, at 201-02; see Morris, supra note 190, at 52, 65, 69; A.L. Goodhart, The Legality of the General Strike in England, 36 Yale L.J. 464 (1926). George Lansbury claimed that in the last days of the General Strike the police stopped picketing of all sorts, including a man in Glasgow who was imprisoned for doing nothing more than holding up his hand to a tramway driver. 196 Parl. Deb., H.C. (5th ser.) 801 (June 2, 1926). He also contended that many workmen were put into prison "on the score that they interfered with someone and prevented the due transport of goods from one place to another." Id. Accordingly, during the strike the General Council of the TUC asked picketers "especially to avoid obstruction and to confine themselves strictly to their legitimate duties." Quoted in Tony Cliff & Donny Gluckstein, Marxism's Trade Union Struggle: The General Strike of 1926, at 201 (1986).
picketing in periods of industrial strife. Judges limited the immunity by interpreting "attending for the purpose of persuasion" to exclude mass picketing, trespass on company premises, and infringement of local regulations. With regard to enforcement, the focus shifted from private employer suits based on Lyons—conduct now immunized by the TDA—to criminal prosecutions for public nuisance by highway obstruction. The police, enjoying substantial discretionary powers, applied a simple numerical standard limiting picketers to six or fewer persons. Basic patterns of doctrinal interpretation and official enforcement had now been established.

B. Strengthening Judicial Autonomy in a Period of Quiescence, 1926-1965

Almost four decades of relative quiescence in labor relations followed the General Strike. During the depression trade unions ceased to regard the strike as a primary weapon and picketing became exceedingly infrequent.¹⁹⁴ Although the Conservative government enacted rigorous controls over picketing in the Trade Disputes Act of 1927,¹⁹⁵ enforcement of its picketing provisions was rare.¹⁹⁶ The

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¹⁹⁴. See, e.g., CITRINE, supra note 8, at 25; DAVIES & FREEDLAND, supra note 39, at 844; GEARY, supra note 184, at 48; KAHN-FREUND, supra note 8, at 262; Bellace, supra note 3, at 133.

¹⁹⁵. The Trade Disputes and Trade Unions Act of 1927, 17 & 18 Geo. 5, ch. 22, declared picketing calculated to intimidate any person in the place picketed to be a criminal "watching or besetting." In itself this did not change the existing law, but the act defined "intimidation" broadly as conduct likely to cause a reasonable apprehension of injury, including "injury to a person in respect of his business, occupation, employment or other source of income." The law was further confused by a provision stating that it was a criminal offense to watch or beset a person's residence for the purpose of persuading any person to work or abstain from working. The wording suggested that notwithstanding the immunity, the exercise of peaceful picketing near any residence was unlawful. Id. § 3(4). The Act was repealed by the Labour Government shortly after the war. Trade Disputes and Trade Unions Act, 1946, 9 & 10 Geo. 6, ch. 52.

¹⁹⁶. See, e.g., DAVIES & FREEDLAND, supra note 39, at 844 (noting that after 1926 there was a period of quiescence in labor relations); CYRIL GRUNFELD, MODERN TRADE UNION LAW 442-43 (1966) (commenting that the lack of picketing prosecutions in the sixty years after 1906 was due to the restraint of trade unions and sensible enforcement by the police); M.A. Hickling, The Judicial Committee and Trade Disputes, 24 MOD. L. REV. 375, 376 & n.2 (1961) (remarking that the "absence of picketing cases from the law reports is a remarkable tribute to the tolerance shown in England").
Second World War further muted industrial conflict, and beginning in 1951 a protracted period of economic prosperity fostered a generally cooperative relationship between employers and trade unions.

Nonetheless, there were still occasional police prosecutions and private actions against picketers for obstruction of the highway.¹⁹⁷ In addition, in 1937 the Supreme Court of Ireland announced a major new doctrinal principle. *Ferguson v. O'Gorman*¹⁹⁸ established that judicial analyses of the TDA immunity and common law nuisance would proceed on independent tracks. That is, parliamentary intent in providing an immunity for peaceful persuasion and the social policy embodied in the TDA were irrelevant to determining what constituted a "reasonable use" of the streets at common law.

*Ferguson* was the first reported case since *Lyons* where an employer sued in private nuisance. Inasmuch as the company based its nuisance claim on blocked access to its premises rather than economic pressure, the case illustrated the refocusing of nuisance lawsuits against unionists on notions of physical rather than commercial obstruction following the TDA's reversal of *Lyons*. It also revealed a successful attempt by picketers to manipulate an exemption for processions in common law obstruction doctrine through the tactical device of parading back and forth along the street.

The 1880s had consolidated a distinction between stationary assemblies, which the courts treated as

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¹⁹⁷. For example, *Agnes v. Ryan* [1938] Ir. R. 512, was a suit brought by the proprietor of a retail dairy in Dublin against picketers from the Irish Union of Distributive Workers who paraded on the public highway in front of the public entrance and informed potential customers that the creamery refused to employ union labor. The proprietor sued in private nuisance for interference with her employees and for causing injury to her business. She claimed that the immunity was inapplicable because the employees had voluntarily rejected joining a union and there was therefore no "trade dispute" within the meaning of the act. The court agreed, also finding the conduct of the defendants to be a wrongful nuisance. "Nothing could have been more damaging than the picketing of premises in a congested thoroughfare like Henry Street . . . ." Id. at 524; see, e.g., Brendan Dunne Ltd. v. Fitzpatrick [1958] Ir. R. 29 (applying a "reasonable method" test and finding that large numbers of picketers exceeded the immunity); *Wedderburn*, supra note 13, at 225 (describing how picketers during the Savoy Hotel strike of 1947 were convicted of obstructing the passage of vehicles by lying down in the highway).

¹⁹⁸. [1937] Ir. R. 620.
nuisances per se, and moving demonstrations, which they regarded as legitimate exercises of the “right to passage.” Subsequently, picketers exploited the favored status of processions by moving in a circle and asserting a “right to pass” along the highway. By the 1920s, in fact, many unionists believed that movement was essential to a protected picketing campaign. As one striker declared, “you had to be mobile pickets, you were only allowed one stationary picket.”

In Ferguson the Irish Union of Distributive Workers and Clerks mobilized four to six picketers to parade two abreast along twenty feet of road during a strike against a hairdressing establishment in Cork. The company responded by initiating a suit against the unionists in trespass and nuisance. Its trespass claim was that the picketers were not using the highway, which the proprietors technically owned, for purposes of legitimate passage. Its private nuisance claim was that the picketers were obstructing the access of vehicles and pedestrians to the plaintiff’s premises, thereby physically impeding the company from carrying on its business. The picketers defended their use

199. See Vorspan, supra note 41, at 976-82.

200. Quoted in Morgan, supra note 7, at 218. There are many examples of the use by unions of parading picketers between the 1880s and 1930s. See, e.g., R. v. Hibbert, 13 Cox C.C. 82, 83-85 (Crim. Ct. 1875) (stating that picketers walked up and down in front of plaintiff’s factory); Judge v. Bennett 52 J.P. 247 (Q.B.D. 1888) (reporting that picketers paraded before premises of boot and shoe manufacturers); Mc’Giveran v. Auld 21 R. (J.) 69 (1894) (stating that men with posters marched back and forth along the pavement); 1894 Royal Commission Report, supra note 52, ¶ 22 (noting that the police did everything they could “to keep the men moving about a little, or else charged them with obstructing the thoroughfare”); R. v. Wall, 21 Cox C.C. 401 (1907) (reporting that picketers marched up and down in front of draper’s business); 12 Parl. Deb., H.C. (5th ser.) 1435-36 (Nov. 1, 1909) (commenting that the National Amalgamated Furnishing Trades’ Association had picketed a company on Bond Street by parading back and forth along nineteen yards of pavement); McCusker v. Smith [1918] 2 Ir. R. 432, 437 (K.B.) (reporting that eight picketers who paraded in front of struck pub claimed that “mere parading in front of a house” was not unlawful); Agnes v. Ryan [1938] Ir. R. 512, 514 (discussing how picketers in Dublin paraded back and forth in front of struck dairy carrying placards); Brendan Dunne v. Fitzpatrick [1958] I.R. 29 (noting that parading occurred in the vicinity of struck furniture company); 1906 Royal Commission Minutes of Evidence, supra note 83, ¶ 2699 (describing picketing as parading before premises with banners and sandwich boards).


202. Id. at 624.
of the street as an exercise of their legal right to passage. 203

Mr. Justice Johnston rejected the plaintiff's application for an interlocutory injunction, possibly influenced by the fact that the numbers of picketers did not exceed what was by now the accepted limit of six. Larkin had ruled that the TDA did not authorize picketing on private property, he reminded the plaintiff. Where else could it occur, he queried, if not on a public street "at or near" the employer's business? The plaintiff's construction of the Act, in other words, would in effect repeal it. 204 Though this decision was unusual in exonerating the unionists, it was hardly radical as a matter of labor policy. Indeed, the government and police had long acknowledged that six picketers—especially circling picketers—could invoke the immunity.

In contrast, the trial judge, in affirming the denial of an injunction, broke significant new doctrinal ground. Mr. Justice Meredith declined to base his conclusion on an interpretation of the immunity, which in fact he construed rather ungenerously, but rather propounded an unexpectedly sweeping approach to the common law rights of picketers on the highway. Uncertain whether the immunity applied to the street obstruction at issue—presumably viewing the TDA as immunizing only against the Lyons form of nuisance—205—the judge reasoned that the statute nonetheless had a bearing on the definition of "reasonable use" of the highway at common law. 206 Picketing was usually performed on the highway, he commented, and thus the TDA constituted a statutory recognition that such an act was not necessarily a trespass or a nuisance. 207 Although picketers must respect the fundamental right of the public to pass, and certain types of picketing might be unlawful, labor legislation suggested that trade union picketing might be a reasonable use of the street. 208

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203. Id. at 631.
204. Id. at 627-28. He distinguished Larkin on the ground that it involved picketing on private property rather than on a public street. Id.
205. He stated that section 2 did "not extend the rights of members of the public as to the legitimate use of the highway, or prevent what would otherwise be an infringement of the right of the owner of the soil from being a trespass or a nuisance." Id. at 629.
206. Id. at 631.
207. Id.
208. Id. at 632-33. In order to make picketing an unreasonable use of the highway and therefore a trespass, he observed, it would be necessary to import into the trade union acts a general hostility to picketing not possible in light of
conclusion, the judge was also influenced by the fact that the picketers were mobile. He remarked that the picketing was a form of "traffic on the highway concentrated on a limited portion." Mr. Justice Meredith thus offered a vision of a common law receptive to legislative change and appropriately informed by parliamentary developments.

On appeal, however, the Supreme Court rejected the notion of a common law responsive to legislative determinations and reverted to Johnston's statutory immunity theory. Lord Sullivan observed for the court that in enacting the TDA, Parliament "cannot reasonably have contemplated that such a house or place would be situated in a waste or no man's land." Unless the right to "attend" was the right to attend on the highway, he concluded, such right could not be exercised at all. The Supreme Court held, that is, not that picketing was a reasonable use of the highway but rather that the TDA authorized a use that would otherwise be a common law violation—even though the picketing at issue involved movement. Thus the court decisively rejected Meredith's premise that common law rules should reflect legislative determinations of public policy.

Though favorable to picketers, the final decision in Ferguson held worrisome aspects for unions. It approved the immunity only in the case of a handful of picketers who kept continuously on the move, and it upheld judicial autonomy to interpret nuisance without regard to parliamentary policy judgments. It was an inauspicious omen for the future of aggressive picketing, which was shortly to become once again a staple feature of English economic life.


In the mid-1960s militant union activity exploded throughout England, triggering a judicial response that resurrected the patterns established fifty years earlier. Courts expanded the scope of common law nuisance to defeat new union strike tactics while simultaneously
contracting the TDA to exclude newly identified nuisances from the coverage of the picketing immunity. "Absten-
tionism" thus disappeared in the context of picketing long before its formal statutory renunciation in the 1980s.

1. The New Union Militancy. The 1960s inaugurated another era of severe industrial volatility. Militant shop stewards, newly self-confident in a period of sustained full employment, demanded wages and working conditions in excess of levels acceptable to national union leaders. By 1965 the burgeoning number of "wildcat strikes" had become a serious problem,212 and the government established a Royal Commission known as the Donovan Commission to reevaluate the framework of industrial relations.213 Despite bipartisan agreement that changes were desirable, the traditional reluctance to regulate labor relations inhibited the Commission from offering any ambitious recommendations.214 It devoted little attention to picketing and found section 2 of the TDA to be "reasonably satisfactory."215 Nor did successive Labour and Conservative

212. See RICHARD CLUTTERBUCK, INDUSTRIAL CONFLICT AND DEMOCRACY 20 (1984); DAVIES & FREEDLAND, supra note 39, at 238-54; FELLING, supra note 15, at 267-72; Klarman, supra note 3, at 1594-95.


215. DONOVAN REPORT, supra note 213, ¶ 875. The Commission did,
governments institute any significant changes in the legislative regime governing picketing. Although the Conservative administration enacted a restrictive labor statute in 1971, and Labour restored union rights in 1974 and 1976, the picketing immunity itself remained essentially unaltered.

However, recommend revision of the picketing immunity to permit the peaceful persuasion of any customer or potential customer of an employer in dispute and to remove protection from picketing a person's residence. In Place of Strife did not propose any changes in the law of picketing, declaring that "the present law does not place any unreasonable limitations on picketing, and that properly enforced it provides sufficient safeguards against violent or intimidating behaviour." In Place of Strife, supra note 214, ¶ 99.

216. Industrial Relations Act of 1971 (IRA), ch. 72. The Act attempted to implement a comprehensive legal framework similar to the NLRA. See McDonough, supra note 214, at 515, 521. It considerably restricted trade union immunities, exposed unionists to liability for "unfair industrial practices," and narrowed the definition of "trade dispute." See Davies & Freedland, supra note 4, at 282-87. The TUC refused to cooperate with the new legislation, which consequently fell quickly into disuse. See Rowley, supra note 214, at 1139.


218. The picketing exemption in the Industrial Relations Act of 1971, ch. 72, which repealed the TDA, stated in section 134:

(1) The provisions of this section shall have effect where one or more persons (in this section referred to as 'pickets'), picketing in contemplation or furtherance of an industrial dispute, attend at or near (a) a place where a person works or carries on business, or (b) any other place where a person happens to be, not being a place where he resides, and do so only for the purpose of peacefully obtaining information from him or peacefully communicating information to him or peacefully persuading him to work or not to work. (2) In the circumstances specified in the preceding subsection, the attendance of the pickets at that place for that purpose (a) shall not of itself constitute an offence under section 7 of the Conspiracy and Protection of Property Act 1875 (penalty for intimidation or annoyance by violence or otherwise) or under any other enactment or rule of law, and (b) shall not of itself constitute a tort.

Thus the section essentially followed section 2 of the 1906 Act but implemented the recommendation of the Donovan Commission to remove protection from
Stability in the formal statutory law, however, belied significant changes in picketing practices. Secondary picketing emerged as a major weapon of industrial conflict, especially in the 1970s when national disputes became increasingly common. In addition, labor adopted more provocative and combative tactics, including physical obstruction of the road by massive numbers of “de-monstrators” who supported a small number of “official” picketers stationed at factory entrances. For the first time picketing also involved vigorous attempts to block vehicles, an innovation that unions considered necessary because of technological changes. Employees now generally arrived at work by car or coach rather than on foot, and traditional forms of persuasion were ineffective against motorized strikebreakers.

Unions also used their growing strength and access to vehicles to dispatch “flying picketers” to isolated areas to picket a broader range of secondary facilities. In addition to exerting commercial pressure on employers by obstructing replacement workers, picketers also sought more broadly to damage the national economy as a means of forcing the government to support higher wage levels.

These more strident tactics first appeared during the picketing a person’s home. In 1974, the Labour Government replaced the IRA with the Trade Unions Labour Relations Act of 1974, ch. 52, § 15, which returned to the formulation of the 1906 Act.

