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The Strike and Its Alternatives: The Public Employment Experience

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THE STRIKE AND ITS ALTERNATIVES: THE PUBLIC EMPLOYMENT EXPERIENCE

I. INTRODUCTION

Last summer six hundred and fifty Sanitation, Works and Safety Department employees walked off their jobs in Louisville, Kentucky, in a disagreement over pay raises and benefits. The strike, which halted various municipal services, including garbage collection, street cleaning, and street repair,[1] was easily squelched when the mayor fired four hundred and twenty workers who did not return to work by an announced deadline. He declared that the workers who violated the conditions of the existing contract and defied the courts had no right to continue in their jobs while flaunting legal authority.[2] In Lexington, Kentucky, firemen struck to dramatize their desire for union recognition even though the Fayette Circuit Court had previously issued a restraining order enjoining them from participating in any work stoppages. The strike resulted when the metropolitan government refused to recognize Local 526 of the Professional Fire Fighters Association as a collective bargaining agent for the contract formulation process.[3] Stating that "[t]hey've (local firemen) done all they could short of a strike to gain recognition for the union and collective bargaining,"[4] a union representative categorized the use of the walkout as a last resort to achieve the firemen's demands. All across the country in the fall of 1973 schools were closed because the teachers, protesting for improved salaries and working conditions, failed to return to the classroom. More than thirty communities nationwide were affected, with 175,000 students gaining an extended summer vacation in Michigan and Pennsylvania alone.[5]

The public services involved in these work stoppages were varied; the effects upon the populace widespread. Nearly all of the strikes were illegal, either statutorily prohibited or judicially proscribed. In spite of the illegality of the work stoppages

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[1] Louisville Courier-Journal, June 7, 1974, at 1, col. 1.
[2] Louisville Courier-Journal, June 8, 1974, at 1, col. 2.
[3] Lexington Herald, Aug. 21, 1974, at 1, col. 2.
[4] Lexington Herald, Aug. 20, 1974, at 1, col. 4.
[5] Lexington Leader, Sept. 5, 1974, at 3, col. 1.

and at the risk of considerable negative consequences, the public employees persisted in their strike activity.

Recent years have spawned an increasing number of public employee work stoppages, as well as the participation of larger numbers of the public servants in the strikes. The strikes have also become widespread geographically, now frequently involving workers in the South and Midwest as well as those in the North, East, and West. Earlier strikes among public employees occurred primarily in the large urban areas, particularly New York, Boston, Philadelphia and Baltimore. Chicago and the major cities of California have also experienced public employee strikes. These cities have been the traditional sites for many initiatives in the labor movement, as well as other sociological and economic developments which later gained general acceptance. Now, however, the public employee strike has reached areas traditionally slow in adopting new ideas and reluctant to emulate the practices of the more "radical" Eastern urban population.

This sudden increase in public employee strikes is a curious phenomenon, especially in light of the severe penalties that are universally imposed for such illegal work stoppages. However, it may well be that "[t]he punitive and overly-rigid repressive laws were counter-productive. Rather than promoting labor peace by helping to improve labor relations and prevent strikes, the laws encouraged labor unrest and strikes and served to fuel the uncertainty."[6] The employees either ignore or overlook the harsh penalties applicable to their conduct and pursue the strike as a means of accomplishing their demands. Often, one of the bargaining demands advanced as a condition of settlement of the strike and resumption of work is a blanket amnesty or pardon for the strikers' illegal conduct. When the employees achieve this goal, the penalties are circumvented and rendered nugatory.[7]

Coupled with the undermining of the penalties designed to prevent the use of strikes as bargaining weapons in public em-

[6] Haemmel, *Government Employees and the Right to Strike*, 39 TENN. L. REV. 75, 83 (1972).

[7] Following the sanitation strike in New York the penalties of the Condon Wadlin Act were not enforced because prosecution had been waived as a condition of settlement. Taylor, *Public Employment: Strikes or Procedures?*, 20 IND. & LAB. REL. REV. 617, 618 (1967) [hereinafter cited as Taylor].

ployment are several external factors which have stimulated the upsurge in public employee organization and strikes. The evolving structure of the American social order is one such factor: "The spread of organization among public employees is . . . a reflection of a more general tendency in our society to form groups in order to augment the force of individual demands by concerted action."[8] In addition, the apparent success of civil rights groups has prodded greater militancy in public employees during the 1960's and 1970's.[9] Perhaps an even greater influence in stimulating the recent public employee strikes were earlier ventures in the same areas.

> [T]he demonstrated success of initial illegal strikes such as the New York transit strike and some early teachers' strikes became powerful proof that the *power* to strike was of far greater relevance than the *right* to strike. As long as some employees obtained improvements from the strike, others recognized it as a useful vehicle for their protest as well.[10]

Finally, the growing conviction that the attainment of desired results warrants a flirtation with legal sanctions, together with the thrill or excitement of "tasting of the forbidden fruit," has added to the forces dictating resort to the strike.

These external factors, nevertheless, would not have been sufficient stimuli for public employees to engage in illegal strikes if conditions within the public employment realm were not ripe for conflict. Historically, government employment was more prestigious, rewarding and secure than work within private enterprise. Of course, the nature of public service differed considerably from that of private industry. Two significant developments emerged from the New Deal era, however, to alter the comparative relationship between public and private employment. The great expansion in services performed by the government and the diversification in the nature of the work brought civil service more parallel to private business. "This growing overlapping of activities in the public and private sectors has been accompanied by a convergence in organizational

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[8] Kheel, *Strikes and Public Employment*, 67 MICH. L. REV. 931 (1969).

[9] Bernstein, *Alternatives to the Strike in Public Labor Relations*, 85 HARV. L. REV. 459, 460 (1972) [hereinafter cited as Bernstein].

[10] Zack, *Impasses, Strikes and Resolutions* in PUBLIC WORKERS AND PUBLIC UNIONS 101, 102 (S. Zagoria ed. 1972) (emphasis added) [hereinafter cited as Zack].

structure. . . . [I]t has become difficult for many government employees to distinguish their position from their counterparts in the private sector."[11] Occurring at the same time as the expansion of government services were the concerted efforts at unionization among private employees and the growth of labor organizations as a result of the national policy enunciated in the Wagner Act.[12] Workers in private enterprise were rapidly organizing, and with unionization came the attendant increases in wages and benefits and improvements in working conditions.

Until recently, government leaders resisted any efforts to unionize public employees; in fact, most states prohibited organizational activities among their employees. Early organization of public employees was not done systematically and resulted in a "crazy-quilt pattern of representation"[13] which has contributed to the growing incidence of public strikes. The few states that initially permitted public employee organization failed to provide organizational rights, which left the public servants with no effective alternative to the strike when they were organized. Indeed, the employer refused to deal with them.[14] Besides refusing to grant organizational rights such as collective bargaining, state and local governments failed to maintain a parity with the private sector in regard to salaries and benefits. Therefore, the right to organize became an empty privilege, forcing the employees to strike. The strike ban was but an ineffective deterrent, simply an obstacle to be disregarded while seeking to achieve employment demands.[15]

II. THEORETICAL BACKGROUND

Essential to understanding the resort to the strike among public employees is a grasp of the function that strikes play in labor relations. A strike may be defined in numerous ways, at

[11] Herman, *Strikes by Public Employees: The Search for "Right Principles"*, 53 CHI. B. REC. 57, 60 (1972) [hereinafter cited as Herman].