219. See, e.g., Davies & Freedland, supra note 39, at 844 (observing that after 1971 “picketing re-established itself as a major weapon of industrial conflict”); Kahn et al., supra note 6, at 19 (commenting on the rise in the 1970s of a national debate over picketing and secondary action); Kidner, supra note 134, at 256 (stating that picketing practice had changed considerably in recent years, with increasing use of secondary activity to make strikes more effective); J.E. Trice, Methods of and Attitudes to Picketing, 1975 CRIM. L. REV. 271, 271 (noting that between 1960 and 1970 there were 28,000 strikes and “picketing has become an essential tactic”); see also Martin Holmes, The Labour Government, 1974-79, at 137 (1985); Kahn-Freund, supra note 8, at 262; Richard Kidner, Trade Union Law 199 (1979); Bellace, supra note 3, at 133; Drake, supra note 87, at 212; Rowley, supra note 214, at 1155. See generally Roger W. Rideout, Power, Picketers and the Closed Shop, 1979 CURRENT LEGAL PROBS. 199, 202.

220. See Kahn-Freund, supra note 8, at 263; Nick Blake, Picketing, Justice and the Law, in Policing the Miners’ Strike 107 (Bob Fine & Robert Millar eds., 1985); Kidner, supra note 134, at 261.

221. See Trade Union Immunities, supra note 5, ¶ 142; Rowley, supra note 214, at 1154; see also Rubin, supra note 120, at 64.

222. See Davies & Freedland, supra note 39, at 845; Kahn-Freund, supra note 8, at 261-62; Rowley, supra note 214, at 1154.
national coal strike in the winter of 1972—the first national strike in the industry since 1926—when miners picketed electrical power stations to prevent oil from being used as a substitute for coal. 223 The dispute culminated in a blockade by picketers of the Saltley coke depot that provoked serious conflict with the police. 224 That same year national strikes erupted in the dock and construction industries, also involving violent clashes between police and picketers. 225 "[W]e are getting longer and bigger strikes," a Labour M.P. remarked, "and they are more difficult to settle." 226 Later in the decade major civil strife occurred during a strike at the Grunwick Film Processing Laboratories in North London. 227 The changes in prevailing strike patterns—national disputes, protracted stoppages and truculent union strategies—brought picketing to renewed prominence and precipitated a vigorous response from the authorities.

2. The Police Reaction. As earlier in the century, the police made effective use of the criminal law of highway obstruction. Nuisance remained more reliable, easier to enforce, and more ostensibly evenhanded than the CPPA. 228

223. See Trice, supra note 219, at 275-76 (noting that picketing during the strike was very successful, with 1000 miners picketing on a single day in February).
224. See id. at 275; Lewis, supra note 135, at 195-96.
225. See Lewis, supra note 135, at 196; Rubin, supra note 120, at 57; see also R. v. Jones, 59 Cr. App. 120 (C.A. 1974) (arising out of violent episode during building strike).
226. 830 PARL. DEB., H.C. (5th ser.) 178 (Jan. 31, 1972); see Taylor, supra note 6, at 16-17 (observing that the number of short strikes dropped and national confrontations increased).
227. The Grunwick dispute involved attempts by the Association of Professional, Executive, Clerical and Computer Staff (APEX) to obtain recognition at the company. In June 1977 APEX initiated mass picketing to heighten public awareness of the dispute, and there was significant violence on the picket line. See Trades Union Congress, One Hundred and Tenth Annual Report 54 (1977); see also Taylor, supra note 6, at 347-52.
228. Prosecutions under section 7 remained rare through the 1970s. During the miners' strike of 1972 and at Grunwick in 1977, no person was charged under the section. See Kidner, supra note 219, at 213; Kidner, supra note 134, at 264. Noting this phenomenon, one commentator suggested that the reason was fear of exacerbating labor disputes by enforcing a criminal provision directed specifically against picketers. Bennion, supra note 87, at 72; see Broome v. D.P.P. [1974] App. Cas. 587 (H.L.) (prosecution commenting in oral argument that the 1875 Act had fallen into disuse); Davies & Freedland, supra note 39, at 844 (remarking that the police rarely used the CPPA in the 1970s because they preferred general public order charges such as obstruction of the
The statutory offense of willful obstruction under the Highways Act conferred a power of arrest, and its elements—obstruction and lack of "lawful authority or reasonable excuse"—were easily satisfied. There was no need to prove specific intent; an obstruction need only be partial or potential; and "reasonable excuse" continued to require a connection with passage. As a TUC delegate complained in 1876, when police arrested members of a peaceful picket line, it was "very difficult indeed to come before a magistrate and be cleared of an obstruction charge." Accordingly, police frequently resorted to nuisance to control mass picketing in major disputes, especially during the miners' strike of 1972 and the Grunwick dispute of 1977, and they generally limited the number of picketers to six. Their actions, especially in

highway and obstruction of a constable); Bercusson, supra note 87, at 273-76 (discussing difficulties in enforcing the CPPA).

229. See McCabe & Wallington, supra note 47, at 31-32; Bennion, supra note 87, at 68-69.

230. Trades Union Congress, One Hundred and Ninth Annual Report 450 (1976). A charge of highway obstruction could also be the predicate for the offense of obstructing a constable in the exercise of his duty pursuant to the Prevention of Crimes Amendment Act or the Police Act 1964. See infra note 297. This offense occurred when a constable anticipated that picketing did or might obstruct the highway and asked a picketer to disperse; any person who disobeyed the request was liable to arrest for obstructing the officer. See, e.g., Tynan v. Chief Constable of Liverpool [1965] 3 All E.R. 99 (Cr. Ct.), aff'd sub nom. Tynan v. Balmer [1967] 1 Q.B. 91; Kavanagh v. Hiscock [1974] 1 Q.B. 600; Kidner, supra note 219, at 206 (observing that obstructing a constable generally occurred when a demonstrator committed an obstruction of the highway and refused a request to move); Rodney Austin, The Miners' Strike—Public Order Prophylactics, 1986 Current Legal Prosbs. 227, 233.

231. During the miners' strike Reginald Maudling, the Home Secretary, confirmed that "pickets were arrested for obstructing the footway and obstructing the police." 830 Parl. Deb., H.C. (5th ser.) 417w (Feb. 10, 1972). Two weeks later he again acknowledged that a large number of people were charged with offenses "mainly of the more normal character of obstruction and that kind of thing." 831 Parl. Deb., H.C. (5th ser.) 1486 (Feb. 24, 1972); Geary, supra note 184, at 74.

232. Between June 1977 and January 1978, 532 people were arrested on the picket line including 106 for obstruction of the highway and 208 for the related offense of obstructing a police officer in the execution of his duty. See 942 Parl. Deb., H.C. (5th ser.) 136 (Jan. 17, 1978); Kidner, supra note 219, at 200; Geary, supra note 184, at 85, 87 (observing that picketers were "moved on" or arrested for obstruction); Phil Scraton, From Saltley Gates to Orgreave: A History of the Policing of Recent Industrial Disputes, in Policing the Miners' Strike 145, 152 (Bob Fine & Robert Millar eds., 1985).

233. See Trades Union Congress, One Hundred and Eighteenth Annual
assisting working employees to cross picket lines, cost them the image of neutrality they had maintained in less contentious times.\textsuperscript{234} Though police employed their massive discretion to treat picketers tolerantly in less turbulent periods or situations,\textsuperscript{235} in the new and more hostile climate they again found nuisance a highly serviceable doctrine.\textsuperscript{236}

3. The Judicial Response. Courts ratified police actions by refining nuisance doctrine and adapting the immunity specifically to meet the new challenges. Reflecting the prior decades of relative tranquillity, in 1960 the classic labor treatise, Norman Citrine's \textit{Trade Union Law}, was sanguine about judicial treatment of the unions. \textquote{[N]owadays,} it proclaimed, it was \textquote{not unlikely} that courts would consider peaceful picketing to be a reasonable use of the highway quite apart from section 2 of the TDA.\textsuperscript{237} In addition, it suggested, the immunity justified such nuisances as

\textsuperscript{234} See \textit{Gary}, supra note 184, at 132; \textit{Lewis}, supra note 135, at 216-17 (noting that charges of partiality occurred most notably during the Grunwick dispute of 1977, the Stockport Messenger dispute of 1983, and the miners' strike of 1984-1985).

\textsuperscript{235} See \textit{Bercusson}, supra note 87, at 292 (declaring that it was an \textquote{open secret} that the police often turned a blind eye to mass picketing); \textit{Kidner}, supra note 134, at 261 (stating that the police informally allowed picketers to approach lorries to prevent confrontations among picketers, police, and strikebreakers); \textit{Rubin}, supra note 120, at 63 (noting that most picketing was carried on to the satisfaction of the police); \textit{Trice}, supra note 219, at 281 (suggesting that the infrequency of arrests indicated tolerance on the part of both picketers and police). The government consistently maintained that the police had operational independence with regard to picketing. For example, when asked about five miners arrested near Charrington's Coal Depot in London during the miners' strike of 1972, Reginald Maudling, the Home Secretary, responded: \textquote{The enforcement of the law in the Metropolitan Police District is the responsibility of the Commissioner of Police of the Metropolis and I have no authority to issue instructions to him on the manner in which the police should deal with picketing.} 830 \textit{Parl. Deb.}, H.C. (5th ser.) 417w (Feb. 10, 1972).

\textsuperscript{236} Many observers testified to the frequent use of obstruction charges during the decade. See, e.g., \textit{Kidner}, supra note 219, at 200-04; \textit{Bennion}, supra note 87, at 68; V. Craig, \textit{Picketing and the Law}, \textit{Scots Law Times} 137 (1975); \textit{Kidner}, supra note 134, at 256-57; \textit{Rideout}, supra note 219, at 203; \textit{Wallington}, supra note 39, at 107-08; \textit{see also Lewis v. Dickson [1976]} R.T.R. 431 (Q.B.) (security officer at British Leyland, working \textquote{to rule} in inspecting cars at entrance to plant, arrested for highway obstruction).

\textsuperscript{237} See \textit{Citrine}, supra note 8, at 461.
highway obstruction, marching back and forth, and chanting in unison. Confronting virulent forms of picketing in a period of industrial turbulence, courts quickly dashed Citrine's expectations.

The judiciary mounted a four-pronged attack on picketing. First, it dealt explicitly and thoroughly with the persistent problem of mass picketing, announcing that even anticipated obstruction of the highway by a group of picketers constituted an indictable nuisance. Second, it targeted the new tactic of stopping vehicles, declaring it to be unprotected by the TDA and a common law obstruction of the highway. Third, it invalidated the union's primary defense to a nuisance charge, the claim that moving picketers were exercising a right to passage. Finally, it expanded the preventive powers of the police to encompass picketing that raised the mere possibility that a nuisance would be committed. Again, courts utilized the doctrinal process of broadening nuisance doctrine to cover new union tactics while concomitantly interpreting the immunity to exclude them.

a. Mass Picketing. Mass picketing, first appearing as an accompaniment to the "new unionism" at the end of the nineteenth century, dominated the labor landscape after the mid-1960s. Judges conclusively established that the TDA did not immunize picketing in groups—obviously an obstruction of the highway—because excessive numbers indicated a purpose outside the immunity's scope. In addition, they broke new ground in Tynan v. Chief

238. See id. at 451; Hickling, supra note 147, at 708 n.7 (stating that section 2 legalized conduct that might otherwise constitute a nuisance); Wedderburn, supra note 4, at 166 (claiming that TDA justified trespass or nuisance to the extent necessary to effect picketing).

239. The first sign of renewed judicial concern about picketing came in Bird v. O'Neal [1960] App. Cas. 907 (P.C.), a decision of the Judicial Committee of the Privy Council on appeal from the West Indies Court of Appeal. The court found picketing in front of a drug store involving the performance of a steel band, threats and blocked access to be an actionable nuisance. Though not pronouncing on the legality of peaceful picketing per se, it suggested—by not considering the Leeward Islands equivalent to section 2 as a defense—that a shouting crowd of picketers was necessarily an actionable nuisance regardless of the fact that it occurred in a trade dispute. That is, the court made clear that shouting picketers were a nuisance and that no immunity encompassed such conduct. See Wedderburn, supra note 4, at 166.
Constable of Liverpool\textsuperscript{240} in finding that mass picketing that might "possibly" cause an obstruction was a public nuisance.

Tynan arose when three hundred out of eight or nine thousand workers struck a plant of the English Electric Company in Liverpool in 1964. Following a recommendation in the union's book of instructions that they "move around,"\textsuperscript{241} forty picketers circled the plant outside the main entrance, laying the foundation for a defense based on their right to pass along the highway. The circling maneuver halted vehicles arriving at the transport gate, where picketers handed drivers a leaflet about the strike.\textsuperscript{242} Tynan, chairman of the strike committee, refused a police order to desist from circling. "No," he insisted, "we want to make a test case of it."\textsuperscript{243} He was arrested and convicted by a stipendiary magistrate of willfully obstructing a constable in the execution of his duty.

The Recorder of Liverpool, Judge Chapman, broadly interpreted the requirements of nuisance, concluding that picketing was an unreasonable use of the highway at common law if it merely posed a possibility of obstruction. Even if the picketing took place on the edge of the highway, he reasoned, "its natural result would be to bring vehicular traffic on the highway to a standstill and to impede pedestrians using the highway, if and when a vehicle or a pedestrian came up to it."\textsuperscript{244} The constable thus had reasonable ground for thinking that "the potential notional obstructions" would become "almost inevitably, and certainly as a real possibility, an actual positive obstruction."\textsuperscript{245} Although use of the concept of potential obstruction was not unusual in nuisance law, it seemed misguided in circumstances where it negated parliamentary intent in enacting the labor statutes. Tynan followed the precedent of Ferguson in refusing to consider the TDA as relevant to the definition of "reasonable use" of the highway at common law.

\begin{itemize}
\item \textsuperscript{241} Tynan [1965] 3 All E.R. at 102, 104.
\item \textsuperscript{242} The strikers, who were all white-collar workers, were "not in the least ruffianly types" but rather "decent, well-mannered, orderly people." \textit{Id.} at 102.
\item \textsuperscript{243} \textit{Id.} at 101.
\item \textsuperscript{244} \textit{Id.} at 105.
\item \textsuperscript{245} \textit{Id.}
\end{itemize}
Judge Chapman also rejected Tynan's immunity defense through an analysis of both the picketers' purpose and the meaning of "attendance." First, the picketers had not evinced a proper purpose because their excessive numbers and circling technique hindered rather than facilitated the objective of communication. A few men lined up as a "guard of honour" on each side of the entrance, he remarked, would have better achieved the purposes of the TDA. Obviously, one of the objects of the strikers was to bring traffic to a standstill. The judge even suggested at one point that only a solitary striker could legitimately use the TDA as a defense. Second, although the right to attend might legalize certain obstructions that were common law nuisances, it did so only to the extent that attendance could not "reasonably take place at all without producing that result." Mass picketers, he declared, were not reasonably necessary to accomplish the legislatively authorized act of attendance.

The Divisional Court affirmed the Recorder on essentially the same grounds. Lord Widgery began his opinion by observing that the picketers' conduct was clearly a common law nuisance, and thus the sole question was whether the unreasonable use of the highway was authorized by the TDA. On this point he accepted the lower court's determination that as a factual matter the picketers were not attending only to communicate and peacefully persuade, even though that finding itself was entirely inferential. That is, Lord Widgery conceded that the picketers may have had a proper purpose, but he found that the immunity was inapplicable because they had the additional purpose of obstructing the highway. He reached this conclusion based not on proof of a common purpose to obstruct but only on an inference from the fact of the obstruction itself.

246. Id. at 104.
247. Id.
248. Id.
249. If there were a strike at the Ritz hotel, he observed, several hundred strikers could not gather in Piccadilly and "bring the whole of the traffic to a standstill." Id.
250. Id. at 103.
251. Id. at 104. The courts suggested that two or three picketers would be sufficient to cope with cars and pedestrians. Id.
252. Id. at 105.
This circumscribed approach to "purpose" was supplemented by an equally constrained view of "attendance." The appellate opinion adopted the narrowest possible interpretation of the term, construing the statute as simply a rejection of *Lyons* rather than an effort to extend any broader protection to picketers. Capitalizing on the ambiguities of the 1906 Act, Lord Widgery suggested that the legislation did not immunize against public nuisances such as highway obstruction but only against private nuisance in the form of economic compulsion. "One should not, in my judgment, regard section 2 as being primarily a highway section," he declared. Finally, he rejected Tynan's argument that section 2 made picketing a lawful use of the highway and that the lack of any actual obstruction was relevant. *Tynan* thus accelerated the judicial attack on mass picketing by expanding nuisance in the labor context to include mere potential obstruction of the highway, by holding the immunity inapplicable if a proper purpose was accompanied by an inferentially illegitimate one, and by interpreting "attendance" to immunize only economic pressure and—just possibly—a few persons standing in the street.

A few years later, in *Broome v. Director of Public Prosecutions*, the House of Lords gratuitously confirmed Tynan's holding that mass picketing forfeited the exemption due to its illegitimate purpose. Even though there was no evidence of mass picketing in *Broome*, Lord Reid took the opportunity to approve Tynan's reasoning

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253. *Id.* at 106. He noted that *Lyons* treated picketing as a nuisance quite apart from any obstruction of the highway and that the statute rejected *Lyons* in the context of trade disputes. *Id.*

254. *Id.*

255. The Donovan Commission, continuing its work while *Tynan* was sub judice, declined to respond to invitations to reform the law on mass picketing either to permit or prohibit it, though it intimated that mass picketing was not necessary to effectuate any legitimate purpose. "It is not clear however why mass picketing is required simply to communicate information, and the advocates of this proposal did not suggest that they desired it for any other purpose than to demonstrate solidarity, which can be done equally well by other means . . . . It should be recalled that the prime objects of picketing are to make known the existence and the facts of the dispute and peaceably to persuade persons to abstain from working. Obstruction or intimidation is unlawful and no change in this respect has been advocated by anybody." DONOVAN REPORT, supra note 213, ¶¶ 874-75.

that picketers who assembled in unreasonably large numbers exhibited the unauthorized purpose of preventing free passage. Lord Salmon similarly observed that although in theory magistrates could decide that a crowd of picketers intended only peaceful persuasion, no reasonable bench of magistrates was "likely to reach such a conclusion." By the 1970s courts had conclusively established that mass picketers inevitably committed an unprotected act of nuisance.

b. Stopping Vehicles. The second picketing tactic that courts invalidated through nuisance law was the more recent and controversial strategy of blocking the movement of cars and trucks. Trade unionists strongly believed that the right to persuade was meaningless unless picketers could obstruct the passage of motorized vehicles. In Tynan, for example, the defendant argued that even if there were no right to stop a pedestrian, who could easily be approached on foot, the section nonetheless authorized detaining a driver. The court responded bluntly that section 2 of the TDA did not permit picketers to block vehicles. In the same year the TUC formally requested the Donovan Commission to expand the immunity to allow picketers to communicate with people whether "in a vehicle or on foot." The Commission reported that nothing in the section prevented such communication—presumably picketers could shout at truck drivers as they sped by—and declined to authorize picketers to stop vehicles in order to speak with their occupants. "[I]t would be impossible," the Commission reasoned, "to define such a right in terms which would avoid considerable obstruction to the highway and serious risk of personal injury to the picketers.

257. Id. at 604; see B.W. Napier, The Limits of Peaceful Picketing, 33 Cambridge L.J. 196, 199 (1974).
258. See, e.g., Davies & Freedland, supra note 39, at 845 (reporting that the TUC was particularly concerned to obtain a right to address drivers); Robert East et al., The Death of Mass Picketing, 12 J.L. & Soc'y 305, 306 (1985) (commenting that "modern transport had destroyed personal contact and reduced picketers' opportunities to communicate with and persuade others"); Kidner, supra note 88, at 261 (remarking that trade unions had pursued a right to stop on the basis that a right to communicate could not be effective in relation to vehicles without it).
260. Id. (Lord Parker, concurring); see Napier, supra note 257, at 198.
themselves. In Broome the House of Lords itself addressed the issue, placing its imprimatur on Tynan's contraction of the immunity and applying it specifically to the question of stopping vehicles. During a national builders' strike in 1972, John Broome, a trade union official, held a poster in front of a lorry attempting to deliver supplies to a construction site in Stockport. The driver wished to cross the picket line, but Broome refused to move out of the way and held up the lorry for nine minutes. Though the incident was peaceful—involving not even an angry exchange of words—Broome was arrested and charged with obstruction under the Highways Act. He argued that his action was justified both because the statute authorized peaceful persuasion and because he was using the highway reasonably. Unexpectedly, the Stockport justices dismissed the charge, accepting Broome's argument that nine minutes "was not an unreasonably long time for the defendant to spend in exercising his statutory right peacefully to seek to persuade a person not to work." The Divisional Court, however, disagreed. Inasmuch as it was "beyond argument" that the defendant had obstructed the highway under the common law, Lord Widgery reasoned, the only question

262. Id. In practice there was considerable variety as to what the police allowed. Many officers permitted picketers to stop lorry drivers and ask them not to cross picket lines. See Craig, supra note 236, at 138 (recounting that during the 1972 miners' strike the police stopped lorries and allowed picketers to talk to drivers); Kidner, supra note 88, at 261 (noting that the police sometimes allowed picketers to approach vehicles to prevent confrontations); Trice, supra note 219, at 280 (indicating that during the 1972 miners' strike the police assisted picketers to stop lorries). Other constables, however, rigorously enforced the law. A Labour member stated during the coal strike of 1972 that "today we see lorry drivers being paid to drive through picket lines, and in certain areas—not all—there seems to be an unfortunate alliance between the police and certain industrial companies." Although some picketers had the cooperation of the police, "there have been places where that is not so," causing the death of one picketer knocked down by a lorry that failed to stop when entering a plant. 830 PARL. DEB., H.C. (5th ser.) 1283-84 (Feb. 8, 1972). Another member of Parliament claimed that at Saltley the police prevented peaceful picketers of the NUM and TGWU from talking to lorry drivers. Some non-union lorry drivers had been told by their employers that if they came away with a full load they would receive a bonus and if not they would lose their jobs. Id. at 1289.

264. Id. at 589.
266. Id. at 696; see Napier, supra note 257, at 199.
was the correct interpretation of the immunity. In this regard the proper inquiry was not what was reasonably necessary to persuade peacefully, but only what was reasonably necessary to secure bare physical presence. The objective of bare attendance, he emphasized, while possibly sanctioning oral and visual methods such as speaking and exhibiting posters, did not encompass the obstruction of a vehicle or person.

On appeal the Lords affirmed, all agreeing that the immunity did not reach the obvious nuisance of stopping a vehicle. There were variations, however, in the approaches of the judges. Lord Reid opted for the widest view of the immunity, suggesting that "attendance" included signaling or inviting a driver to stop and, if he complied, attempting to persuade him not to proceed. Even this action would otherwise be a crime or a tort, he noted, particularly if more than a few picketers were acting in concert. However, he cautioned that there was no statutory right to restrict the personal freedom of the driver, as this would imply that a motorist had a statutory duty to stop. "One is familiar with persons at the side of a road signaling to a driver requesting him to stop. It is then for the driver to decide whether he will stop or not. That, in my view, a picket is entitled to do." The picketer's legal rights, in other words, resembled those of a hitchhiker.

Lord Morris exhibited a slightly different emphasis. Rather than focusing on the meaning of "attend," he inferred improper purpose from the existence of the obstruction. He concluded, that is, that the fact of a

268. Id. at 700. Lord Widgery observed that initially the argument that the Act only rendered lawful the act of attendance appeared to him remarkably narrow, because it was improbable that Parliament would have gone to all the trouble to legalize something not likely to be unlawful at all. But further research had convinced him that attendance would otherwise have been unlawful as a section 7 violation or a trespass to the highway. Id. at 697-98.
269. Id. at 701.
271. Id. at 597.
272. Id.
273. Id. Lord Reid also applied the traditional analysis that an improper purpose could be inferred from the picketers' numbers. Id. at 597-98.
274. Id. at 597.
275. See Wedderburn, supra note 169, at 511.
nuisance implied a purpose to commit it. Similar to Lord Widgery in \textit{Tynan}, Lord Morris took the view that Broome's obstruction of a vehicle indicated a purpose not only to peacefully persuade the driver but also to detain him against his will.\textsuperscript{276}

The narrowest opinion of all was offered by Lord Salmon, who echoed the view that an obstruction was a nuisance that both exceeded attendance and reflected an improper purpose. “Attendance” did not empower picketers to stop a person from using the highway to reach work, he concluded, as that would be an “astonishing interference with the liberty of the subject.”\textsuperscript{277} Each person had “the right to use the highway free from the risk of being compulsorily stopped by any private citizen.”\textsuperscript{278} This formulation, treating a striker as a “private citizen,” implied that the statute conferred no special rights on picketers at all.\textsuperscript{279} Lord Salmon found, as had Lord Morris, that physically blocking access was proof that one of the picketers' purposes was to prevent entry. “Men are usually presumed to intend the natural consequences of their acts.”\textsuperscript{280}

Highway obstruction thus served a dual function in the case. First, the act of standing in the street and obstructing vehicles was unquestionably a nuisance. Second, the act of

\textsuperscript{276} 
Broome [1974] App. Cas. at 590. Attendance did not involve a right to stop or other reasonable means to further a statutory purpose; this would involve “reading into the section words which are not there.” \textit{Id.} at 599.

\textsuperscript{277} \textit{Id.} at 603. Parliament, he noted, would not have done so without making “its intention plain by express and unambiguous language.” \textit{Id.}

\textsuperscript{278} \textit{Id.}

\textsuperscript{279} Lord Salmon stated that because the statute immunized the otherwise unlawful act of “attendance,” it was not meaningless if it did not permit stopping vehicles. \textit{Id.}

\textsuperscript{280} \textit{Id.} at 604. Viscount Dilhorne, joined by Lord Hodson, also adopted a narrow view of the immunity. He agreed with Lord Reid that picketers could “invite persons and vehicles to stop” but that they could do nothing else. \textit{Id.} at 601. He rejected Broome’s assertion that the statute was meaningless if it did not permit the stoppage of vehicles, observing that it legalized attendance, which would otherwise be obstruction of free passage along the highway. \textit{Id.} at 600. Even if the section as it stood was meaningless, “it would be wrong in the absence of Parliamentary intent to interpret it at the expense of other people’s rights.” \textit{Id.} As to the difference between the formulation in the 1906 Act and the 1971 Act—the fact that the TDA specified that attendance “shall be lawful” whereas the IRA provided that it “shall not of itself constitute an offence or a tort”—Viscount Dilhorne concluded that the change of language did not involve any change of meaning. \textit{Id.} at 601.
obstruction forfeited the immunity by exceeding mere attendance and demonstrating a purpose to obstruct. The entire analysis, as seemingly complicated as it was, reduced itself to a single proposition. Exactly the same conduct—committing the nuisance of obstruction—both eradicated the statutory protection and constituted the predicate offense for a prosecution under the general law. Broome, a decision of the nation's highest court, represented a culmination of the activist judicial effort to narrow the picketing rights of trade unionists through the instrument of nuisance. It made nuisance central to the analysis of lawful picketing and left picketers who detained drivers defenseless against a nuisance charge of highway obstruction. Further, it reoriented the discussion toward the importance of protecting the rights of nonstrikers, equating strikers with ordinary citizens—even hitchhikers—lacking any special legislative immunity. 281

When the Labour Party returned to power shortly after Broome, the TUC renewed its campaign for legislation that would enable picketers to communicate with occupants in vehicles. 282 In 1975 the Labour government moved in this direction by proposing to insert into its Employment Protection Bill a right for picketers to communicate with pedestrians and drivers. 283 The bill, however, only permitted attempts to persuade “falling short of obstruction of the highway.” 284 The Congress found the provision unsatisfactory for obvious reasons, and the enactment failed in the House of Commons. 285 Broome thus remained the author-

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281. Kavanagh v. Hiscock [1974] 1 Q.B. 600, reiterated that there was no right as such to picket but only an immunity that did not encompass even the right to ask a driver to stop. According to Lord Widgery, it was “fundamental to a proper understanding of the present case that there was no right in any of these picketers to stop the progress of the vehicle unless the driver wished to stop.” Id. at 610. The House of Lords thought that this point was covered by Broome, which said there was no right to approach vehicles, and refused leave to appeal. See Kidner, supra note 219, at 204; Napier, supra note 257, at 199.

282. See Craig, supra note 236, at 138; Kidner, supra note 134, at 261.

283. See Bercusson, supra note 87, at 286; Lewis, supra note 135, at 198.


285. TRADES UNION CONGRESS, ONE HUNDRED AND NINTH ANNUAL REPORT 75 (1976). Several Labour M.P.s did not vote because they viewed the clause as useless. See Bercusson, supra note 87, at 286 n.43. The legislation also engendered opposition from the police, who thought that enforcing a right to stop vehicles would infringe their neutrality. See Davies & Freedland, supra note 4, at 85.
c. Circling Picketers. In addition to crippling the tactics of mass picketing and blocking vehicles, courts eliminated a standard defense that demonstrators had used against nuisance charges for almost a century: the assertion of a right to passage along the highway. Labor picketers as well as other protesters had employed it since the 1880s, but when picketing became more ambitious, better organized, and more threatening in the 1960s, the judiciary explicitly rejected this defense. In so doing, it immediately brought a longstanding labor practice to a virtual halt.

Tynan was once again the major case. In his decision, Judge Chapman declared circling to be impermissible on two grounds: it demonstrated an unprotected legislative purpose, and it failed to constitute a legitimate exercise of the right to passage. According to the court, the circling maneuver did not effectuate the purposes of the 1906 Act but was simply a device to bring vehicular traffic to a standstill. Although the picketers asserted that "they were exercising their ordinary common law right of passing and repassing," the judge regarded their argument as "a thin one." They were not exercising a right to pass, he objected, merely because their "blockage took the form of a revolving circle." In fact, it would have made no difference if, "instead of being stationary, they produced the same result by walking round and round in an unbroken circle."Interestingly, in the context of political processions such as anti-nuclear marches—where the demonstrations were not only patently unrelated to actual travel but the participants

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286. See cases cited supra note 200. In these reported cases the court did not reach the merits of the defense because unionists were invariably convicted of offenses other than obstruction. However, in one case, M'Cusker v. Smith, [1918] 2 Ir. R. 432, 428 (K.B.), the judge stated in dictum that parading would be legitimate if the picketers did not enter the premises. Picketers continued to use the parading technique as standard practice after Ferguson. See, e.g., Bird v. O'Neal [1960] App. Cas. 907, 913 (P.C.) (appeal taken from West Indian Court of Appeal); Piddington v. Bates [1961] 3 All E.R. 660, 661 (Q.B.). Tynan v. Chief Constable of Liverpool [1965] 3 All E.R. 99 (Cr. Ct.), aff'd sub nom. Tynan v. Balmer [1967] 1 Q.B. 91.

287. [1965] 3 All E.R. at 104.
288. Id.
289. Id.
290. Id.
291. Id. at 103.
lacked any special legislative protection—courts were accepting precisely such an argument predicated on movement.\(^{292}\) As a consequence of *Tynan*, strikers in England, in contrast to those in America, ceased to parade along the pavement and instead simply stationed themselves at the entrances to company premises.\(^{293}\)

A decade later a High Court judge confirmed in dicta that circling failed to afford industrial picketers a common law defense. In *Hubbard v. Pitt*,\(^{294}\) a case involving social workers who picketed a real estate agency in London, Mr. Justice Forbes validated the distinction between processions and stationary assemblies on the highway. A peaceful march was lawful as an exercise of the right of passage, he proclaimed, whereas a stationary meeting or demonstration was not.\(^{295}\) However, he followed convention in treating a labor picket—even if circling—as a stationary assembly. He cited *Tynan* for the proposition that it was pointless for labor picketers to attempt "a colourable pretence" of passage by moving around.\(^{296}\) Thus in the 1960s and 1970s courts not only extended highway obstruction doctrine to encompass new picketing tactics, but they also expressly invalidated in the case of unions a primary defense against nuisance that labor picketers and other groups had utilized for nearly a century.

d. Preventive Action. The final prong in the judicial assault on picketing involved the discretionary power of the police to disperse picketers based on anticipated harm to the public. The Divisional Court had first conferred such preventive common law authority on constables in the 1936 case of *Duncan v. Jones*,\(^{297}\) which upheld the right of an

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\(^{292}\) See, e.g., *R. v. Clark* (No. 2) [1964] 2 Q.B. 315 (Crim. App.) (holding that a procession conducted by the Committee on Nuclear Disarmament might be a reasonable use of the street).

\(^{293}\) See, e.g., Bellace, *supra* note 3, at 134 (comparing English and American picketing activity in terms of movement).

\(^{294}\) [1976] 1 Q.B. 142.

\(^{295}\) Id. at 157.

\(^{296}\) Id.

officer to preemptively restrain a political assembly based on reasonable anticipation of a breach of the peace. In 1961 the Divisional Court extended this doctrine to a situation of industrial picketing in *Piddington v. Bates.* 298 Although *Piddington* also involved a potential breach of the peace, the case had critical implications for the role of nuisance in picketing law. In introducing the *Duncan* rule into the labor context, it paved the way for courts to apply preventive concepts to anticipated nuisance in *Tynan* a few years later.