[12] *See generally* 2 S. MORISON, H. S. COMMAGER & W. LEUCHTENBERG, THE GROWTH OF THE AMERICAN REPUBLIC 471 (1969).

[13] Clark, *Public Employee Strikes: Some Proposed Solutions*, 23 LAB. L.J. 111, 112 (1972) [hereinafter cited as Clark].

[14] Krinsky, *Avoiding Public Employee Strikes—Lessons from Recent Strike Activity*, 21 LAB. L.J. 464 (1970) [hereinafter cited as Krinsky].

[15] Herman, *supra* note 11, at 65.

some times broadly and at others narrowly, but a fairly representative and inclusive definition of a strike, in the present context, is:

> . . . the failure to report for duty, the willful absence from one's position, the stoppage or deliberate slowing down of work, or the withholding, in whole or in part, of the full, faithful and proper performance of the duties of employment, for the purpose of inducing, influencing or coercing a change in the conditions, compensation, rights, privileges or obligations of State employment. . . .[16]

From this definition, numerous characteristics of the device can be elicited. First, a strike is a mechanism of labor designed to bring force, inducement, influence or coercion upon the employer in order to alter the conditions of employment and to shift the relationship between employer and employee. Further, it is generally used with collective bargaining in order to equalize the relative strength of the parties. Normally the employee is in a weak position, since he must continue work in order to obtain funds to provide his necessities. On the other hand, the employer is in a position of strength and dominance, since he usually has the vast labor pool from which to fill vacant jobs. The opportunities for alternative employment are ofttimes scarce, whereas the supply of potential workers may be great. Operating from this position, the employer can dictate the terms and conditions of employment to meet his convenience when the employees are not organized.

In contrast, when employees are organized, pressure can be brought upon the employer to accede to labor demands through the vehicle of a concerted work stoppage. Advocates of the power to strike often take the position, and rightly so, that true collective bargaining depends upon a balanced power relationship between the parties, and that without the strike public employees do not have sufficient power with which to obtain bargaining leverage.[17] Thus, "[t]he absence of the right to strike in the great majority of jurisdictions has permitted the employer to bargain with the assurance that if his offer is not

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[16] GA. CODE ANN. § 89-1302 (1971).

[17] Anderson, *Strikes and Impasse Resolution in Public Employment*, 67 MICH. L. REV. 943, 948 (1969) [hereinafter cited as Anderson].

acceptable, the employees are legally prohibited from asserting the same economic pressure as might their private sector counterparts."[18]

Apart from the balancing of power, strikes, along with the employer work stoppage equivalent (lockout), serve an important function in allowing the parties to impose the cost of disagreement on each other.[19] When the parties cannot agree and refuse to compromise, the cessation of work affects the expectations and needs of both sides. The employer is injured when services terminate, and the nonpayment of wages naturally harms the employee. Thus, each side has a loss resulting from its recalcitrance. In addition, each side eventually has to alter its stance in order to reach agreement. It is in this behavior modification that the strike generates its effectiveness: "The beauty of the strike is that while a potent weapon, it also inflicts damage on the wielder, so that even the threat of its use induces in both sides the degree of reasonableness essential to realistic bargaining."[20]

The vitality and validity of the strike have been historically tested and proven by the experiences in private industry. Prior to the passage of the National Labor Relations Act[21] [hereinafter referred to as NLRA], which legalized the strike as a labor bargaining tool, management had been for the most part successful in refusing to grant meaningful rights and benefits to employees. Since the passage of the NLRA, labor has made great advances in establishing reasonable and safe working conditions at adequate pay by the use of the power to strike to exact concessions from employers. The strike as an economic weapon has achieved a permanent status in the private sector of labor relations. While the years have witnessed an evolving recognition and dependence upon the necessity of the private strike, the vehement and firm rejection of this weapon within public labor relations has not subsided. Indeed, the opposition to a relaxation of the strike ban in the public sphere has remained doggedly adamant.

This resistance lies to a great extent in the differences

[18] Zack, *supra* note 10, at 105.
[19] Herman, *supra* note 11, at 61.
[20] Bernstein, *supra* note 9, at 463.
[21] 29 U.S.C. §§ 151-68 (1970).

between public services and private business. Admittedly, the nature of the products involved is different, and the effects of strikes within each sector are of varying degree.

> In the private sector, employers sell a product for which there are generally adequate alternative sources of supply. The purpose of a private sector strike is to bring economic pressure on the employer by depriving the employer of sales and profits. On the other hand, in the public sector the employer provides a service which is often free of charge, and for which there is generally no immediately available alternate source of supply. Because the service is paid for by tax revenues, a public sector strike generally does not affect the receipt of revenue. Rather than bringing economic pressure on the employer, the purpose of a strike in the public sector is to bring political pressure on the public employer, the pressure being generated by the recipients of the public service which is halted by the strike.[22]

The services affected by a public employee strike are both crucial to the smooth functioning of society, as exemplified by the public transportation system, and vital to the health, safety and general welfare of the community, as illustrated by the sanitation, police and fire departments, public schools and welfare disbursement offices. Due to their widely disseminated impact upon our way of life, work stoppages in these essential services are immediately apparent and obviously threatening to the maintenance of social order. On the other hand, strikes in private industry are generally more delayed in their impact upon the public. Even though the families of striking workers are directly affected by the lost or reduced income, they are able to continue their everyday functions. Eventually, the public may feel the crunch of lessened production through increased prices resulting from the decreased supply. Generally, however, the consequences of a private industry strike are not nearly as drastic or pervasive as those experienced in a public strike.

The proscription of strikes by public employees is dictated by a consideration of several principles. First, public services are of such an essential character that they must be continued.

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[22] Clark, *supra* note 13, at 115-16 (footnotes omitted). The author concludes that there is no functional justification for permitting strikes by public employees.

Second, price flexibility is an economic concept inapplicable to the public sector. Third, the procedure to raise taxes or to find new sources of revenue, reposed in the legislative body, is slow and not sufficiently responsive to meet the immediate demands imposed by striking public employees.[23]

Arising out of the background of the above mentioned principles are several key distinctions between the nature and effect of public and private strikes. Public strikes are generally shorter than those of the private sector. This brevity may be due to the fact that since public strikes are generally illegal, the resort to the judicial process has terminated such strikes. Furthermore, public pressure for early settlement is substantially greater because of the broader and more immediate impact upon society. Also, government employers are usually more responsive to such public opinion and accede to the employees' demands in order to avoid the significant political consequences of a long strike. Likewise, union officials, cognizant of negative public reaction, usually exercise greater restraint in calling and continuing the strikes due to the serious consequences of affecting vital services.[24]

Another key distinction is that the economic motivation is far less significant in public strikes than in private sector work stoppages. In private industry the loss of sales resulting from decreased output lowers profits and thus undermines the basis of the free enterprise and competitive system. Public strikes, on the other hand, do not affect the revenue collected but do result in lower wage outputs. Thus, from an economic standpoint, public strikes result in a favorable budget balance. Pressure to terminate the strike is not economic but instead is political, emanating from citizen expression for the resumption of needed public services.[25]

Finally, a factor affecting the ability to rapidly and successfully reach agreement and terminate the strike is the degree of diffusion of responsibility within the two sectors. Public employer authority and responsibility are widely diffused. In fact, the legislative arm has responsibility for budgetary appro-

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[23] Witt, *The Public Sector Strike: Dilemma of the Seventies*, 8 CAL. WEST. L. REV. 102 (1972).

[24] J. STIEBER, PUBLIC EMPLOYEE UNIONISM 171 (1973).

[25] Bernstein, *supra* note 9, at 464.

priations necessary to fulfill employee demands, whereas the executive has authority in the negotiation process and administration of the dispersal of the services. Contrasted with this lack of a unified structure is private industry, which is characterized by a close-knit organization with an apparent centralization of decision-making power which permits a reasonably rapid and decisive resolution of the disagreement with the employee unions.[26]

III. JUDICIAL AND CONCEPTUAL BASES FOR PUBLIC STRIKE PROHIBITION

The differences in the nature of services and goods provided by the public and private productive sectors, in the consequences emanating from strikes, and in the ability to cope with and settle work stoppages in light of democratic philosophies have formed the framework for the theories and reasons propounded to uphold the prohibition of strikes by public employees. Both the courts and commentators have developed rationales to buttress their arguments for denying public employees the strike power. As would be expected, some of these reasons are fundamentally sound; others seem to be merely manipulations of rhetoric designed to justify a continuation of the traditional approach to the issue.

A. *Sovereignty Theory*

Perhaps the most frequently articulated reason for proscribing the public employee strike is that it is an attack upon the sovereignty of the government. Founded in the ancient, but now waning, maxim— "The King can do no wrong"—this rationale once received great favor. Recently, however, it has slipped in prominence as its conceptual source has also diminished.[27] The clearest, and most often quoted, capsulization of

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[26] *Id.* at 465.

[27] The comments concerning the special trust and obligations of public employees included in President Franklin D. Roosevelt's letter to Luther Stewart, President of the National Federation of Federal Employees, reflect this sovereignty theory, once so prevalent among the governing individuals and institutional leaders of this country.

> Upon employees in the Federal service rests the obligation to serve the whole people, whose interests and welfare require orderliness and continuity in the

this theoretical argument is the explanation in *Norwalk Teachers' Association v. Board of Education*,[28] where the court stated:

> In the American system, sovereignty is inherent in the people. They can delegate it to a government which they create and operate by law. They can give to the government the power and authority to perform certain duties and furnish certain services. The government so created and empowered must employ people to carry on its task. Those people are agents of the government. They exercise some part of the sovereignty entrusted to it. They occupy a status entirely different from those who carry on a private enterprise. They serve the public welfare and not a private purpose. To say that they can strike is the equivalent of saying that they can deny the authority of the government and contravene the public welfare.[29]

Central to this view is that, in accepting public employment, the employee becomes enshrouded in the robes of the sovereign. It is the duty and ". . . should be the aim of every employee of the government to do his or her part to make it function as efficiently and economically as possible."[30] Because in the daily course of performing his work the employee is both bolstered and protected in his task by the very sovereignty that he rebels against by striking, ". . . [t]he drastic remedy of the organized strike to enforce the demands of the unions of government employees is in direct contravention of this principle"[31] [sovereignty]. Indeed, under this theory the mere possibility of the threat of a strike is incongruous to public employment as "the acceptance of a position involving the exercise of some degree of sovereignty necessarily implies a surrender of certain personal rights and privileges which, though properly

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> conduct of Government activities. . . . [A] strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of Government until their demands are satisfied. Such action, looking toward the paralysis of Government by those who have sworn to support it, is unthinkable and intolerable.

Letter from Franklin D. Roosevelt to Luther Steward, Aug. 16, 1937, in THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 325 (1941).

[28] 83 A.2d 482 (Conn. 1951).

[29] *Id.* at 484.

[30] *Id.*

[31] *Id.*

exercisable in private employment, are in public employment inconsistent with the public interest."[32]

In recent years the sovereignty theory has fallen into disfavor as political leaders, as well as the judiciary, recognize it as little more than self-serving rhetoric to rationalize the basic assumptions upon which the theory is founded. Instead, a public strike is no longer considered a serious threat to the sovereignty of the government since "sovereignty" serves no function other than as a political myth to preserve the existing social structure.[33] Judge DeBruler in his dissent in *Anderson Federation of Teachers v. School City of Anderson*[34] labelled the term "sovereignty" as nothing more than a magical word employed to justify the prevailing view; he further stated that the government should not insulate itself against the pressures of public employees by prohibiting public strikes.[35]

The strongest attack upon the sovereignty theory is that the recognition of the right to strike would not work to destroy the government's sovereignty. Instead, a recognition of public employee's right to strike would involve only the release of a small portion of its authority and sovereignty similar to the government's waiver of immunity in tort and contract suits. Certainly, from this relaxation of governmental power, the government's sovereignty will not be jeopardized. In fact, the example of tort and contract suits demonstrates that government is capable of functioning after a release of a portion of its sovereignty.[36]

B. *Structural Integrity Theory*

Public employee strike prohibition has also been justified as being necessary to preserve the present structure of our government. Proponents of this argument contend that public employee strikes must be prohibited in order to contain within

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[32] City of Pawtucket v. Pawtucket Teachers' Alliance, 141 A.2d 624, 629 (R.I. 1958).

[33] Kruger, *The Right to Strike in the Public Sector*, 21 LAB. L.J. 455 (1970) [hereinafter cited as Kruger].

[34] 251 N.E.2d 15 (Ind. 1969).

[35] *Id.* at 20.

[36] *See generally* ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, LABOR-MANAGEMENT POLICIES FOR STATE AND LOCAL GOVERNMENT 35 (1969) [hereinafter cited as ADVISORY COMM'N].

the legislative branch the sole power and discretion regarding the budget. In this regard a strike is seen as a mechanism through which employees can dictate policy changes and financial priorities:

> [o]ne of the vital interests of the public which should be conserved in the government-employee relationship is the ability of representative government to perform the function of levying taxes and, through the budgeting of governmental resources, of establishing priorities among the government services desired by the body politic.[37]

To permit a strike would be intolerable since this would be the result of a coercive delegation of the discretion which a public board or public body must exercise in its fulfillment of its duties.[38]

> . . . [T]he ability of the Legislature to establish priorities among government services would be destroyed if public employees could, with impunity, engage in strikes which deprive the public of essential services. The striking employees, by paralyzing a city through the exercise of naked power, could attain gains wholly disproportionate to the services rendered by them and at the expense of the public and other public employees. The consequences would be the destruction of democratic legislative processes because budgeting and the establishment of priorities would no longer result from the free choice of the electorate's representatives but from the coervice effect of paralyzing strikes of public employees.[39]

Still, as with the sovereignty theory, this argument is not totally persuasive. The resulting budgetary disruption could easily be circumvented by the passage of regulations requiring negotiations prior to any strike, prescribing time guidelines and coupling the strike power with alternative conflict resolution

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[37] Taylor, *supra* note 7, at 619.

[38] City of Detroit v. Division 26, St. Elec. Ry. and Motor Coach Employees, 51 N.W.2d 228 (Mich. 1958); City of Cleveland v. Division 268, St. & Elec. Ry. & Motor Coach Employees, 90 N.E.2d 711 (Ohio C.P., Cuyahoga County, 1949); *See* City of Alcoa v. Local 760, IBEW, 308 S.W.2d 476 (Tenn. 1957); S. MAKIELSKI, EMPLOYEE RELATIONS IN STATE AND LOCAL GOVERNMENT 38 (1971).