*Piddington* arose during a 1959 strike against the Free Press in London, a small company employing non-union labor whose personnel remained at work during a printing dispute. Eight employees were working inside the premises when two vehicles drew up containing eighteen union picketers. Two picketers positioned themselves at each of the premises' two entrances. When Piddington, a member of the union, attempted to join the two back-door picketers, a constable told him that two at each door were sufficient. "I'm going there and you can't stop me," Piddington replied, pushing past the constable. "I know my rights." 299 The situation involved no disorder, violence, or obstruction of the highway. In such peaceful circumstances, the defendant contended, the constable had no right to restrict the number of picketers to two. Indeed, he argued, two picketers were insufficient to communicate either with workers, who generally entered and left en masse, or with lorry drivers who delivered materials to the premises. The magistrate, however, accepted the constable's view that picketing by three persons might have produced intimidation and a breach of the peace. 300

On appeal, Lord Parker held the law to be "reasonably plain." 301 An arrest was proper if a constable reasonably anticipated a real possibility of a breach of the peace. Moreover, the picketers enjoyed no TDA immunity because their numbers implied an unprotected purpose. Eighteen unionists were not necessary to picket only eight workers, and therefore the police officer reasonably suspected "something more than mere picketing to communicate infor-
mation or peaceably persuade."  

Although Lord Parker was troubled by the apparently arbitrary limitation of the picketers to two at each entrance, he left it to the police officer to take such steps as he thought proper.

*Piddington* thus established four propositions. First, it confirmed that courts could circumvent the statutory immunity by inferring unprotected purposes from unreasonable means, particularly the presence of "excessive" numbers of picketers. Second, in finding that more than two picketers at the entrance to a workplace was unjustifiable, it sanctioned an exceptionally restrictive quantitative test in determining "reasonableness." Third, by validating the particularized factual judgments of a constable, the case vested extensive discretion in the police to regulate the picket line. Finally, the decision was significant for endorsing in the picketing context the *Duncan* notion that police could preventively reduce the number of picketers based on anticipated consequences. The importance that the government attached to the case was indicated by the Home Secretary's immediate circulation of the judgment to all police chiefs.

In 1974 *Kavanagh v. Hiscock* carried the preventive approach even further, upholding a constable's discretionary power not merely to reduce the number of picketers but to eliminate them entirely. *Kavanagh* linked the preventive common law powers established in *Piddington* with the rigorous concepts of highway obstruction developed in *Tynan* and *Broome.* Significantly, it allowed a constable to disperse picketers in advance based not on anticipated breach of the peace but merely on the poten-

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302. *Id.*
303. *Id.* He stated "all these matters are so much matters of degree that I, for my part, would hesitate, except on the clearest evidence, to interfere with the findings of the magistrates." *Id.*
304. The General Secretary of the TUC expressed to the Home Secretary his concern that the case might motivate the police to limit arbitrarily the number of picketers. See *Drake*, *supra* note 87, at 214 n.9.
305. *Id.*
307. There was also dictum involving preventive action in *Tynan*. Judge Chapman suggested that the police would have acted properly in removing the picketers even if no actual obstruction had occurred, thus upholding preventive action against picketers based solely on highway obstruction that was, in itself, merely anticipated. *Tynan* v. Chief Constable of Liverpool [1965] 3 All E.R. 99, 105 (Cr. Ct.), *aff'd* sub nom. *Tynan* v. Balmer [1967] 1 Q.B. 91.
Potentially of an obstruction of the highway.

The case involved a 1973 electricians' strike at a building site in Lambeth for St. Thomas' Hospital. After several weeks of picketing, thirty or forty people including the defendant assembled outside the hospital gates. By prior arrangement with the police, four men wearing armbands were designated as the "official" picketers. As a coach carrying working electricians was about to depart through the gates, the police formed a cordon of twenty-four officers on each side of the entrance. Removing even the official picketers from the immediate area, they prevented anyone from speaking to or approaching the coach driver. The police chief explained that on previous occasions large numbers of picketers had shouted at the workers and that a recurrence of such conduct might precipitate violence.

Peter Kavanagh, a member of the Transport and General Workers' Union (TGWU), noticed that the four official picketers had been cleared from the gateway. Attempting to break through the cordon to speak to the coach driver, he pushed against Alan Hiscock, a constable, who told him to "[k]eep moving and stop pushing." "You can't tell me what to do, you little squirt," Kavanagh replied, punching Hiscock in the back. Shouting and swearing as he pushed past another officer, Kavanagh was arrested and convicted of obstructing a constable.

On appeal the defendant argued that removing the four official picketers amounted to a complete denial of the strikers' right to peacefully persuade the driver. "If the police action in the present case is lawful," insisted Lord Gifford, counsel for Kavanagh, "no possibility exists of picketing." However, Lord Widgery—also a member of the court in Tynan and Broome—observed that there were several justifications for police action in clearing a path for the coach. First, the constable had a reasonable

308. [1974] 1 Q.B. at 602-03.
309. Id. at 604. During argument before the Divisional Court, Lord Gifford contended that it was lawful for picketers to gesture to a driver to stop, invite him to enter into conversation, and try to persuade him not to continue his course of conduct. He observed that the essence of picketing was not demonstrating but attempting to persuade non-strikers. The prosecution argued that picketers were not entitled to stop vehicles because in Broome only Lord Reid had suggested that attendance included a right to approach a driver to stop and listen. It supported Lord Widgery's view in the Divisional Court that the methods of persuasion were limited to oral or visual methods. Id. at 604-05.
apprehension based on past experience that the picketers would stop the vehicle, thereby interfering with the rights of the driver and passengers. Second, the constable reasonably feared that there would be disorder or at the least threatening language. Finally, police officers had “the general duty to regulate the use of the highway by competing users, and to make sure that everybody gets a fair share.”

The statute, he reminded unionists, did not create a positive right to persuade but merely an immunity for bare “attending.”

Kavanagh’s significance lay mainly in its extreme preventive implications. It invested the police with common law powers to restrain even lawful picketing within the immunity. Further, it allowed them to do so on either of two grounds, to avoid a breach of the peace or to prevent an anticipated nuisance such as highway obstruction. The case further suggested that the police could use their highway powers to prevent picketers from even inviting or signaling a driver to stop. Kavanagh invoked the Duncan rule as applied to picketing by Piddington and extended it to the most minimal form of anticipated interference with passage. Under its authority, the police could literally prevent any type of picketing at all. The discretionary police power to limit the number of picketers based on anticipated disorder or nuisance was probably the most serious limitation on the freedom to picket in the 1970s.

4. Counterpoint: Non-Industrial Picketing. The treatment of non-industrial picketers provides an illuminating perspective on the treatment of labor picketers in the same period. Picketing by groups other than employees first became prominent in the 1970s when political and consumer organizations began boycotting...
companies to publicize their objectives and inflict economic pressure. Non-industrial picketing was theoretically, of course, even less protected than industrial picketing. The right to "attend," which generally allowed at least a technical obstruction to the highway by fewer than six persons, applied only to actions in furtherance of a trade dispute. Strict common law doctrines were therefore fully applicable to situations of political or consumer picketing.

*Hubbard v. Pitt,* a 1976 decision of the Court of Appeal, confirmed the rigid rules governing non-industrial picketing and also held important implications for labor picketing. First, the case provided a baseline to compare the rights of immunized as opposed to non-immunized picketers and thereby to ascertain the effectiveness of the picketing immunity. Second, it stood as a major authority on the common law rights of picketers; as such, it would have growing importance when labor's statutory immunity shrank dramatically in the 1980s. Third, it again revealed the elasticity of nuisance as courts molded it to defeat another new picketing strategy, the consumer boycott. Fourth, it was the first major picketing case since *Lyons* to involve private nuisance in the form of economic pressure, and it revitalized the sharply restrictive rule that *Lyons* had announced at the end of the nineteenth century.

*Hubbard* arose in 1975 when a pro-tenant group in Islington began to picket the offices of local real estate agents whom they suspected of conspiring with property developers in a gentrification scheme. The picketers, mostly middle-class social workers, believed that large scale renovation was encouraging landlords to harass rental tenants. On three consecutive days in March, members of the group "attended" on the public sidewalk in front of the agents' offices, displaying placards and distributing leaflets. They repeated this tactic for three hours each on succeeding Saturdays. The real estate agents, Prebble & Company, sued for an injunction based on nuisance to the highway, conspiracy to unlawfully use the highway, and defamation.

In the High Court, Mr. Justice Forbes granted an

314. See Kidner, supra note 134, at 267 (suggesting in 1975 that non-industrial picketing was a recent phenomenon).

315. Persuasion directed at suppliers or customers even by industrial picketers was unprotected. See GRUNFELD, supra note 196, at 452-53; KAHN-FREUND, supra note 8, at 265.

interlocutory injunction on the ground that use of the
highway for non-industrial picketing was per se a common
law public nuisance. He distinguished Ward, which had
declared that picketing was not necessarily a common law
nuisance, by pointing out that it had involved an industrial
dispute and was influenced by the contemporaneous
passage of the TDA.\textsuperscript{317} If peaceful picketing were lawful
when done by any citizen, the judge reasoned, it would have
been unnecessary to pass a statute legalizing peaceful
picketing in the special context of a trade dispute.\textsuperscript{318} The
public had “a right to go on every part of the highway,” he
proclaimed, and any act that made passage “less
commodious” was a public nuisance. Conceding that an
obstruction would be permissible if reasonable, he insisted
that any reasonable use of the street must be related to
passage and that picketing obviously did not satisfy that
qualification.\textsuperscript{319}

Although Mr. Justice Forbes decided the case on the
ground of public nuisance, the Court of Appeal affirmed his
grant of an injunction on the alternate theory of private
nuisance. In so doing, the court disinterred and revitalized
the Lyons concept that imposing economic pressure was a
nuisance per se. Further, it extended the concept beyond
the context of a trade dispute to a non-union attempt to
boycott a private company.\textsuperscript{320} Lord Stamp observed that the
real estate firm might well succeed in showing that the
picketers interfered with enjoyment of property by putting
“pressure on the company to surrender to the defendants’

\textsuperscript{317} Id. at 154.
\textsuperscript{318} Id. Lord Gifford, attorney for the defendants, relied on Ward to argue
that the social workers were using the highway reasonably. According to Mr.
Justice Forbes, all Ward decided was that three picketers did not constitute a
common law nuisance. Id.
\textsuperscript{319} Id. at 150-51. Thus, a court should consider not the “behavior expected
of a reasonable picket, but whether the behavior of these picketers amounted to
an unreasonable user of the highway,” and this question could only be answered
by reference to passing and repassing. Id. at 151. Turning to Lord Gifford’s
argument that every subject had an inalienable right to picket, analogous to
freedom of speech, Mr. Justice Forbes concluded that “no such general right to
picket as that for which Lord Gifford contends exists at all.” Id. at 158.
\textsuperscript{320} It disapproved the trial court’s reliance on public nuisance. Lord Stamp
noted that much of what was said by the judge in the court below was not
directed to the question of private nuisance but was concerned with the extent
of the public’s right to use a highway. “In the result I cannot regard the judge’s
conclusions of law as a satisfactory application of the law to the facts which he
found.” Id. at 180.
demands." Similarly, Lord Orr observed that "there was a serious issue to be tried" on the Lyons' claim.

The plaintiff's reliance on Lyons forced the court to confront Ward, its most recent precedent on the issue, and the judges adopted the strained position that the two cases were consistent on the law but distinguishable on their facts. Lord Stamp insisted that Lyons and Hubbard both differed from Ward in that the latter case involved only picketers' attempts to persuade employees to become members of a union rather than an effort to pressure an employer. "Which side of the line the case falls," he concluded, must "depend on the facts found at the trial." Lord Orr agreed that Lyons and Ward were on "two sides of a dividing line" and that the crucial question was on which side of that boundary a case lay.

As in Ward, however, the court failed to locate the supposed "dividing line." Indeed, the fact that it found a cognizable Lyons claim meant that such a line was illusory. To follow Lyons and treat picketing as invariably a nuisance precluded simultaneously invoking Ward's ruling that a nuisance might or might not exist on a given set of facts. All three cases were identical in involving peaceful picketing that exerted commercial pressure on an employer. Under Lyons such picketing was per se a common law nuisance, not something that might or might not be a nuisance; in contrast, under Ward bare economic pressure was not cognizable as a nuisance at all. The court's invocation of Ward was in fact meaningless and its resurrection of Lyons a warning shot to picketers of all types.

Hubbard was also notable because it found peaceful picketing impermissible on two wholly separate grounds. The lower court treated it as per se a public nuisance through obstruction of the highway, and the Court of Appeal viewed it as per se a private nuisance through economic compulsion. In subsequent years both views would consistently inform the treatment of labor picketing outside the statutory immunity.

321. Id. at 183.
322. Id. at 189.
323. Id. at 183. Weighing the balance of convenience between the two parties, he found it to favor the employers. Id. at 183-85.
324. Id. at 189.
The decision included an impassioned dissent by Lord Denning. Gathering together earlier scattered notions of picketing as a reasonable use of the highway, Denning denied that the picketers in the case had committed a public nuisance:

[There was nothing in the nature of a public nuisance here. No crowds collected. No queues were formed. No obstruction caused. No noises. No smells. No breaches of the peace. Nothing for which an indictment would lie, nor an action on the relation of the Attorney-General.]

On the issue of private nuisance, Lyons had "not stood the test of time." It had been superseded by Ward, which rejected the notion that picketing was unlawful per se. In the instant case, Lord Denning concluded, there was no unreasonable conduct because the picketers consisted only of a small number of young people who had arranged their demonstration in advance with the police. Courts must recognize, he proclaimed, "the right to demonstrate and the right to protest on matters of public concern."

In spite of its generous tone toward protest generally, Lord Denning's opinion held adverse implications for unionists. Although industrial picketing was governed by statute and other types of picketing by the common law, he observed, "broadly speaking, they are in line the one with the other." "Why," he asked, "should workers be allowed to picket and other people not?" It was, of course, a question that illuminated starkly the mentality of the

325. Id. at 175. If there was no public nuisance, Lord Denning continued, there could be no question of an individual suing based on particular damage. There was also no action in trespass because the company did not own the pavement, which was vested in the local authorities. They had not complained, "nor could they, since no wrong has been done to their interest." Nor was there any evidence of conspiracy to injure. Id.

326. Id.
327. Id. at 172-73.
328. Id. at 178.
329. Id. at 177. He treated Ward as a non-industrial picketing case, noting that it was decided on the common law of torts, did not involve the picketing immunity and was handed down prior to the TDA. "It covers picketing, not only in furtherance of a trade dispute, but also in furtherance of other disputes or other causes." Id. at 176. He also seemed to suggest, as had the court in Ferguson, that the statutory immunity had no bearing on the interpretation of the common law. Id. at 176-77.
330. Id. at 177.
English judiciary. The obvious answer—that Parliament had expressly so provided—was for Lord Denning simply not sufficient. Though he supported a right to protest, his decision effectively eradicated the special protection that Parliament had conferred on organized labor.\textsuperscript{331}

5. The Legal Significance of the 1960s and 1970s. In the period 1965-80 industrial strife and provocative picketing tactics—especially those instigated by secondary picketers in the context of national strikes—again made picketing a bitterly contentious issue. Courts adapted and widened the concept of public nuisance to cover mass picketing, blocking drivers, and potential nuisances, even as they invalidated a claim of passage as a defense. In addition, courts augmented further the discretionary powers of the police by enabling them to disperse picketers even prior to commission of an anticipated nuisance. By 1980, in consequence, even a bare handful of picketers standing as sentinels at a doorway to company premises was a nuisance that required a special protective immunity. Correspondingly, courts contracted the immunity to apply only to this extraordinarily limited type of picketing. They accomplished this, first, by inferring that picketers who participated in mass picketing, blocking vehicles, or circling demonstrated an improper motive; and, second, by concluding that Parliament only intended to effectuate bare "attendance," which necessarily excluded these tactics. Although the traditional immunity still governed the rights of union picketers, courts had altered its construction to

\textsuperscript{331} See Bercusson, supra note 87, at 275 (observing that Lord Denning reduced the worker "to the unprotected status of an ordinary citizen"). Lord Denning was in fact hostile to unions. Even a sympathetic biographer, Edmund Heward, conceded that Denning was regarded as "anti-trade union." EDMUND HEWARD, LORD DENNING: A BIOGRAPHY 108, 134 (2d ed. 1997). For example, when speaking at a graduation ceremony in Canada in April 1979, he stated that "the greatest threat to the rule of law today is posed by the big trade unions." Id. at 139. A typical judicial statement of Lord Denning appeared in Express Newspapers v. McShane [1979] I.C.R. 210, 218 (C.A.), where he insisted that the words of the labor statute

are not to be construed widely so as to give unlimited immunity to law-breakers. They are to be construed with due limitations so as to keep the immunity within reasonable bounds. Otherwise the freedom of ordinary individuals to go about their business in peace would be intruded beyond all reason.