[39] City of New York v. De Lury, 243 N.E.2d 128, 132, 295 N.Y.S.2d 901, 906 (N.Y. 1968).

alternatives.[40] The criticisms of this theory focus upon aspects unique to public employee strikes and have been used to justify the difference in policy between the private and public strike.[41]

C. *Absence of Profit Motive*

A further basis for the denial of the public employee's right to strike has been the absence of the profit motive within the government.[42] Private enterprise's fundamental goal of profit maximization is considered an adequate force to impede any unreasonable concessions regarding wage and benefit demands which striking private employees can exact. Conversely, government employers are characterized as sufficiently benign to make the use of an economic weapon unnecessary.[43] However, this portrayal of the government employer is inaccurate. In fact, the politically necessary desire to maintain a low budget is the public employer's equivalent to profit maximization. By maintaining a ceiling on the budget, the government is able to keep a check on high salaries.[44]

D. *Preservation of Government*

Public strike prohibition is also justified as being necessary to preserve our system of government—a government of law rather than contract. Under a government of law there is a continuity of function, predictability in requirements and rights, and equality of treatment among all people. To condone public strikes is seen as a sanctioning of a government by con-

[40] Comment, *Prohibition Revisited: The Strike Ban in Public Employment*, 1969 WIS. L. REV. 930, 936 [hereinafter cited as Comment, *Prohibition Revisited*].

[41] Indicative are the comments of the New York Court in City of New York v. De Lury, 243 N.E.2d 128, 134, 295 N.Y.S.2d 901, 909 (N.Y. 1968):

> [t]he orderly functioning of our democratic form of representative government and the preservation of the right of our representatives to make budgetary allocations—free from the compulsions of crippling strikes—require the regulation of strikes by public employees whereas there is no similar countervailing reason for a prohibition of strikes in the private sector.

[42] Board of Educ. v. Redding, 207 N.E.2d 427 (Ill. 1965); City of Manchester v. Manchester Teachers Guild, 131 A.2d 59 (N.H. 1957); City of Pawtucket v. Pawtucket Teachers Alliance, 141 A.2d 624, 628 (R.I. 1958).

[43] Comment, *Prohibition Revisited*, *supra* note 40, at 932.

[44] *Id.* at 936.

tract and not law.[45] In this manner those desirable characteristics of a smoothly functioning government just mentioned are lost.

E. *Essential Versus Non-Essential Services*

Courts and commentators have frequently classified strikes in terms of those affecting essential services and those touching nonessential services. Generally, strikes are considered at least tolerable in the latter category and not at all acceptable in the former. However, this distinction between essential and non-essential services is not feasible. First, the range of government services is too complex and includes too many widely used essentials to support a principle of selectivity. Second, public opinion would not tolerate such fine distinctions. Third, it is unreasonable to permit some government employees to strike while denying the right to others.[46] This dichotomy also defeats the purpose behind the grant of the right to strike for leverage and bargaining power of the employees. If such a distinction were made, only the non-essential services would be permitted to strike, and by definition this would prevent the pressure from affecting the employer since only non-essential, less noticeable services would be involved.[47] Moreover, consideration must be given to "the adverse psychological impact an employing agency would create when it tells certain groups of its employees that since they are 'non-essential' they may strike."[48] Finally, "[t]he essentiality of continued service does not require that the sole power of finally determining the wage rate be left with the budget-oriented government employer."[49]

F. *Governmental Versus Proprietary Functions*

Another distinction which once had considerable following is that of the governmental versus proprietary functions of government. Strikes were permitted in the latter category but

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[45] Almond v. County of Sacramento, 80 Cal. Rptr. 518 (Cal. Ct. App. 1969).
[46] Clark, *supra* note 13, at 116.
[47] Anderson, *supra* note 17, at 951.
[48] ADVISORY COMM'N, *supra* note 36, at 97.
[49] Comment, *Prohibition Revisited*, *supra* note 40, at 937.

were forbidden within the former. Today, however, courts have generally discarded this dichotomy as being illogical and immaterial.[50]

IV. STATUTORY PROVISIONS

In spite of the courts' hesitance and frequent refusal to permit organization and collective bargaining among public employees and the almost universal denial of the right to strike, the utilization of these labor relations tools has increased rapidly in recent years. Particularly, strikes have grown in number, employee involvement, and duration.[51] Of

[50] *See, e.g.*, City of Los Angeles v. Los Angeles Bldg. & Constr. Trades Council, 210 P.2d 305 (Cal. 1949); City of Alcoa v. IBEW, 308 S.W.2d 476 (Tenn. 1957); International Longshoremen's Ass'n v. Harris County-Houston Channel Nav. Dist., 358 S.W.2d 658 (Tex. 1962); Port of Seattle v. International Longshoremen's Union, 324 P.2d 1099 (Wash. 1958).

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Work Stoppages Affecting Government Employees in Administrations, Protection and Sanitation

Year	Number	Workers Involved	Man-Days Idle
1956	27	3,460	11,100
1957	12	820	4,430
1958	15	1,720	7,510
1959	25	2,050	10,500
1960	36	28,600	58,400
1961	28	6,610	15,300
1962	28	31,100	79,100
1963	29	4,840	15,400
1964	41	22,700	70,800
1965	42	11,900	146,000
1966			
State	9	3,090	6,010
Local	133	102,000	449,000
1967			
State	12	4,670	16,300
Local	169	127,000	1,230,000
1968			
State	16	9,300	42,800
Local	235	190,900	2,492,800
1969			
Federal	2	600	1,100
State	37	20,500	152,400
Local	372	139,000	592,200
1970			
Federal	3	158,800	648,300
State	23	8,800	44,600
Local	386	168,800	1,330,400

course, the public has been tremendously affected by this rise; drastic consequences of public strikes felt across the nation dictated a serious investigation into the causes and remedies of strikes. Soon the desperation of public employees, without any alternative method to secure employer recognition and responsiveness to their grievances, was noted and recognized as a significant contributive factor to strikes.[52] As the penalties against strikes proved futile, and it was learned that strikers could benefit from breaking the law, there ". . . was a recognition . . . that there was a need for machinery into which employee unrest and dissatisfaction could be channeled, hopefully to do away with the need for the resort to strike."[53] In addition it was recognized that "[i]f the prevailing no-strike policy is to be maintained, it must be demonstrated that on balance the interest of public employees and the general community will be better served by a process of *political* collective bargaining based upon recommendations or upon voluntary or binding arbitration rather than upon the economic coercion of a strike."[54]

Finally, public officials began to realize that the key to the elimination or, at least, substantial reduction in the use of strikes is the development of a substitutional equivalent which will most nearly achieve the benefits of the strike's leverage;[55] that a quid pro quo for the withdrawal of the right to strike must be provided before work stoppages will be effectively eliminated. Neither the passage of legislation with severe penalties nor the judicial decree with accompanying fines will end strikes in the public sector. Unions involved in the public em-

1971			
Federal	2	1,000	8,100
State	23	14,500	81,800
Local	304	137,100	811,500

U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, HANDBOOK OF LABOR STATISTICS 360-63 (1973).

[52] Bernstein, *Beyond the Strike: A Proposal for Experimentation with Substitutes*, 33 OHIO ST. L.J. 781, 782 (1972).

[53] Zack, *supra* note 10, at 103.

[54] Anderson, *supra* note 17, at 969 (emphasis original).

[55] Lev, *Strikes by Government Employees: Problems and Solutions*, 57 A.B.A.J. 771 (1971).

ployee sector locally will vigorously oppose any real reduction in their strike power[56] unless the abatement is accompanied by material benefits. ". . .[T]he same unions, at a higher level, will find it hard to resist the prospects of expansion into the unorganized areas."[57]

From the insights and recognitions discussed above, statutes and ordinances were enacted in numerous states, and a new era of public employee labor relations has emerged.