See HEWARD, supra, at 138.
accommodate the realities of reinvigorated industrial action, fully realizing the opportunities to inhibit union picketing presented to them by the critical ambiguities of 1906.

As a result of the doctrinal changes in this period, police enjoyed even greater discretion to enforce nuisance law. Combined with a swollen nuisance law, the shrinking immunity meant that by the end of the 1970s public nuisance was technically available in every case of effective picketing. Underenforcement was inevitably the norm, and police were able to employ nuisance selectively in situations where they perceived a particular threat to social stability. Their preferred nuisance offense in these decades was highway obstruction. Industrial picketers were insulated from private nuisance by the TDA, and certain tactics—especially stopping vehicles—offered obvious occasions for the invocation of obstruction doctrine. The availability of plausible nuisance charges against picketers in every circumstance of industrial action meant that even where police and unionists attempted to reach an informal accommodation, nuisance law provided an additional weight on the scales in favor of the authorities.

In the 1970s a number of academic commentators sympathetic to unions—though not generally trade unionists themselves—began to consider the limitations inherent in a system of immunities and to advocate a right to picket that courts could balance against the public's right to passage and the economic rights of employers. The

332. See, e.g., Davies & Freedland, supra note 4, at 369 (noting that the Labour Party never seriously considered renouncing the system of immunities); Pelling, supra note 28, at 81 (observing in 1979 that the unions still remained largely loyal to their tradition of collective laissez-faire); Taylor, supra note 6, at 170 (stating that there are "no stronger champions of the dogmas of laissez-faire in collective bargaining in British society than the unions"); Simpson, supra note 5, at 162; Wedderburn, supra note 169, at 509-10.

333. See, e.g., Guy Goodwin-Gill, Judicial Reasoning and the Right To Picket, 1975 L.Q. Rev. 173, 177 (arguing that the right to picket should be a qualified right, balanced against the right of others to use the highway); Kidner, supra note 134, at 263 (arguing that reasonable picketing for the relevant purposes was not an unreasonable use of the highway and that the right to picket should be balanced against the common law right to passage); Peter Wallington, The Case of the Longannet Miners and the Criminal Liability of Picketers, 1972 Indus. L.J. 219, 228 (arguing for the creation of a statutory right for a reasonable number of persons to picket peacefully and to stop persons or vehicles).
judges, however, were not receptive to the notion of granting positive law status to labor picketing by recognizing it as a reasonable use of the highway. Indeed, not only did rigid common law rules on obstruction continue to govern in the non-industrial context, but the Court of Appeal revived Lyons to cope with the new phenomenon of consumer picketing. By the end of the 1970s nuisance law increasingly held picketers—industrial as well as non-industrial—in its tenacious grasp. It was to prove even more useful in the 1980s, when a legislative revolution exacerbated labor's declining status at common law.

V. NUISANCE LAW AND THE END OF COLLECTIVE LAISSEZ-FAIRE

In the 1980s Margaret Thatcher's Conservative government radically restructured the industrial relations regime, bringing to an official close the era of collective laissez-faire: In a series of anti-union enactments, Parliament removed the protection of the immunity from large numbers of picketers and thereby rendered them wholly vulnerable to nuisance law. Equally important, in the new political climate judge-made nuisance law flowered luxuriantly in both traditional and novel forms.

A. Parliamentary Rejection of Abstentionism

Public concern with mass picketing and other militant strike tactics intensified during the "winter of discontent" of 1978-1979, when unions in both public and private sectors demanded substantial wage increases, engaged in major secondary activity, and disrupted essential public

334. See Bellace, supra note 3, at 119. Unions justified secondary picketing by the need to maintain a balance of industrial power at a time when employers operated on a "multi-plant, multi-company, and multi-national basis" and the state played a larger role as employer and manager of the economy. See Lewis, supra note 135, at 198. The government's Green Paper on Picketing, Trade Union Immunities, attributed the increase in secondary picketing to easier transport and communication, greater organization of picketing—sometimes by unofficial groups rather than union leaders—and the increased formalization of the closed shop. The report commented that no one in 1906 "could have foreseen how damaging the scope for organizing secondary industrial action would become as a result of the interdependence of modern industries and improved communication." Trade Union Immunities, supra note 5, ¶ 99.
Aggressive strike action and other perceived abuses of union power significantly contributed to the Conservative victory in 1980. Capitalizing on labor weakness in a period of high unemployment and economic decline, the new government quickly moved to dismantle the statutory framework of the preceding century. A series of parliamentary enactments replaced collective laissez-faire with a complex scheme of industrial regulation. The Employment Acts of 1980 and 1982 and the Trade Union Act of 1984 narrowly redefined "trade dispute," abolished the immunity of trade unions as entities and revived the economic torts for most forms of secondary action and for strikes not authorized by a secret ballot of the membership.

335. DAVIES & FREEDLAND, supra note 4, at 444, 457-58. Strikers who aroused the most opposition were road haulage workers who rationed the movement of essential supplies and grave diggers who delayed burials. See id. at 444; HOLMES, supra note 219, at 135-46.

336. See EWING, supra note 5, at 149-50; Bellace, supra note 3, at 119.

337. See DAVIES & FREEDLAND, supra note 4, at 459; Klarman, supra note 3, at 1597. According to Labourites, in 1980 Conservatives launched an attack upon the unions because they were the "main obstacle that stands between their objective of restoring Victorian capitalism and its realisation." BENN, supra note 214, at 6; see MICHAEL FOOT, ANOTHER HEART AND OTHER PULSES: THE ALTERNATIVE TO THE THATCHER SOCIETY 196 (1984) ("[T]he 1979-83 period will be seen as a most painful interlude for Britain and the Western world, when all the lessons of the post-1945 experience were senselessly cast aside in a sudden but fortunately not fatal reversion to the doctrine of a shameful, shameless laissez-faire.").

338. Employment Act, 1980, ch. 42; Employment Act, 1982, ch. 46; Trade Union Act, 1984, ch. 49. The 1980 Act restricted the general tort immunities of 1974 and 1976 in three ways: section 16 provided that they did not apply to picketing except at a picketer's own place of work; section 17 provided that they did not apply to secondary action unless undertaken by employees of firms that purchased from or supplied the employer in dispute; and section 18 provided that they did not apply where a person induced an employee of one employer to break a contract to compel employees of another employer to join a particular union. The Employment Act of 1982 eliminated tort immunity for union funds and narrowed the scope of "trade disputes" to issues arising wholly or mainly between workers and their employers, thus inhibiting unions from engaging in politically oriented industrial action such as striking against denationalization. Employment Act, 1982, ch. 46, §§ 15, 18. The 1984 Act legislated a code of "union democracy," requiring membership ballots every five years for principal officers and prior to engaging in any form of industrial action. Trade Union Act, 1984, ch. 49, §§ 1, 10-12. Additional legislation in 1988 attacked the closed shop and prohibited union sanctions against members who refused to participate in lawful industrial action. Employment Act, 1988, ch. 49, §§ 3, 10-11; see EWING, supra note 5, at 10-13; Éwan McKendrick, The Rights of Trade Union
The legislation also targeted picketing because, as a government report observed, its use in industrial disputes had been the subject of "widespread and increasing public concern in recent years." The legislation implemented three major changes in picketing law. First, provoked by a national steel strike in early 1980 marked by extensive secondary activity and much violence, Parliament narrowed the scope of the picketing immunity to cover only primary picketing at a worker's own place of work. This provision significantly contracted the scope of statutory protection because labor had begun in the 1970s to direct much of its picketing at secondary targets.

Second, in a measure intended to encourage employers themselves to regulate picket lines, the Employment Act of 1982 rejected the basic tenet that union funds enjoyed immunity from legal action. This meant that employers could more easily obtain interlocutory injunctions against

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339. TRADE UNION IMMUNITIES, supra note 5, ¶ 165; see BENN, supra note 214, at 2 (observing that the new legislation was aimed at making effective picketing illegal); Simon Auerbach, Legal Restraint of Picketing: New Trends; New Tensions, 16 INDUS. L.J. 227, 242 (1987).

340. See Lewis, supra note 135, at 196. Picketers were arrested for obstruction of the highway during the strike. See GEARY, supra note 184, at 89.

341. The Employment Act 1980 created a new "substituted" section 15 of TULRA 1974, which provided:

It shall be lawful for a person in contemplation or furtherance of a trade dispute to attend (a) at or near his own place of work, or (b) if he is an official of a trade union, at or near the place of work of a member of that union whom he is accompanying and whom he represents, for the purpose only of peacefully obtaining or communicating information, or peacefully persuading any person to work or abstain from working.

Employment Act, 1980, ch. 42, § 16(1). Previously, there had been no distinction at law between primary and secondary picketing. Workers whose picketing fell outside the new section 15 also lost immunity from the economic torts, because the Act provided that nothing in TULRA section 13, which set forth these immunities, "shall prevent an act done in the course of picketing from being actionable in tort unless it is done in the course of attendance declared lawful" by TULRA section 15. Employment Act, 1980, ch. 42, § 16(2).

342. Section 14 removed the immunity for acts done by the union itself, section 15 extended liability to actions endorsed by a responsible person, and section 16 met the concern that employers could bankrupt a union with huge damage claims by setting a tariff of maximum awards. Employment Act, 1982, ch. 46, §§ 14-16.
picketing in private civil tort actions. In addition, unions that disobeyed injunctions faced criminal fines and sequestration of assets.

Third, the government formally validated the restrictive quantitative approach to picketing in a "Code of Practice on Picketing" issued in conjunction with the Employment Act of 1980. The Code reinforced both judicial theory and police convention by advising that picketers should generally not exceed six at any entrance to a workplace. Although the Secretary of State for Employment insisted that the Code did not define the law but merely offered "practical guidance," the document had a pervasive influence on judicial and police determinations as to when picketing was reasonable. As a Labour M.P.

343. Prior to 1982 it was procedurally difficult for employers to obtain injunctive relief in picketing cases because injunctions could be pursued only against named individuals and in some circumstances employers had difficulty ascertaining picketers' names. Picketers were not legally obligated to supply their names and addresses and, because the injunction was sought under the civil law, the employer could not enlist the help of the police. TRADE UNION IMMUNITIES, supra note 5, ¶ 172. But see Auerbach, supra note 339, at 230 (noting that even prior to 1982 it was "probably rare in practice for plaintiffs to experience serious difficulties").


345. SECRETARY OF STATE FOR EMPLOYMENT, CODE OF PRACTICE ON PICKETING (1981) [hereinafter CODE OF PRACTICE].

346. Id. ¶ 31. The Code disclaimed the intention of narrowing police discretion on the picket line, because the chief constables had stated flatly that they did not require operational guidance from the government. See Bercusson, supra note 87, at 227; Lewis, supra note 135, at 200. However, the Code stated that numbers larger than six were likely to provoke fear and resentment among those seeking to cross the line "even where no criminal offense is committed." CODE OF PRACTICE, supra note 345, ¶ 31. If a picket did not leave a picket line when requested to do so, the police could arrest the picketer for obstruction of the highway or obstruction of a constable. Id. ¶ 28.

347. 992 PARL. DEB., H.C. (5th ser.) 647 (Nov. 13, 1980). He adamantly denied that "we are indulging in what some people have termed back-door legislation." Id.

348. The Code was admissible in evidence in courts and tribunals, see id. at 655 (statement of James Prior, Secretary of State for Employment), and was relevant to civil liability for nuisance as well as to criminal prosecutions for obstruction, breach of the peace, watching or besetting and intimidation. See, e.g., Roy Lewis, Codes of Practice on Picketing and Closed Shop Agreements and Arrangements, 44 MOD. L. REV. 198, 200 (1981). This may have not been "law as such," critics charged, "but it operates very like law." Robert Baldwin & John
remarked on the floor of the House, "the administration of the criminal law, especially in relation to obstruction of the highway, is being decided."\(^{349}\) Despite the continuing broad discretion of the police in matters of enforcement,\(^{350}\) a 1983 study found that the police regularly applied the recommended maximum of six picketers as the standard legal norm.\(^{351}\)

With the exception of the Code, the end of the abstentionist regime did not produce governmental regulation of picketing per se but instead reined in the immunity and unleashed the general law. Most industrial picketing was now outside the immunity, either because it was not primary picketing at an employee's place of work under the new statutes,\(^{352}\) because it involved a nuisance that was not encompassed by "attendance," or because it demonstrated a non-immunized purpose. The massive relegation of industrial picketers to common law status, conjoined with the greater availability of civil actions and widespread public hostility to unions, spurred a substantial increase in suits against picketers. A member of the TUC General Council expressed dismay that in the first six months of 1980 more people were charged with picketing offenses "than in any period in our history for the last fifty years."\(^{353}\)

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Houghton, *Circular Arguments: The Status and Legitimacy of Administrative Rules*, 1986 PUB. L. 239, 264-65 (observing that the Code was promulgated to influence the law and courts and officials paid great attention to it); see Bercusson, * supra* note 87, at 228 (commenting that with respect to a criminal trial for obstruction, it did "not require much imagination to forecast the result when a magistrate takes a relevant bit of the Code between his teeth").


350. See Ewing, *supra* note 5, at 145; Kahn et al., *supra* note 6, at 89-90 (noting that the police sometimes used their discretion to turn a blind eye to obstructions of the highway); East et al., *supra* note 258, at 306.


B. Continuing Judicial Interventionism in the Early Thatcher Years: Private and Public Nuisance

The larger scope of non-immunized common law operations, together with the possibility of private civil suits against unions, resurrected the unresolved debate between Lyons and Ward over whether picketing as a form of economic pressure was per se a common law nuisance. In a social and political environment hostile to picketing, courts accommodated employers by applying Lyons' notion of economic compulsion—already revived in the non-industrial context in Hubbard—to industrial actions for the first time since the early twentieth century.

The breakthrough came in Mersey Dock & Harbour Co. v. Verrinder, a suit brought in 1981 by the Port Authority of Liverpool against TGWU members. Picketing the entrance to two container terminals, the union sought to ensure that the Port of Liverpool employed only union haulage contractors by forcing it to boycott shipowners who hired nonunion "cowboy" drivers. When lorry drivers refused to cross picket lines, effectively bringing business at the port to a standstill, the Authority sued in nuisance.

None of the picketers worked at the dock premises and therefore the immunity did not govern. Applying the general law, the High Court granted an interlocutory injunction restraining the picketing as likely to constitute a nuisance even though "[t]he personal conduct of the individual picketers appears to have been exemplary." Mr. Justice Fitzhugh followed judicial convention in claiming that Lyons and Ward fell on two sides of a dividing line; that is, on any given set of facts picketing might or might not be a private nuisance. In this case, he concluded, the behavior of the picketers differed from that in Ward because the goal of limiting business to union drivers was effectively an attempt to "regulate and control the container traffic." In finding that picketing to pressure a company to

354. [1982] I.R.L.R. 152 (Ch.). An earlier sign of the vitality of Lyons came in Thompson-Schwab v. Costaki [1956] 1 W.L.R. 335 (C.A.), where the Court of Appeal suggested that streetwalking could constitute a private nuisance by interfering with the reasonable enjoyment of adjacent premises. It cited Lyons for the proposition that physical interference with property was not necessary to support an action for private nuisance. Id. at 341.


356. Id. at 155.
operate in a certain manner was a private nuisance, the court paid homage to Ward but, as in Hubbard, actually treated picketing as a nuisance per se. Exerting economic pressure was inevitably the object of any effective picketing.\textsuperscript{357}

In the bitter Messinger Newspaper dispute of 1983, the High Court again invoked the Lyons concept of private nuisance to restrain picketing. The National Graphical Association (NGA), a powerful trade union in the newspaper publishing industry with a loyal following of over 100,000 members, instituted mass picketing against the Messenger Newspaper Group in the course of a recognition dispute.\textsuperscript{358} When the company planned to expand without a closed shop from its Stockport plant to associated companies in Bury and Warrington, the union organized primary picketers at Stockport as well as secondary picketers at these other locations. The chairman of the company, Eddie Shah—whom the court characterized as the unions' "most hated and despised enemy"\textsuperscript{359}—sued the NGA on various theories including private nuisance.