> The growing attention now being given to devising and revising discussion, negotiating, and impasse procedures reflects in part a realization that the public employee has legitimate grievances that should be aired and resolved. Yet, nothing has done more to hasten the development of this procedural machinery than the increasing tendency of public employees to strike in order to obtain redress of their grievances.[58]

The success of past strikes in accomplishing the desired reform goes even beyond the immediate concessions in wages, hours, benefits and working conditions. Today the thrust of the prior strikes is felt through the impact upon public employer-employee relations and the resulting statutorily prescribed impasse resolution procedures. Too great a liberalization of the strike ban in the past, and probably even today, would have diverted attention from constructive alternatives to the strike and stimulated the negative aspects of work stoppages.[59]

Two states whose statutes exemplify the type of attractive compromise that can result from the clash between strike-prone public workers and the traditional no-strike philosophy are Pennsylvania and Hawaii. There, legislation permits the use of the strike following an unsuccessful attempt to resolve the dispute through other impasse resolution procedures.

> [B]y legalizing the strike after the required procedures are followed, [Pennsylvania and Hawaii] have not only recognized what had been occurring in any event illegally, but they have forced employees into the dispute settlement procedures

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[56] Even though strikes are illegal in most every jurisdiction, they are still a real and vitally effective tool of unions despite their prohibition. Before unions will relinquish their power to strike, they must be afforded an equally productive substitute.

[57] Lev, *supra* note 55, at 776.

[58] ADVISORY COMM'N, *supra* note 36, at 59.

[59] Comment, *Prohibition Revisited*, *supra* note 40, at 932.

> as a prerequisite to striking and jolted recalcitrant employers into more realistic bargaining with the awareness that the strike might in fact occur. It could be argued, also, that by making the strike a legal weapon they reduced the likelihood of its use by those employees who, as others elsewhere, had engaged in the strike, even though illegal, to prove that they were not afraid to use it.[60]

These two states have made provision for the psychological human elements of public employers and employees. This is essential if the statues are to accomplish their goal of insuring smoother, more stable and predictable relations between the government and its employees.

A. *Recognition*

The statutes regulating public employer-employee relations are quite varied in both their specificity and in the general principles behind them. Ten states have no statutes concerning public employment labor relations or collective bargaining.[61] This does not signify that there is no applicable law to apply in these states but simply that there is an absence of statutory law pertaining to the area. Twenty-eight states specifically guarantee the right of public employees to organize for collective action and usually include various other rights and regulations within these statutes.[62] Twenty-two states regulate

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[60] Zack, *supra* note 10, at 121.

[61] Arkansas, Arizona, Colorado, Louisiana, Mississippi, New Mexico, South Carolina, Tennessee, Utah and West Virginia have no statutes generally applicable to public employees, nor are there provisions pertaining to specific occupational or professional groups.

[62] The states guaranteeing the right to organize are: Alaska, ALASKA STAT. §§ 23.40.070-.260 (1972); California, CAL. GOV'T CODE § 3527 (West Supp. 1974); Connecticut, CONN. GEN. STAT. ANN. § 7-468 (1973); Delaware, DEL. CODE ANN. tit. 19, § 1302 (Supp. 1970); Hawaii, HAWAII REV. STAT. § 89-3 (Supp. 1973); Iowa, IOWA CODE ANN. § 8 (1973); Kansas, KAN. STAT. ANN. § 75-4324 (Supp. 1973); Maine, ME. REV. STAT. ANN. tit. 26, §§ 979-B, 963 (Supp. 1973); Maryland, MD. ANN. CODE art. 77, § 160 (1957); Massachusetts, MASS. ANN. LAWS ch. 150E, § 2 (Supp. 1974); Michigan, MICH. COMP. LAWS ANN. § 423.209 (1967); Minnesota, MINN. STAT. ANN. § 179.65 (Supp. 1974); Missouri, MO. ANN. STAT. § 105.510 (Supp. 1974); Montana, MONT. REV. CODES ANN. § 59-1603 (Supp. 1974); Nebraska, NEB. REV. STAT. § 48-837 (1973); Nevada, NEV. REV. STAT. § 288.140 (1973); New Hampshire, N.H. REV. STAT. ANN. § 98-C:2 (Supp. 1973); New Jersey, N.J. STAT. ANN. § 34:13A-5.3 (Supp. 1974); New York, N.Y. CIV. SERV. LAW § 203 (McKinney 1973); North Dakota, N.D. CENT. CODE § 34-12-03 (1972); Oregon, ORE. REV. STAT. § 243.662 (1973); Pennsylvania, PA. STAT. ANN. tit. 43, §

public employment relations in specific occupational and professional groups.[63] Florida,[64] Georgia,[65] Ohio,[66] and Virginia[67] have provisions prohibiting strikes by public employees; however, these provisions are silent as to other rights and duties of public workers. Alabama[68] and North Carolina[69] prohibit public employees from joining or participating in any trade union or labor organization.

B. *Impasse Resolution*

A considerable number of these statutes provide impasse resolution procedures. The details of the procedure vary from

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1101.401 (Supp. 1974); Rhode Island, R.I.GEN. LAWS § 36-11-1 (Supp. 1973); South Dakota, S.D. CODE § 3-18-2 (Supp. 1973); Texas, TEX. REV. CIV. STAT. art. 5154 C, §§ 1-7 (1971); Vermont, VT. STAT. ANN. tit. 3, § 903 (1972); Washington, WASH. REV. CODE ANN. § 41.56.040 (Supp. 1973); and Wisconsin, WIS. STAT. ANN. § 111.82 (1974).

[63] States which have regulations concerning public employment in certain professional fields are: Alabama, Firefighters: ALA. CODE tit. 37, § 450 (Supp. 1973); Alaska, Teachers: ALASKA STAT. §§ 14.40.570-.580 (1971); California, Teachers: CAL. EDUC. CODE § 13082 (1969); Delaware, Teachers: DEL. CODE ANN. tit. 14, §§ 4001-4013 (Supp. 1970); Idaho, Firefighters: IDAHO CODE §§ 44-1801 to 1811 (Supp. 1973) and Teachers: IDAHO CODE §§ 33-1271 to 1276 (Supp. 1973); Illinois, Firefighters: ILL. ANN. STAT. ch. 24, § 10-3-8 to 11 (1962); Indiana, Teachers: IND. ANN. STAT. tit. 20, art. 7.5, §§ 1-4 (1973); Iowa, Firefighters: IOWA CODE ANN. §§ 90.15-.27 (1972); Kansas, Teachers: KAN. STAT. ANN. §§ 72-5413 to 5424 (1972); Kentucky, Fireman: KY. REV. STAT. §§ 345.010-.130 (Supp. 1972); Montana, Teachers: MONT. REV. CODES ANN. §§ 75-6115 to 6128 (1971); Nurses: MONT. REV. CODES ANN. §§ 41-2201 to 2209 (Supp. 1974); Nebraska, Teachers: NEB. REV. STAT. §§ 48-801 to 836 (1968); New Hampshire, Police: N.H. REV. STAT. ANN. §§ 105-B:1-14 (Supp. 1973); North Dakota, Teachers: N.D. CENT. CODE §§ 15-38.1-01 to 15 (1971); Oklahoma, Firefighters, Police and Teachers: OKLA. STAT. ANN. tit. 11, §§ 548.1-.14 (Supp. 1974); Oregon, Nurses: ORE. REV. STAT. §§ 662.705-795 (1973); Pennsylvania, Firefighters and Police: PA. STAT. ANN. tit. 43, § 217.1-.10 (Supp. 1974); Rhode Island, Firemen: R.I. GEN. LAWS ANN. § 28-9.1-1 to 14 (1969) and Police: R.I. GEN. LAWS ANN. §§ 28-9.2-1 to 14 (1969); and Teachers: R.I. GEN. LAWS ANN. §§ 28-9.3-1 to 16 (1969); South Dakota, Firefighters and Police: S.D. CODE §§ 9-14A-1 to 22 (Supp. 1974); Texas, Firefighters and Police: TEX. REV. CIV. STAT. art 5154c-1, §§ 1-20 (Supp. 1974); Vermont, Teachers: VT. STAT. ANN. tit. 16, § 1982 (Supp. 1974); and Wyoming, Firefighters: WYO. STAT. ANN. §§ 27-265 to 273 (1967).