Mr. Justice Caulfield granted a permanent injunction against the picketing in Messinger Newspapers Group, Ltd. v. National Graphical Association.\textsuperscript{360} First, he dispelled the union's immunity by finding that the picketing was not peaceful and that the picketers' motive was the unlawful one of compelling the plaintiff to accept a closed shop.\textsuperscript{361} Second, applying the common law, he identified a nuisance in the blocked access and the fact that the NGA picketed

\textsuperscript{357} Verrinder indeed took the unionists by surprise as they did not expect that their peaceful picketing would provoke any legal action. See KAHN ET AL., supra note 6, at 177-78.
\textsuperscript{359} Id.
\textsuperscript{361} Id. at 402. He also concluded that there was no "trade dispute" at Bury and Warrington because the action was an unlawful secondary boycott. Id. at 406. By transferring work from the establishment where the dispute had arisen to another location, the Messinger Group was able to exploit the prohibition in the Employment Act of 1980 against picketing at a location other than the worker's own place of work. It was obviously ineffective for the NGA to assign picketers to prevent supplies from entering and leaving an empty factory at Stockport. See, e.g., John Gennard, The Implications of the Messenger Newspaper Group Dispute, 15 INDUS. REL. J. 7, 15 (1984).
the plaintiff's premises "with accompanying obstruction." Although the judge did not cite Lyons, he incorporated its notion of pressuring a company. The picketing, he remarked, "was an organized, beautifully organized, attempt to prevent the plaintiff carrying on its business." The increased litigiousness of employers in the 1980s was also reflected in a growing number of private suits based on "particular damage" that companies suffered from a union's obstruction of public passage. In Messinger, for example, the court found the union guilty of public as well as private nuisance for its use of techniques of mass picketing, highway obstruction and stopping vehicles. Applying Tynan in the context of a private suit, it concluded that the company suffered particular damage from the public obstruction because non-striking employees were forced to arrive early at work and barricade themselves into the building. The greater ease of civil actions in the 1980s,

362. [1984] I.R.L.R. at 406. The court noted that in private nuisance the obstruction need not be successful; impeding access was sufficient. Id. The judge stressed the fact that the strikebreakers endured gestures, shouting, abuse, veiled threats ("we know where your children go to school"), incessant phone calls, foul language and frightening episodes such as the shaking of the minibus in which they traveled. Id. at 402-03. There were determined attempts to stop lorries entering or leaving the premises. This was "mobocracy at its worst . . . a determination on the part of the defendant to wreck the plaintiff's business because of the plaintiff's refusal to accept a closed shop." Id. at 403. The court thus seemed to find that picketing that made entering or leaving a premises less pleasant, such as enduring violence and threatening language, might amount to private nuisance. See BENSON, supra note 47, at 210. 363. [1984] I.R.L.R. at 403. The court awarded damages of £125,051 and issued a permanent injunction restraining the picketing. For other developments concerning the litigation, see CLUTTERBUCK, supra note 212, at 29; Gennard, supra note 361, at 8-14. 364. [1984] I.R.L.R. at 406. Another noteworthy case of private nuisance was Norbrook Laboratories Ltd. v. King [1983] N. Ir. 306 (C.A.). King, the branch secretary of the TGWU in Ireland, organized a picket line to protest the dismissal of seven employees at a workplace for expressing interest in joining the union. The picketers and their cars blocked access to the building, and Norbrook sued King, inter alia, for damages in private nuisance and trespass. The court found that King had committed unlawful picketing by standing in front of a car, using language threatening to drivers ("we will remember you for this"), and organizing picketers that were excessive in number. Id. at 324. One judge observed, however, that a momentary instruction to stop vehicles to attract the attention of the drivers and put the strikers' case, standing alone, would be excusable on the "de minimis principle." Id. The court ordered a new trial to identify the damages arising from the trespass and nuisance violations as opposed to those resulting from inducing workmen to break their contracts of employment, which it found protected by the immunity conferred by Article 64
conjoined with the loss of the immunity, thus generated a growing number of employer actions in private nuisance utilizing a wide range of nuisance theories. 65

Despite this new emphasis on employer civil suits, the government did not abandon its own practice of prosecuting strikers for public nuisance and highway obstruction. Enforcement of nuisance law remained a matter of police discretion, and even in the 1980s the police often declined to enforce the law strictly. 66 However, in volatile situations they frequently resorted to obstruction law, especially when they feared exacerbating labor disputes by enforcing criminal provisions directed specifically against picketers. 67

In the case of industrial picketing, an obstruction charge was available whenever the number of picketers exceeded six. Unions therefore generally stationed no more than six official picketers at a workplace entrance while gathering a large number of demonstrators nearby. 68 There was never a strike “where we have had only six picketers,” one TUC official acknowledged. “[T]hey have always been attended by a considerable number of demonstrators.” 69

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65. A scholar who analyzed 38 industrial disputes between 1980 and 1982 discovered that despite the tradition of not using civil remedies, the threat of an injunction was significant; that is, the Employment Act of 1980 created “live ammunition” as far as picketing was concerned. S. Evans, The Labour Injunction Revisited: Picketing, Employers, and the Employment Act 1980, 12 INDUS. L.J. 129, 146 (1983).

66. See, e.g., EWING, supra note 5, at 145; McCABE & WALLINGTON, supra note 47, at 32 (stating that highway obstruction was so flexible in the case of stationary picketing that the police effectively “licensed” picketers by not enforcing the law strictly); Brian Bercusson, Picketing, Secondary Picketing and Secondary Action, 9 INDUS. L.J. 215, 227 (1980) (observing that “the enormous discretion of the police on picket lines is not disturbed by any directions or even advice as to how they should exercise it”); East et al., supra note 258, at 306; Lewis, supra note 135, at 211 (commenting that in practice the police exercised a wide discretion, sometimes stopping vehicles so that picketers could briefly communicate with drivers); John McIlroy, “The Law Struck Dumb?”—Labour Law and the Miners’ Strike, in POLICING THE MINERS’ STRIKE 81 (Bob Fine & Robert Millar eds., 1985).

67. See Bennion, supra note 87, at 72; see also, e.g., BENSON, supra note 47, at 260 (commenting that the two crimes most frequently committed on the picket line were public nuisance or its statutory equivalent under the Highways Act and watching or besetting under the CPPA); McCABE & WALLINGTON, supra note 47, at 46.

68. See Davidson, supra note 119, at 139; Wallington, supra note 351, at 153.

69. TRADES UNION CONGRESS, ONE HUNDRED AND EIGHTEENTH ANNUAL
This ploy may have protected the official picketers, but demonstrators fell afoul of the strict rules on obstruction that governed non-immunized strikers.

The stringent judicial approach to unprotected labor picketers was illustrated in *Jones v. Bescoby*, where Mr. Justice Forbes applied the strict rules on street obstruction enunciated in *Hubbard* to a case of industrial action. During a 1983 strike against Halifax General Hospital, Bescoby and fellow unionists prevented delivery vehicles from entering the hospital driveway, and as a result trucks soon backed up and blocked part of the street. The police arrested the unionists for willful obstruction under the Highways Act. Although the magistrates acquitted the defendants, the appellate court reversed. Mr. Justice Forbes reiterated that a person could exercise passage only when using the highway as a highway, and in this case the defendants were not "exercising any right to use the highway at all."

In addition to expanding the use of highway obstruction, the Divisional Court in the 1980s held picketers liable for trespass in the first reported decision on this issue since *Larkin* in 1908. *British Airports Authority v. Ashton* involved a 1982 dispute between the British Airports Authority (BAA) and the TGWU, the union representing ramp workers at Heathrow Airport. Adhering to the Code of Practice, the Metropolitan Police permitted limited picketing at entrances to the airport but not at locations within its perimeter. Picketers nonetheless appeared at some of the interior control points, causing delivery vehicles to turn away. When the strikers defied a constable's request to leave, they were arrested. Following
Larkin, the court concluded that the immunity did not confer a right to attend on land against the will of the owner or to suspend the operation of any bylaws regulating the use of property. Although BAA's private ownership was subject to a public right of access, that did not include "access for the purpose of picketing."\footnote{Id. at 330.}

Reflecting the coalescence of legislative and judicial activism, the early 1980s thus saw a wider scope for the common law, a greater incidence of employer civil suits, and the revitalization of older anti-union cases such as Lyons and Larkin. The miners' strike of 1984-1985, a watershed in British industrial relations, accelerated those tendencies and also generated a wholly new theory of labor nuisance.

C. Picketing and the Miners' Strike of 1984-1985: The Reinvention of Nuisance

The miners' strike, beginning in March 1984 and continuing for a full year, was the longest and most violent industrial conflict in decades.\footnote{See Ewing & Gearty, supra note 12, at 103; Roger Benedictus, The Use of the Law of Tort in the Miners' Dispute, 14 INDUS. L.J. 176, 176 (1985).} It was precipitated by an announcement by the National Coal Board (NCB) that it would close a colliery in South Yorkshire, which fueled fear that the government proposed to close all pits regarded as uneconomic at a cost of 65,000 jobs.\footnote{See K.D. Ewing, The Strike, The Courts and the Rule-Books, 14 INDUS. L.J. 160, 160 (1985); Tony Weir, A Strike Against the Law?, 46 MD. L. REV. 133, 137-38 (1986). By 1983 the NCB had a deficit of £485 million and coal had been heavily subsidized for years. See Edwin R. Render, Comparative Role of the Judiciary in the 1984-85 British Coal Strike, 16 COMP. L.J. 317, 321 (1995). In March 1984 Ian MacGregor, Chairman of the National Coal Board, informed the NUM of the need to close the mines and reduce production. Id. at 322. In 1998.} The disorder as-

\footnote{331. The justices found the picketers guilty of violating Byelaw 5(58), which provided that no person could remain at the airport after being requested by a constable to leave. Importing a requirement that the request be fair and reasonable in the circumstances, the Divisional Court remitted the case to the magistrates to determine if this was indeed the case. Id. at 330.

\footnote{376. Id. In a subsequent case, Rayware Ltd. v. TGWU [1988] 3 All E.R. 583 (C.A.), company premises were on a private trading estate three quarters of a mile from the highway entrance. The union established picketers at the entrance to the highway. The Court of Appeal, construing "at or near the place of work" in a geographical sense and a "common sense way," declared that such picketing was lawful. It should be noted, however, that if the picketing had not been held to be within the statutory term, the plaintiffs' site could never have been lawfully picketed.

\footnote{377. See Ewing & Gearty, supra note 12, at 103; Roger Benedictus, The Use of the Law of Tort in the Miners' Dispute, 14 INDUS. L.J. 176, 176 (1985).}

sociated with the strike was far worse than anything that had occurred at Saltley, Grunwick or Warrington. Almost fifteen hundred officers were injured, at least two picketers were killed and the police worked fourteen million hours of overtime at an estimated cost of £140 million. Culminating in a decisive defeat for the mineworkers, the strike was probably the most litigated industrial dispute in Britain since World War II. Both public and private nuisance theories again proved useful tools against militant picketing.

1. Criminal Nuisance. Despite the new Thatcher legislation facilitating private civil actions, when the strike began the government followed the advice of local police chiefs and relied primarily on the criminal law. Lord Denning claimed that it was "high policy decided at Cabinet level" not to use the new statutes but "to call out, instead, hundreds and hundreds of police." Direct policing, the government believed, would allow greater political control and fine tuning than actions brought by employers in civil courts. Moreover, treating the strike as a law and order issue dissociated from industrial relations appeared to be the best means of mobilizing public support and presenting state intervention as non-partisan. The National Council on Civil Liberties described the strike as "the most massive and sustained deployment of the police ever experienced in Britain," and the dispute raised the issue of police

the same month the South Wales and other area branches went out on strike; in May the national executive committee of the NUM endorsed the action of the area branches, and in June the national executive appointed a national committee to coordinate industrial action. Thomas v. NUM [1985] 2 All E.R. 1, 7 (Ch.).

379. See Ewing & Gearty, supra note 12, at 103; Weir, supra note 378, at 133-34.
381. Quoted in McIlroy, supra note 366, at 79.
382. Id. at 85. The government was pleased by the use of the Employment Acts in the Messenger strike, but it considered that using them against a relatively weak printing union at one company was different from doing so in a national coal strike. During the miners' strike the government exerted direct pressure on the National Coal Board not to utilize the employment acts. Id. at 84-85.
383. Id.
Among the crimes that the police employed against picketers were the ostensibly impartial offenses of public nuisance and its statutory analogue, willful obstruction of the highway.

Early in the strike some police forces permitted strikers direct contact with drivers, and the National Union of Miners (NUM) enjoyed substantial success in turning vehicles back from the collieries. Abruptly changing policy, the police began to prohibit workers from waving vehicles to the side and to threaten drivers who stopped their trucks with charges of highway obstruction. In Nottinghamshire, for example, the police interpreted instructions that picketers should not “impede the free flow of traffic” to mean that even official picketers had to remain on the pavement where they could not speak to drivers. Combined with use of their discretionary powers to restrict the number of picketers to six, the police transformed the right to “attend” into the right of a few picketers “to wave farewell to the back of a speeding police van hurrying through a massed cordon of officers.” During the strike 640 miners were arrested in England and Wales for obstruction of the highway and 1682 for the related offense of obstructing a constable.

385. The NCCL pointed to provocative police behavior on picket lines, the use of thousands of police to ensure the passage to work of a handful of mine workers, and the extensive use of road blocks to deny the passage of “presumed picketers.” See id; EWING & GEARTY, supra note 12, at 104-12; Bob Fine & Robert Millar, Introduction: The Law of the Market and the Rule of Law, in POLICING THE MINERS’ STRIKE 1, 14-15 (Bob Fine & Robert Millar eds., 1985); John McLroy, Police and Picketers: The Law against the Miners, in DIGGING DEEPER, ISSUES IN THE MINERS’ STRIKE 101, 107 (Huw Beynon ed., 1985) (claiming that military-style policing was aimed not at regulating but at stopping all picketing).

386. See Fine & Millar, supra note 385, at 13.

387. See McCABE & WALLINGTON, supra note 47, at 177.

388. See, e.g., TRADES UNION CONGRESS, ONE HUNDRED AND EIGHTEENTH ANNUAL REPORT 456 (1985); Baldwin & Houghton, supra note 348, at 264; Carty, supra note 380, at 544.

389. Blake, supra note 220, at 107-08.

390. See McCABE & WALLINGTON, supra note 47, at 163; see also GEARY, supra note 167, at 137, 141. Arthur Scargill, the President of the Union, was found guilty of obstruction at Orgreave. See Weir, supra note 378, at 145. The government also brought 643 charges under the CPPA for watching or besetting, the first significant use of this section in living memory. See EWING & GEARTY, supra note 12, at 109. However, as the CPPA did not carry a power of arrest, charges of besetting generally followed arrests on other grounds. See Wallington, supra note 351, at 151. In addition, 4314 miners were arrested
The miners' strike also saw the first use of a systematic policy of establishing road blocks against "flying picketers." This "intercept" strategy was designed to seal off the mining communities and impose tight controls over the number and movement of strikers. If the police were not satisfied that miners planned to picket at their own work sites, they directed the drivers to turn around or face arrest for obstruction. According to an official estimate, in the six months from March to September 1984 the police blocked the passage of 290,000 "presumed picketers."

The Divisional Court upheld the intercept policy in *Moss v. McLachlan*, a case involving a convoy of sixty to eighty Yorkshire miners on their way to picket collieries in Nottinghamshire. Although the police had no information that a volatile situation existed at any of the four local pits, they stopped the strikers at a roadblock a few miles from their destination and arrested forty picketers who refused to turn back. Relying on *Piddington*, the court held that, owing to the proximity of the pits and the availability of cars, the constable reasonably apprehended an imminent and immediate threat of a breach of the peace. *Moss* extended police powers beyond *Piddington* in that the constable was not even present at the pit to make a direct assessment of the situation. The state, it appeared, was itself free to obstruct the highway and infringe the workers' under *Piddington* powers and 1109 for criminal damage. See GEARY, *supra* note 167, at 137.


392. See Blake, *supra* note 342, at 112; East & Thomas, *supra* note 391, at 77-78.


394. Id. at 79. Although *Moss* required an "imminent or immediate" threat to the peace, in practice the police stretched the decision considerably. One roadblock was set up in London to stop Kent miners travelling to unknown destinations over a hundred miles away in the counties of Nottinghamshire and Warwickshire. See East et al., *supra* note 258, at 308-09; East & Thomas, *supra* note 391, at 78.