[64] FLA. STAT. ANN. § 839.221 (1965).

[65] GA. CODE ANN. §§ 89-1301 to 1304 (1971).

[66] OHIO REV. CODE ANN. §§ 4117.01 to .05 (Anderson 1973).

[67] VA. CODE ANN. §§ 40.1-55 to 57 (1970).

[68] ALA. CODE tit. 55, §§ 317(1)-(4) (1960).

[69] N.C. GEN. STAT. § 95-97 (1965). This statute, which prohibits joining or participating in a labor organization, was held unconstitutional in Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D.N.C. 1969) as a violation of the first amendment right of free association and the fourteenth amendment due process requirements.

state to state and there often are variations within each state depending upon the nature of the occupation. Generally, the laws establish voluntary rather than mandatory procedures to be followed. Very often the triggering mechanism for an impasse resolution procedure is the request by one or both parties; seldom does the state have the power to force one of its agencies or sub-divisions or their employees to submit to the impasse resolution procedure. Once invoked, the statutes typically provide several different procedures designed to resolve the impasse, including mediation, fact-finding, and final arbitration.[70] For example, sixteen states[71] provide for mediation[72] as one of the methods to attempt a reconciliation of the parties. Generally this is the initial step and is a means of settlement which is available at all times throughout the impasse resolution procedure. Thirteen states[73] include fact-finding[74] as one of

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[70] *See generally* the statutes cited in notes 62-69 *supra* and notes 73, 75-76 *infra*.

[71] Mediation is provided as one of the steps for impasse resolution in the following states: Alaska, ALASKA STAT. § 23.40.190 (Supp. 1974); Iowa, IOWA CODE ANN. § 20 (1973); Kansas, KAN. STAT. ANN. § 75-4332 (Supp. 1973); Maine, ME. REV. STAT. ANN. tit. 26, §§ 979-K, 965 (Supp. 1973); Massachusetts, MASS. ANN. LAWS ch. 150E, § 9 (Supp. 1973); Michigan, MICH. STAT. ANN. § 423.207 (1967); Missouri, MO. ANN. STAT. § 105.525 (Supp. 1974); Montana, MONT. REV. CODES ANN. § 59-1614 (Supp. 1974); Nevada, NEV. REV. STAT. § 288.190 (1973); New York, N.Y. CIV. SERV. LAW § 209 (McKinney 1973); North Dakota, N.D. CENT. CODE § 34-11-01 (1972); Oregon, ORE. REV. STAT. §§ 243.712, 662-785 (1973); Pennsylvania, PA. STAT. ANN. tit. 43, § 1101.801 (Supp. 1974); Vermont, VT. STAT. ANN. tit. 3, § 925, tit. 16, § 2007 (Supp. 1973); Washington, WASH. REV. CODE ANN. § 41.56.100 (1968); and Wisconsin, WIS. STAT. ANN. § 111.87 (1974).

[72] Mediation is a procedure by which an outside party assists the two sides to reach a voluntary settlement. In order to promote a settlement, the mediator may offer suggestions of his own. M. FORKOSCH, A TREATISE ON LABOR LAW § 541 (2d ed. 1965).

[73] Fact-finding is one of the steps in impasse resolution in the following states: Connecticut, CONN. GEN. STAT. ANN. § 7-473 (1973); Iowa, IOWA CODE ANN. § 23 (1973); Kansas, KAN. STAT. ANN. § 75-4332 (Supp. 1973); Maine, ME. REV. STAT. ANN. tit. 26, § 965 (Supp. 1973); Massachusetts, MASS. ANN. LAWS ch. 150E, § 9 (Supp. 1973); Montana, MONT. REV. CODES ANN. § 59-1614 (Supp. 1974); Nevada, NEV. REV. STAT. § 288.200 (1973); Oregon, ORE. REV. STAT. § 243.722 (1973); Pennsylvania, PA. STAT. ANN. tit. 43, § 1101.802 (Supp. 1974); Rhode Island, R.I. GEN. LAWS § 36-11-8 (Supp. 1973); Vermont, VT. STAT. ANN. tit. 3, § 929, tit. 16, § 2007 (Supp. 1974); and Wisconsin, WIS. STAT. ANN. §§ 111.88, 111.70 (1974).

[74] Fact-finding has been defined as:

> a structured procedure involving a hearing, presentation of oral testimony, submission of documentary evidence, oral evidence (and sometimes briefs), and other characteristics of a judicial proceeding. The fact finder is expected to make findings of fact based upon the evidence and to submit recommend-

the steps in their impasse resolution procedure. The timing, whether and when the finding of facts and recommendations for resolution are publicized, and the effect of the findings and recommendations, vary from state to state. Final and binding arbitration is included as one of the stages in the procedure in nine states;[75] however, it is almost always initiated by the request of both parties. When thus initiated, arbitration is ordinarily binding on the parties. Strikes are permitted in Hawaii,[76] Oregon,[77] Pennsylvania[78] and Vermont[79] when the use of certain specified procedures fails to produce an agreement. Alaska, on the other hand, follows a traditional essential/non-essential dichotomy of public services and allows strikes within certain classes of employees.[80]

C. *Federal Government*

The federal government has historically restricted the labor organization activities among its employees. Both the NLRA and the Labor Management Relations Act of 1947 specifically excluded government employees from their coverage.[81] Moreover, although Executive Order 10988 (Employee-Management Cooperation in the Federal System) signed on January 17, 1962, by President Kennedy gave federal employees the right to form, join or assist any employee organization, the definition of "employee organization" contained therein excluded labor groups asserting the right to strike against the

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ations reflecting a considered judgment as to what the terms of a fair settlement are.

D. WOLLETT & R. CHANIN, THE LAW AND PRACTICE OF TEACHER NEGOTIATIONS 6:54 (1970).

[75] Final and binding arbitration is one of the conflict resolution methods provided for by: Delaware, DEL. CODE ANN. tit. 19, § 1310 (Supp. 1970); Iowa, IOWA CODE ANN. § 22 (1973); Maine, ME. REV. STAT. tit. 26, § 979-K, 965 (Supp. 1973); Massachusetts, MASS. ANN. LAWS ch. 150E § 8 (Supp. 1973); Montana, MONT. REV. CODES ANN. § 59-1614 (Supp. 1974); Oregon, ORE. REV. STAT. § 243.742 (1973); Pennsylvania, PA. STAT. ANN. §§ 1101.805, 217.4, 217.7 (Supp. 1974); Rhode Island, R.I. GEN. LAWS §§ 36-11-8, 28-9.4-13, 28-9.1-9, 28-9.3-12 (Supp. 1973); and Vermont, VT. STAT. ANN. tit. 21, § 1733 (Supp. 1973).

[76] HAWAII REV. STAT. § 89-12 (Supp. 1973).

[77] ORE. REV. STAT. § 243.276 (1973).

[78] PA. STAT. ANN. tit. 43, § 1101.1003 (Supp. 1974).

[79] VT. STAT. ANN. tit. 21, § 1730 (Supp. 1974).

[80] ALASKA STAT. § 23.40.200 (Supp. 1972).

[81] 29 U.S.C. §§ 151-68 (1970).

United States government or to assist in any such strike against the government.[82] President Nixon's Executive Order 11491 (Labor-Management Relations in the Federal Service), effective October 29, 1969, was more extensive than that of President Kennedy. It not only continued the provisions prohibiting participation in employee organizations that asserted the right to strike, but also provided that a labor organization shall not call or engage in a strike, work stoppage or slowdown or condone any such activity.[83]

During the effective period of both these Executive Orders, two other federal statutes regulating federal employee strike activity were also operative. One such statute prohibited any individual who participates in a strike against the government or who belongs to an organization that asserted the right to strike against the government from accepting or holding a federal job in the United States Government or the District of Columbia.[84] The other statute provided for a fine of not more than $1000 or imprisonment for not more than one year and a day, or both, for anyone violating the first statute.[85]

V. STRIKE ALTERNATIVES

To proscribe strikes is very easy, but to accomplish the goal of preventing the interruption of vital services is another matter. As has been mentioned previously, strikes continue to occur despite their illegality. The strike is still considered a valuable and necessary tool by public employees and their unions, because no other satisfactory and effective alternative procedure has been implemented. The Lexington firemen's two-hour strike was called because all available means to reach a settlement had been employed without accomplishing the desired result. Furthermore, there were no other procedures or possible methods to achieve the demands of the firefighters;[86] no procedure had been established in order to permit meaningful discussion between the parties in the dispute. It must be remembered that "[i]t is, however, the employees' right of

[82] Exec. Order No. 10988, 3 C.F.R. 521 (1962).
[83] Exec. Order No. 11491, 3 C.F.R. 861 (1969).
[84] 5 U.S.C. § 7311 (1970).
[85] 18 U.S.C. § 1918 (1970).
[86] Lexington Herald, Aug. 20, 1974, at 1, col. 2.

effective participation which is central. The strike is only a mechanism. Public employee rights of effective participation should be made more effective, but the strike is not the mechanism for doing so."[87] Instead, a more effective system must be developed. "Procedural mechanisms and the strike are different means to the same end—improvement of the terms and conditions of employment."[88] However, in order to gain acceptance of and reliance on alternative means to achieve this goal, the methods and procedures developed must possess the same essential characteristics that make the strike the successful weapon that it is.

It is possible, though, that the strike might be acceptable as the final step in a series of measures utilized to produce settlement. If the impasse is first required to be submitted to some sort of conflict resolution procedure, the chances of a settlement will be improved. Public employees will invoke the weapon with less frequency, its use likely being confined to those serious disputes where either or both parties are unreasonable in their demands. The reaction to a strike in such circumstances will probably be far less severe, and public attitude will be more tolerant and sympathetic.[89]

To adequately consider the effectiveness of alternatives for impasse settlement, the characteristics of a strike must be recognized. The strike is an economic weapon which places a cost of disagreement on both parties to the dispute. It is a threat to the employer in causing a reduction in the services he is expected and required to provide. To the employee, it signals a lowering of his income and a period of limited financial resources to provide his necessities. To each side of a labor dispute the strike is thus a fearful tool and one which is to be avoided when reasonably possible. This economic cost factor

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[87] Taylor, *supra* note 7, at 619.

[88] ADVISORY COMM'N, *supra* note 36, at 97.

[89] George Taylor, Harnwell Professor of Industry, Wharton School of Finance and Commerce, University of Pennsylvania, has stated that:

> . . . a qualitative analysis of the strikes which have occurred suggests that a sharp distinction is drawn by the public between strikes as an expression of civil protest against patently unfair treatment and assertion of the right to strike as a regular way of life, that is, as a recognized institutional form for establishing employment terms.

Taylor, *supra* note 7, at 629.

operates to bring the parties together in agreement so that the negative consequences of a strike may be avoided. Therefore, the strike works to resolve the impasse without the involvement of a third party. Particularly, a strike is successful in establishing the requisite atmosphere of urgency on the part of both parties, which is so necessary to settlement.

With this as a background, it is possible to discuss several basic considerations regarding impasse procedures within public employment labor relations. First, vital public services are essential and can be neither flippantly or frequently interrupted. Second, collective bargaining cannot be meaningful unless all the parties are faced with an economic pressure to reach agreement. Third, a policy promoting sincere and good-faith collective bargaining must be in effect within the jurisdiction or else efforts at encouraging the parties to consult and discuss will be futile. Also, of primary importance is the recognition that the parties themselves should ultimately decide upon all the contract provisions. After all, the parties must live with the agreement and maintain an ongoing employer-employee relationship. Neutrals or outsiders may play an important role in successful negotiations and resolutions, but it is the parties who should make the final and binding decisions. Fourth, any alternative dispute settlement procedure should possess the flexibility for application to the many disparate types of public employees. Finally, the procedure must be workable and acceptable to the government employer, the employees and the public. Not to be overlooked is the necessity that the legislature accept the procedure, because whatever conflict resolution method is chosen must, of course, be implemented by that branch of government.[90]

A. *Mediation*

Mediation is probably the most familiar impasse resolution method and is the most commonly designated statutory procedure. Under this method a neutral third party, mutually acceptable to the disputing parties, intervenes as a referee to police the discussion and to foster its continuance. "The proper

[90] Brookshire and Holly, *Resolving Bargaining Impasses Through Gradual Pressure Strikes*, 24 LAB. L.J. 662, 663 (1973).

function of a mediator is to keep the parties talking and to suggest possible solutions to those issues where the parties remain apart."[91] One of the key characteristics of the mediation process is the voluntary nature of both the submission of disputes and acceptance of the mediator's suggestions or advice. Seldom is the mediator given the power to settle the dispute if the parties are unable to do so. This, of course, greatly weakens the impact that the mediator can have on the disagreement, often relegating him to a position of merely clarifying the issues of the dispute. However, ". . . a mediator entrusted with a power to *determine* the dispute, should the parties be unable to agree, will find his persuasiveness multiplied to a remarkable degree."[92] In addition, one should not underestimate the importance of the mediator's role in promoting communication since at times discussion between the parties often completely ceases, making settlement impossible.