395. See, e.g., Austin, *supra* note 230, at 227-30 (criticizing *Moss* for extending a constable's power to prevent a breach of the peace to a situation where the constable was not "on the spot"); A.L. Newbold, *Picketing Miners and the Courts*, 1985 PUB. L. 33, 34.
right to passage on the flimsiest grounds.\footnote{396}

2. Employer Civil Suits. Though the government relied predominantly on police action in the early months of the strike, the prolongation of the conflict saw increasing resort to the civil law.\footnote{397} The civil initiative came not from the NCB or any of its major customers—the Central Electricity Generating Board, the British Steel Corporation, or British Rail—but from the Read companies, small haulage contractors with commitments to convey coke from British Steel's Port Talbot plant to various customers. When mass picketing interfered with deliveries, the Read companies sued the South Wales NUM for damages and an injunction.\footnote{398} In April 1984 a judge granted an interlocutory injunction restraining the NUM "from stopping, approaching or in any other way interfering with the free passage of the plaintiffs' vehicles."\footnote{399} The injunction was apparently based on the plaintiffs' particular damage—the loss to their haulage business—caused by the union's obstruction of the highway.\footnote{400} When the union failed to comply with the injunction, the plaintiffs instituted contempt proceedings.

The court in Richard Read, Ltd. v. NUM\footnote{401} held that the immunity did not apply because the picketing was non-peaceful secondary picketing. Further, it found union officials guilty of numerous breaches of the injunctions resulting in "serious interference with and disruption of the trade and business of both companies."\footnote{402} The court fined

\footnote{396. Even in the case of minor criminal offenses such as obstruction, during the miners' strike the courts granted bail only on the condition that a person agree not to picket except at his or her own place of work. This in effect granted the NCB an injunction against picketing, and the policy aroused considerable opposition. See Blake, supra note 220, at 114-15; Louise Christian, Restriction Without Conviction: The Role of the Courts in Legitimizing Police Control in Yorkshire, in Policing the Miners' Strike, supra note 385, at 120, 124-29; McIlroy, supra note 385, at 113-14.}

\footnote{397. See Fine & Millar, supra note 385, at 15.}

\footnote{398. See Benedictus, supra note 377, at 177. The NCB did apply successfully for an interlocutory injunction three days into the strike, but it discontinued the proceedings and took no further action out of fear of uniting working and striking miners. Id.}


\footnote{400. See Benedictus, supra note 377, at 180.}

\footnote{401. [1985] I.R.L.R. at 68.}

\footnote{402. Id. at 71.}
the NUM £50,000 and, upon the union’s failure to pay, sequestrated its assets. 3 Thereafter picketers ceased to interfere with drivers at Port Talbot, 4 again demonstrating the utility of private civil nuisance actions encouraged by the Thatcher legislation of the early 1980s. 5

3. Employee Nuisance Suits: A New Synthesis. From a doctrinal perspective, the most significant case arising from the miners’ strike was Thomas v. National Union of Miners. 6 The decision was notable in two respects. First, reflecting the prevailing emphasis on the rights of individual workers, the plaintiffs were not employers but working miners. 7 Second, the High Court created for the non-striking miners a new form of nuisance that fused theories of public and private nuisance as well as notions of physical and psychological obstruction. Superimposing concepts of passage drawn from Tynan and Broome on the notion of economic pressure developed in Lyons, the court created a new synthetic tort actionable by a new class of plaintiffs. This development demonstrated the plasticity of nuisance law in accommodating the altered goals of a new government.

The miners’ strike was solid in South Wales between March and November 1984, when a small number of miners returned to work in vehicles organized by the NCB and protected by a large police escort. By January 1985, 270 of a total work force of 21,000 men had resumed work. 8 At each of five collieries the union arranged with the police to

403. Id.; see Render, supra note 378, at 325.
404. See Benedictus, supra note 377, at 178.
405. See McIlroy, supra note 385, at 88. The effectiveness of the civil law was largely due to the plaintiff’s ability to obtain sequestration of assets upon a union’s nonpayment of a judgment. In this case Price Waterhouse seized £707,000 from the union’s bank accounts until it purged its contempt fines. See id. at 89. A commentator noted that the Stockport Messinger, miners’ and News International disputes demonstrated “that the possibility of incurring crippling fines or sequestration must be taken very seriously by any union contemplating the use of picketing as a central tactic in a major dispute.” Auerbach, supra note 339, at 227.
406. [1985] 2 All E.R. 1 (Ch.)
407. According to some accounts, the “return to work” movement was organized by NCB managers and did not actually reflect individual workers exercising their civil liberties. Moreover, the NCB arranged for the government to pressure chief constables to secure a passage to work for strikebreakers. See McCabe & Wallington, supra note 47, at 131-32.
mount an official picket line at the gates. In addition, approximately fifty to seventy demonstrators gathered behind police lines, far enough back from the road to allow buses conveying the mine workers to enter the colliery unimpeded. As the buses passed, the picketers and demonstrators shouted insults such as “you scabby bastards,” “you’re dead,” and “kill the scabs.” The mine workers sought an injunction to restrain the picketing, claiming that it involved various offenses including nuisance by obstruction of the highway.

Mr. Justice Scott thought that the statutory immunity might cover the six official picketers but did not apply to the demonstrators, reaching his conclusion on the usual ground that the presence of large numbers indicated that the demonstrators’ purpose was something other than peaceful persuasion. The judge recognized, however, that merely because picketing did not fall within the immunity, it was not necessarily unlawful. Its legality depended on the common law of tort, and on the facts he could not find an actionable tort. Public nuisance by highway obstruction was not available because, though the picketing may have obstructed the highway, it did not interfere with the workers’ access by bus and consequently caused no particular damage. Traditional private nuisance was also not possible because the plaintiff workers lacked the essential prerequisite for suit, a property interest in land.

Rather than taking the analysis to its logical conclusion

409. Id. at 8.
410. Id. at 1-2. They also claimed that the picketing constituted assault, interference with contract, intimidation and watching or besetting under section 7 of the CPPA. Id. at 2.
411. Id. at 20. The union claimed that the demonstrators were not picketers organized by the union but rather spontaneous supporters. The judge found, however, that the local lodges had played a significant role in arranging the attendance of large numbers of persons and that there was no difference in law between a picketer and a demonstrator. Id. at 25, 27.
412. Id. at 21.
413. In addition, there was no assault because, cocooned within their vehicles and surrounded by police, the mine workers had no genuine fear of immediate physical violence. Nor was there interference with contract, because work was being done as the NCB wanted. Id. The judge did not actually decide whether the picketing was criminal within section 7, which until the miners’ strike had virtually never formed the basis of a successful prosecution, see Thomas & Todd, supra note 88, at 379, but he did follow Ward in requiring an independent tortious illegality for a CPPA violation. Thomas [1985] 2 All E.R. at 18-19.
and denying recovery, the judge peremptorily created a new variety of the tort of nuisance. Lyons had made clear, he declared, that unreasonable interference with the rights of others was actionable in tort. Although nuisance was traditionally confined to activity that infringed on the use or enjoyment of land, there was no reason why it should not also protect the enjoyment of other rights such as the right to travel to work on the highway.

The tort might be described as a species of private nuisance, namely unreasonable interference with the victims' rights to use the highway. But the label for the tort does not, in my view, matter. In the present case, the mine workers have the right to use the highway for the purpose of going to work. They are, in my judgment, entitled under the general law to exercise that right without unreasonable harassment by others.\(^4\)

Following Ward, he concluded that neither primary nor secondary picketing was per se a common law nuisance.\(^4\)\(^1\) Whether the picketers in any given case were committing a nuisance would depend on the particular circumstances. "The law must strike a balance," he declared, "between the rights of those going to work and the rights of the picketers."\(^4\)\(^1\)\(^6\)

The harassment at issue, however, was in his opinion clearly unreasonable. "A daily congregation on average of 50 to 70 men hurling abuse and in circumstances that require a police presence and require the mine workers to be conveyed in vehicles do not in my view leave any real room for argument."\(^4\)\(^1\)\(^7\) Given the temper of the local communities, he suggested, mass picketing was inherently unreasonable and intimidating.\(^4\)\(^1\)\(^8\) To support this proposition he conjured up the specter of "a large number of sullen men lining the entrance to a colliery, offering no violence,

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415. Id. at 30.
416. Id. at 22. He noted that the result might depend on prevailing ideas about conduct. Perhaps it was legitimate in 1896, when Lyons was decided, to regard peaceful picketing as per se a common law nuisance; but attitudes had already changed by 1906 when Ward was decided, and by 1985 they had altered even further. Id. at 30.
417. Id. at 22.
418. Id. at 15, 26. He also stated that mass picketing, in blocking the entrance to premises, was per se both a common law nuisance and a OPPA offense. Id. at 30.
saying nothing, but simply standing and glowering. \[^{419}\] Thus invoking Lyons' notion of pressure in the conduct of economic life—albeit that suffered by employees rather than employers—he set an unusually low threshold for assessing unreasonable pressure. The suggestion that "glowering" men constituted a nuisance harkened back to the "black looks" that Baron Bramwell had found so objectionable in Regina v. Druitt in 1867 almost a hundred and twenty years earlier.\[^{420}\]

Scott's new tort relied not only on Lyons but also on the doctrine of highway obstruction. The mine workers, he emphasized, had the right "to use the highway for the purpose of going to work."\[^{5421}\] Thomas thus creatively melded both private and public nuisance into one combined action that encompassed both obstruction of passage and pressure in the pursuit of economic interests.

Utilizing Ward as well as Lyons, the decision ostensibly affirmed a balancing test rather than a predetermined concept of "reasonableness."\[^{422}\] Nevertheless, as Scott's opinion clearly implied, the right to use the highway to go to work would invariably prevail over the interests of picketers. In functional terms, therefore, "balancing" afforded picketers no greater protection than a per se test. In a political and legal climate inimical to trade union power and supportive of the rights of individual workers, it was not surprising that a court adapted nuisance not merely to restrain picketers but to confer on their

419. Id. at 15.
420. See supra note 14 and accompanying text.
422. Scott also adopted the quantitative approach to permissible picketing within the immunity. Although he acknowledged that limiting the picketers to any specific number would be arbitrary, he followed the guidance of the Code of Practice on Picketing and restricted the number of picketers to six. Id. at 26-27. Many commentators found his use of the Code to be troublesome. See, e.g., Benedictus, supra note 377, at 182 (predicting that the new tort of "unreasonable interference" would be proven by six picketers); Carty, supra note 380, at 544-45 (stating that legislation "by the backdoor source of the Government's Code of Practice appears to have been accepted. The magic number of six may come to be the dividing line between persuasion and intimidation .... "); Simon Lee & Simon Whittaker, Rights, Wrongs, Law and Non-Law: Miner Examples, 102 L.Q. Rev. 35, 39 (1986) (claiming that by making six picketers a condition of the injunction, Scott indirectly gave the Code's provision the force of law and preempted police discretion). Scott declined, however, to enjoin the South Wales branch from picketing at other collieries or at premises other than collieries. Thomas [1985] 2 All E.R. at 29-31.
D. After the Miners' Strike: The Disfavored Status of Industrial Picketing

Ironically, just as industrial picketers were suffering from expanded legislative and judicial disabilities, courts were developing a more genuinely flexible approach toward non-labor picketers. In the aftermath of the miners' strike, judges for the first-time considered the possibility that stationary picketing in non-industrial contexts might be a reasonable use of the street. Yet they refused to apply this notion seriously to union activity, leading to the curious result that non-immunized labor picketers actually came to hold a disfavored status under the law.

The new relative position of industrial and non-industrial picketers was evident in two 1987 decisions, one involving political picketers and the other an industrial dispute. *Hirst & Agu v. Chief Constable of West Yorkshire,* 424 a case factually similar to *Hubbard,* involved a group of animal rights activists who picketed a fur shop in Bradford. The Divisional Court, echoing Lord Denning's dissent in *Hubbard,* endorsed the view that stationary picketing might be a reasonable use of the highway rather than a nuisance. Mr. Justice Otton, for example, insisted that freedom of protest on public issues should receive "the recognition it deserves." In agreeing that the picketers' conduct was not necessarily unlawful, however, Lord Justice Glidewell quickly established that judicial tolerance would not extend to industrial picketing. He stressed that a highway obstruction "caused by unlawful picketing in pursuance of a trade dispute"—presumably non-immunized picketing—"cannot be said to be an activity for which there is a lawful excuse." 425

This same view of the respective positions of industrial and non-industrial picketing appeared in *News Group Newspapers Ltd. v. Society of Graphical and Allied Trades*

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423. See Hendry, supra note 313, at 162.
In January 1986 members of the principal typesetting unions struck plants of The Sun, News of the World, The Times and The Sunday Times in a dispute over the introduction of new technology and recruitment of non-union labor at a newspaper plant in Wapping. The publishers dismissed 5500 union members, shutting down Fleet Street, and moved production of all four newspapers to the new Wapping facility. The unions initiated mass picketing of the Wapping plant and other sites, which precipitated substantial violence and necessitated a large police presence. In addition to six official picketers, fifty to two hundred people demonstrated daily and up to seven thousand persons attended rallies on Wednesdays and

428. See K.D. Ewing & B.W. Napier, The Wapping Dispute in Labour Law, 45(2) CAMBRIDGE L.J. 285, 286-87 (1986). Rupert Murdoch wished to cut personnel by introducing computer-based technology for typesetting. He claimed that the industry had worked for many years with three times as many people as necessary at wages between two and five times the national average. News Group Newspapers [1986] I.R.L.R. at 341. The defendants for their part thought that Murdoch had acted in bad faith, intending from the outset to transfer the newspapers to Wapping without the unions and to sack the existing labor force. Id. A Labour member of Parliament proclaimed that in the miners' strike "we were told that the dismissals were due to the fact that the pits were uneconomic, but Murdoch has made £47 million out of the labour of those whom he has sacked." 97 PARL. DEB., H.C. (6th ser.) 302 (May 8, 1986).
429. The picketers shouted out such threats as "[w]e'll get you" and "[y]ou can't hide forever," threw missiles at employees and the police and occasionally broke through police barriers and blocked the egress of lorries. News Group Newspapers [1986] I.R.L.R. at 343-44. Most employees went to work each day in a bus protected with barred windows to repel missiles. Id. at 344. The court found that although some of this behavior was attributable, as the union insisted, to a "lunatic fringe," some unionists were also involved. Id. Moreover, the unions did nothing to discipline their members and continued to organize events in the knowledge that nuisances would be committed. Id. at 353.
430. See, e.g., 97 PARL. DEB., H.C. (6th ser.) 284 (May 8, 1986) (complaining of the number of officers the Home Office was forced to deploy during the strike) (Home Secretary); 102 PARL. DEB., H.C. (6th ser.) 579-80 (May 8, 1986) (noting that 1870 officers were sent to the News International plant and an additional 590 policed a march to Wapping) (Home Secretary). According to the Home Office, by July 346 police had been injured at Wapping and 1098 people arrested. See id. at 581. Many Labour members objected to the level of police violence. Tony Benn stated that he had spent four or five hours at Wapping and saw scenes "that I hope not to live to see again." 97 PARL. DEB., H.C. (6th ser.) 300 (May 8, 1986). According to another member of Parliament, the metropolitan police at Wapping "are behaving with intolerable arrogance. They appear to be unanswerable and unaccountable to anyone." Id. at 327.
Saturdays. The strike witnessed a resurgence of involvement by outsider support groups not seen since the Grunwick strike ten years earlier. Demonstrations impeded the movement of lorries, and the police instituted roadblocks under their authority to prevent obstruction of the highway. In June seven private plaintiffs—six corporations and one deputy advertising manager for The Times at Wapping—brought suit to restrain the picketing on grounds, inter alia, of public and private nuisance.

Mr. Justice Stuart-Smith applied general nuisance law because the picketers were engaging in non-immunized secondary action. Exhibiting the more tolerant judicial approach to stationary demonstrations evident in Hirst, he ruled that marches, demonstrations and picketing were not per se unlawful: "They are, so long as they are peaceful and orderly, not actionable, even though they may cause some inconvenience to others." In his view, a court should balance "the rights of those who wish to demonstrate with those who wish to exercise their rights of passage."

433. News Group Newspapers [1986] I.R.L.R. at 344. At other sites such as Bouverie Street mass picketers obstructed the whole street, preventing the movement of people and traffic until the police could force a passage. Id. at 345.
434. See, e.g., 92 PARL. DEB., H.C. (6th ser.) 306w (Feb. 20, 1986). A member asked the Home Secretary whether he was aware that a major road had been blocked by a mass of picketers: "When the Queen's highway is blocked in this way, is it not essential that police remain in the area to ensure free passage?" Douglas Hurd replied that the police were acting "to prevent breaches of the peace and obstruction of the highway." 102 PARL. DEB., H.C. (6th ser.) 581 (July 21, 1986).
435. The plaintiffs claimed that the picketers committed four separate torts—nuisance, intimidation, harassment and interference with the performance of commercial contracts. News Group Newspapers [1986] I.R.L.R. at 346. The court found that the defendants had committed the tort of intimidation by issuing threats that employees took seriously. Id. at 347. It also found a likelihood that the plaintiffs would establish at trial that the unions' use of unlawful means—nuisance and intimidation in delaying the departure of lorries—had prevented TNT from performing a primary obligation of its contract. Id. at 349.
436. Id. at 346.
437. Id. The defendants contended that the obstruction only affected a small number of people, namely, the plaintiffs' employees. Mr. Justice Stuart-Smith rejected this argument: "I am doubtful if it can ever apply to obstruction of the highway, where it may be presumed that those who may wish to pass are obstructed." Id. But in fact, he concluded, it did affect the public at large, and in
opinion suggested, however, as had Scott's opinion in *Thomas*, that a "balancing" test would never justify picketing in large numbers. Obstructing the highway by masses of people, the judge stressed, was not a reasonable use of the highway but rather a nuisance, and he found for the plaintiffs on both nuisance theories.\footnote{438}

Revealingly, the judge permitted controlled processions along the highway only, apparently, because he recharacterized the participants as ordinary non-industrial political marchers. Mr. Justice Stuart-Smith stated that those who took part "in marches and rallies, if they proceed peaceably along the Highway"—in contrast to the official labor picketers and daily demonstrators—were not "picketing."\footnote{439} Similarly, the six permissible picketers were those who "attend at the plaintiffs' premises as opposed to any event the plaintiffs' employees and the drivers constituted a sufficient class. *Id.*

438. *Id.* at 347. On the question of the requisite damages for a private suit in public nuisance, the judge concluded that the corporate plaintiffs suffered particular damage from the costs of busing their employees and hiring extra security; in addition, they had lost the services of journalists. *Id.* On the issue of private nuisance, the judge found that the owners of the land adjoining the highway at Wapping had a cause of action in private nuisance based on interference with their right of access to the highway, and it was not necessary for them to establish particular damage. *Id.* at 348. The individual employee suffered particular damage because unlike the miners in *Thomas* who were driven into the pit in a bus and suffered no damage, the assistant manager had to travel by taxi or minicab instead of on foot and felt drained by the constant pressure of coming to work through the picket line. She also felt unable to leave the plant during the day for a meal or break. *Id.* at 347. The court also found SOGAT guilty of an organizational tort in continuing to organize events with the knowledge that a public nuisance such as obstruction of the highway would be committed. *Id.* at 352-53; see Auerbach, *supra* note 339, at 237-38 (observing that this ruling was a departure from traditional tort principles). Mr. Justice Stuart-Smith refused to find for the plaintiffs on the harassment claim, agreeing with the defendants that that Mr. Justice Scott should "not have invented a new tort." *News Group Newspapers* [1986] I.R.L.R. at 348. In his view it was not sufficient to find an unreasonable interference with the rights of others, especially where damage did not appear to be a necessary ingredient of the tort, "unless those rights were recognized by the law and fell within some accepted head of tort." *Id.* Inasmuch as Stuart-Smith had already found particular damage and commission of the traditional tort of nuisance, he concluded that it was unnecessary to pronounce definitively on the question of harassment. *Id.*

439. *News Group Newspapers* [1986] I.R.L.R. at 351. He defined "picketing" as "men acting in a body or singly who are stationed by a trade union or the like to watch men going to work during a strike or at a non-union workshop and to endeavour to dissuade or deter them." *Id.*
peacefully marching or processing." The right to march or demonstrate, therefore, did not formally extend to union picketers. Although the 1980s saw increasing judicial rhetoric about the need to balance rights to demonstrate against the right of passage, even judges who adopted this stance did not consider picketing in a trade dispute to be a cognizable public "right." The ostensibly more generous attitude in this decade toward stationary assemblies still excluded labor picketing as a reasonable use of the highway.

A stunning change had thus taken place over the course of the preceding eighty years. Strikers had originally enjoyed a preferred position as compared with non-industrial picketers based on a specific legislative immunity that authorized at least limited obstruction of the highway. Further, at least some judges viewed the legislative

440. Id. at 357. The court in British Airports Auth. v. Ashton [1983] I.R.L.R. 326 (Q.B.), also decided that industrial picketing did not constitute a "demonstration." It held that the strikers did not violate a bylaw prohibiting "any public assembly, demonstration or procession likely to obstruct or interfere with the proper use of the aerodrome." Id. at 328.

441. Industrial picketing was also particularly targeted by the Public Order Act of 1986, ch. 24, which imposed statutory restrictions on outdoor demonstrations for the first time since 1936. As a TUC delegate and member of SOGAT observed in 1985, the fact that the government's proposal for a new Act appeared in May, immediately after the miners' strike, demonstrated that "the prime target is the trade union Movement." TRADES UNION CONGRESS, ONE HUNDRED AND SEVENTEENTH ANNUAL REPORT 611 (1985); see Hazel Carty, The Public Order Act 1986: Police Powers and the Picket Line, 1987 INDUS. L.J. 46; Wallington, Some Implications for the Policing of Industrial Disputes, 1987 CRIM. L. REV. 180, 180. The government expressly presented mass picketing as an example of behavior that the Act sought to regulate. See REVIEW OF PUBLIC ORDER LAW, Cmd. 9510, ¶ 5.10 (1985); Lewis, supra note 135, at 218. As enacted, section 14 permitted restrictions on stationary street activity relating to size, number or duration where the purpose was "intimidation" or where there was "serious disruption to the life of the community." Public Order Act 1986, ch. 24, §§ 12, 14. Some observers noted that moving a picket line even a short distance or ending it before a work force was due to arrive or leave could totally defeat its purpose. See, e.g., TRADES UNION CONGRESS, supra, at 610 ("As we all know, a picket line which is held away from the workplace entrance which lasts for half-an-hour and which only has two or three people on it is worthless."); East et al., supra note 258, at 315 (noting that imposing conditions can undermine a picket as effectively as a ban); Wallington, supra note 39, at 190. The Public Order Act also made CPPA section 7 offenses arrestable and increased the penalties from three months' imprisonment or a fine of £100 to six months' imprisonment or a fine of £2000. It did not resolve the problem of the appropriate interpretation of the "independent illegality" requirement. See Carty, supra note 441, at 47.
immunity as informing the common law interpretation of reasonable use. By the 1980s, however, three developments had collectively reversed the respective positions of union and non-union picketers: the legislative constriction of the immunity; an increasingly narrow view of permissible common law picketing, especially the resurrection of Lyons and the creation of a special cause of action for strikebreakers in Thomas; and a more tolerant approach to stationary picketing that excluded the activities of union members. The evolution of nuisance thus ensured that the legal status of most union picketers, far from being privileged, was even more precarious than that of ordinary citizens.

CONCLUSION

The intersection of nuisance law and picketing over the past century suggests several conclusions about the history of industrial relations in England. First, despite the supposedly "abstentionist" nature of the labor law regime after 1875 and the existence of a special legislative picketing immunity, judge-made nuisance law continued to play a significant role in determining the fate of union picketing. Rather than acquiescing in the scheme of collective laissez-faire, courts utilized nuisance at critical junctures to circumvent the abstentionist labor statutes. As the Article demonstrates, labor law cannot be viewed as an isolated field governed by specialized labor doctrines such as the CPPA and the economic torts. To the contrary, developments in the area of picketing were significantly determined by the general law of nuisance.

Second, this Article establishes that particular characteristics of nuisance law made it an effective tool to regulate labor picketing. It was easily adaptable to judicial purposes; it imposed on plaintiffs and prosecutors minimal evidentiary requirements; it ostensibly applied to all persons impartially; and it operated independently of legislative judgments in the area of labor relations.

The elasticity of the doctrine was especially significant. It allowed the courts to shape its two dominant forms—a private civil doctrine to protect enjoyment of property and a criminal doctrine to safeguard public passage—to ac-

442. See supra note 5.
commodate changing social and economic circumstances. Private nuisance first appeared in the labor context in response to the new unionism of the 1890s, when *Lyon* ruled that the infliction of economic pressure was actionable by employers. Ostensibly interred by Parliament, the *Lyon* concept of labor nuisance was resuscitated many decades later in *Hubbard* in the context of a consumer boycott and eventually in *Verrinder* in connection with an industrial strike. A similarly innovative process occurred in public nuisance. When industrial picketing grew in sophistication and militancy after the mid-1960s, adopting such confrontational forms as mass picketing and blocking vehicles, the courts shaped nuisance law precisely to reach these new provocative types of conduct. Developments in the two categories complemented each other nicely. Though picketing was generally a criminal nuisance that the police enforced at their discretion, in divisive periods such as the 1890s and 1980s private civil suits by employers played an important supplementary role in regulating picket lines. Indeed, during the miners' strike the two types of nuisance coalesced, when the High Court created a new action for nonstriking workers by synthesizing concepts of private economic harm and public interference with passage.

The other major advantage of nuisance was its ease of proof, making it exceptionally reliable as an instrument of enforcement. Although nuisance was by nature a fact-sensitive doctrine, in the labor context judges enunciated per se rules that obviated the need for them to consider particular facts and often allowed plaintiffs to prevail without offering any evidence as all. As a matter of private law, courts following *Lyon* treated peaceful picketing as a nuisance per se. Similarly, as a matter of public law, the judiciary considered stationary picketing to be per se an unreasonable street obstruction. In addition, *Piddington*, *Kavanagh* and *Moss* empowered the police to restrain pickets preventively on the mere basis of an "apprehension" of potential nuisance. By ensuring that nuisance was always available as an instrument to control picketing, these judicial rules maximized the discretionary powers of the policy in situations of industrial conflict.

In addition to exploring the manner in which the courts stretched the limits of nuisance law, this Article has also traced the circuitous but effective process by which they simultaneously narrowed the protective immunity. A third
principal conclusion is that the erosion of picketing rights after 1875 was based on a dual process that involved shrinking the statutory immunity as well as reinterpreting nuisance law. Although Parliament in 1906 eschewed a test of lawful picketing based on the reasonableness of picketers' methods, courts skillfully reintroduced this rejected approach as part of an analysis of picketers' "purpose." Judges inferred that "excessive" tactics such as circling, mass picketing and stopping vehicles belied the claimed lawful purposes, and they also ratified the police practice of defining "reasonable" picketing in highly restrictive quantitative terms. The result was to undercut severely labor's achievement in persuading Parliament to support a "purpose" standard in the Trades Disputes Act. Further, the courts drained the statutory "right of attendance" of any practical significance by construing it to confer only a bare right to be physically present as opposed to conveying any meaningful right to influence and persuade. So defined and limited, the picketing immunity covered few pickets and sanctioned few actions.

As this Article has demonstrated, the combination of a widening nuisance law and a contracting legislative immunity significantly eroded the union "privilege" to picket in the course of the twentieth century. By the 1980s most union picketers stood outside the immunity's scope, yet at common law were unable to benefit from either a claim of passage or the more relaxed nuisance rules that governed stationary picketing in non-industrial settings. Labor picketers—the formal beneficiaries of a special scheme of statutory protection—thus came in fact to possess a legal status inferior to that of ordinary citizens.

These developments, however, were not attributable to the actions of the judiciary alone. A fourth central argument of the Article is that the legislature, supposedly the unions' protector against judicial incursions, was complicitous in exposing picketers to the vagaries of nuisance law. The Trade Disputes Act of 1906 and subsequent legislation failed to clarify the relationship between the picketing immunity and nuisance, leaving the matter wholly to judicial elaboration. The Court of Appeal doubtless contributed to the uncertainty by refusing in *Ward* to define the scope of nuisance or later to resolve the conflict between *Ward* and *Lyons*, thereby allowing inferior courts considerable freedom in applying nuisance rules to curb
picketing. The legislature itself, however, bore significant responsibility for the erosion of the protection that it purported to mandate.

Finally, as part of a broader inquiry into the political power of nuisance law in modern English history, this Article establishes that nuisance doctrine determined the boundaries of permissible labor picketing as thoroughly as it dictated the contours of the more general right to public assembly. In the labor as well as the more directly political context, the special features of nuisance law—its elasticity, reliability and seeming neutrality—permitted subtle but highly effective interferences with organized popular movements. Moreover, in both spheres the police enjoyed extensive independence to enforce nuisance rules, a discretion that they exercised lightly in harmonious times but employed rigorously and systematically in contentious periods.

As a political instrument, nuisance also provided a pivotal mechanism for allowing authorities to treat groups disparately, sanctioning the actions of certain movements while stifling the operations of others. The author has argued elsewhere that in the 1880s the courts achieved a doctrinal resolution that recognized processions as lawful exercises of the “right to passage” while invalidating stationary assemblies as impermissible obstructions of the highway. This framework legitimized moving demonstrations by relatively respectable organizations such as the Salvation Army while justifying the suppression of radical meetings of socialists, communists and the unemployed. The labor picketing cases illustrate how the judges imposed special limits on their own doctrinal formulation. In addressing the practices of organized labor, they shaded their own distinction by excluding circling picketers from the category of “movement,” despite the fact that parading by labor picketers was no less related to “legitimate” travel than the lawful political processions of other organized groups. The ultimate logic of nuisance law was not an abstract “legal” logic but a purposeful social logic.

The disfavored position of unions by the 1980s was both ironic and disturbing. Parliament had, after all, carved out for labor picketing a special sphere of protection, yet the

443. See Vorspan, supra note 41.
444. See id. at 976-82.
The judiciary’s use of nuisance law had virtually extinguished this mandated area of insulated conduct. Moreover, unionists were more vulnerable to nuisance than protesters in general for an additional reason. Not just the state but also the picketers’ direct adversaries—employers and strikebreakers—were able to wield the power of the doctrine. In circumstances of popular political protest, nuisance ostensibly protected “public” rights; in the labor context, it openly served narrow private interests as well. Indeed, the judiciary created new civil nuisances based on “economic pressure” and “harassment” specifically to advance private anti-union economic objectives. By the 1980s the combined force of judicial efforts to protect interests antagonistic to labor—the employer’s right to conduct business, the nonstriking employee’s right to work and the public’s right to passage—had wholly overpowered the legislative immunity. The history of labor picketing thus suggests that nuisance was more powerful in restraining labor activity, and less justified in doing so, than it was in curtailing other popular movements. One solution to this progressive weakening of the ability to picket might be enactment of a scheme of positive trade union rights, paralleling a movement in the general political context to secure for all subjects a positive “right to demonstrate.” However, a more effective approach—and one more promising in light of the return of the Labour Party to power—might be to clarify through elaborate and fully articulated legislation the proper role of nuisance law in industrial relations.

445. See supra note 333. Discussion of the virtues of a scheme of positive rights accelerated in the 1980s. See, e.g., DAVIES & FREEDLAND, supra note 4, at 369; TRADE UNION IMMUNITIES, supra note 5, ¶¶ 339-82; Patrick Elias & Keith Ewing, Economic Torts and Labour Law: Old Principles and New Liabilities, 41 CAMBRIDGE L.J. 321, 356-58 (1982); Ewing, Immunities, supra note 5, at 26-31; Lee & Whittaker, supra note 422, at 37-38; Simpson, supra note 5, at 192; Wedderburn, supra note 169, at 515-16. Indeed, some trade unionists themselves became converted to the idea. As a TUC delegate proclaimed in 1985: “What we need is a positive statutory right to demonstrate and to picket.” TRADES UNION CONGRESS, ONE HUNDRED AND SEVENTEENTH ANNUAL REPORT 610 (1985). However, it was not only the left that supported such proposals, and the problem remained how to cabin judicial interpretation of such rights. See DAVIES & FREEDLAND, supra note 4, at 369; Wedderburn, supra note 12, at 515 (noting that discussion could be meaningful “only if the proponents make clear what kind of right, what kind of strikes, what extent of legality, they have in mind”).

446. Vorspan, supra note 41, at 1014 n.376.