The task of the mediator is by no means an easy one to fulfill. His goal is to bring about a resolution of the conflict, yet he has no coercive powers with which to accomplish it. For this reason, mediation frequently proves unsuccessful, and must be followed by a further impasse-resolution step, such as fact-finding. Moreover, the very availability of fact-finding or other alternative procedures diminishes the likelihood of settlement through mediation.[93] Finally, the nature of the mediation process itself imposes obstacles for the mediator. He must seek, "[b]y separate and joint meetings with the parties, presumably maintaining the confidence of each side[,] . . . to expand the area of agreement until all disputed items are resolved."[94] Seldom is he successful, however, because he is usually required to fulfill his responsibility in a limited number of meetings, after which he is required to declare the dispute deadlocked and ready for the next procedural step in the search for a settlement.[95] The crucial nature of the process dictates a rapid settlement and often does not really allow for adequate meetings with the parties, narrowing of conflicts and eventual

[91] Clark, *supra* note 13, at 117-18.
[92] Lev, *supra* note 55, at 774 (emphasis added).
[93] Zack, *supra* note 10, at 112.
[94] *Id.* at 107.
[95] *Id.* at 109.

convergence of thought. Thus, the subjects of dispute and the potentially drastic consequences of a termination of vital services prevent the mediation process from accomplishing the significant goal of having the parties learn that they can best resolve their disputes themselves without the heavy-handed intervention of an individual external to the relationship and the dispute.[96]

A related drawback to mediation as an impasse resolution procedure is the insufficient number of unbiased, qualified and experienced mediators. This problem is particularly acute during the time of greatest need, the budgeting period, when numerous government agencies and departments within each state require the services of a mediator.[97] One suggested solution to this problem is that states establish their own mediation services instead of relying upon the limited resources of the American Arbitration Association. Under this proposal, the mediators would be familiar with the special problems in the locality and less time and expense would be required to inform them of any distinctive features of a particular dispute.[98] Another way to eliminate part of the excessive demand at peak times would be to provide for the staggering of the budget formulation process within states and among the various states.[99] This could ease the crunch, thereby permitting more effective mediation. A further recommendation is that other groups, such as civil service commissioners, could be utilized as mediators, especially since they are well acquainted with the working conditions and administrative framework of public employment. This idea, however, has two major drawbacks. First, it would probably discourage the use of mediation, since employees often identify civil service commissioners with management. Additionally, it is likely that these same commissioners would be called upon to interpret the employment contract or to hear appeals from employees who have been suspended or discharged for strike action.[100]

Unquestionably the greatest difficulty with mediation as

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[96] *Id.*

[97] *Id.* at 111.

[98] *Cf.* Lev, *supra* note 53.

[99] Zack, *supra* note 10, at 111.

[100] C. SASO, COPING WITH PUBLIC EMPLOYEE STRIKES 34 (1970).

a means to settle impasses between employers and employees is arriving at a resolution which is acceptable to both sides. In approaching a mediation problem and attempting to adjust the balance between demands and offers, the mediator cannot be arbitrary in his recommendations. His ". . . real objective is to determine employee benefits and employer costs in the framework of the employee's needs and the employer's financial position."[101] To do this the mediator must consider numerous factors, including the cost of living, the area's salary and benefit structure for comparable work in the private sector, the unemployment rate, economic projections and the "catch-up costs" necessary to bring public employment in line with its private counterpart.[102] In light of these various considerations, the mediator arrives at proposed solutions to break the impasse; having done so, his real task has only begun. He must then persuade the governmental entity of the reasonableness and fairness of the plan. This is true even where the proposed solution would exhaust or exceed the money available.[103] This responsibility of the mediator, while not an active one, is nonetheless real, especially since ". . . when recommendations are rejected by one side and accepted by the other, the dispute usually becomes more difficult to settle. Positions become frozen, and the likelihood of a serious impasse is increased."[104]

Several factors weigh heavily against the likelihood of the mediator formulating a universally acceptable proposal. First, hostility between the parties often makes discussion almost impossible. Second, the emotional embroilment of the parties often renders them unable to alter their positions once they have been stated. In addition, the inexperience or naivete of the parties frequently results in the failure to respond to overtures and suggestions. Also, as alluded to above, the availability of alternative procedures lessens the pressure for settlement since the parties can maintain the hope of receiving a favorable resolution later.[105] Finally, sufficient costs are not imposed on the parties to force them to bargain and discuss in a meaningful

[101] Lev, *supra* note 55, at 775.
[102] *Id.* at 775-76.
[103] *Id.* at 773.
[104] Kheel, *supra* note 8, at 934.
[105] Zack, *supra* note 10, at 106.

manner. For this reason, mediation could be considered an inadequate substitute for the strike, which generally involves substantial costs to the disputants.[106]

Although it would be difficult to remove all of these impediments to successful mediation, it may be possible to lessen or erase the impact of at least one of these—the cost element. First, the parties could be required to pay the costs of the service, thus encouraging quick settlement so as to decrease the expense of settling the dispute.[107] Another suggestion, but one which seems to involve inequities, is that penalties, such as reduced federal aid or state allocation, be imposed if the parties are unable to settle the dispute within a specific period.[108] This would appear extremely unfair to the government employer who feels compelled to settle within the designated time in order to protect the integrity of his budget. Greater concessions would be made in order to preserve the state aid, and a union could relentlessly pursue its demands without the fear of repercussions for either delay or unreasonableness.

Certainly, then, mediation is one possible alternative to the strike that offers much needed relief from the chaotic consequences that can evolve from a work stoppage. Indeed, this procedure by its nature embodies several positive characteristics for dispute settlement. Unfortunately, it is also shackled by numerous shortcomings which render it but a questionably effective substitute for the strike.

B. *Fact-Finding*

Fact-finding is a second, frequently used impasse-resolution procedure. Under this method, the fact finder, who might be a single individual or a committee, depending upon the parties' selection or statutory requirements, plays a more active role than the mediator. Instead of simply serving as a neutral entity seeking to promote communication, the fact finder:

> . . . functions in a more judicial role, receiving in joint session evidence from the parties in support of their respective

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[106] Herman, *supra* note 11, at 64.
[107] Zack, *supra* note 10, at 110-11.
[108] *Id.* at 111.

> positions, permitting examination and cross-examination of witnesses, until he has collected sufficient evidence to prepare a report of his findings and his recommendations for settlement.[109]

These findings and recommendations are the fact finder's only weapons, since he lacks the power to force the parties to accept his proposals;[110] as in mediation, the parties are perfectly free to accept or reject proposed solutions. For example,

> [i]f the fact finder's report is favorable to the employer, it may be embraced as the "fair judgment" of an impartial outsider. If the recommendations do not satisfy the employer, they may be rejected as "palpably inequitable," and the character and bona fides of the fact finder may be attacked. Ultimately in the tough cases . . . a hard nosed employer will prevail.[111]

It is for this reason that some larger labor organizations refuse to use fact-finding, viewing it as a process that only delays settlement. In contrast, unions see the strike as providing a greater chance of obtaining their demands due to certain employer attitudes or expectations about the fact finder.[112] Thus, it is apparent that fact-finding is not really a sufficient substitute for the strike.

The predominate reason for this unfavorable employee attitude toward fact-finding is the parties' ability to reject the recommendations without explanation. To overcome this weakness it has been suggested that a show cause procedure be instituted which would require a party rejecting a proposal to give an explanation for the rejection.[113] This should overcome the basic flaw in fact-finding and make it a much more attractive procedure to all concerned; forcing the recalcitrant party to justify its refusal to follow the fact finder's recommendation would almost certainly increase the frequency of settlement at this stage of the dispute-resolution process. More importantly, this proposal would still allow the final decision of settling the

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[109] *Id.* at 107.

[110] *Id.* at 114.

[111] Wollette, *The Taylor Law and the Strike Ban*, in PUBLIC EMPLOYEE ORGANIZATION AND BARGAINING 34 (H. Anderson ed. 1968).

[112] Krinsky, *supra* note 14, at 469.

[113] *Id.* at 468.

dispute to rest with the employer and the employee rather than a disinterested third party.

The acceptability to the parties of recommendations is the prime motivational force at play in fashioning the fact finder's proposal.[114] Because of the desire to propose a mutually acceptable recommendation, the fact finder often delves into what has transpired at mediation in order to gauge what the parties will tolerate.[115] This involves repetition and adds to the time required for the procedure, which, in turn, increases the cost of fact-finding and makes it less attractive.

Once a recommendation is made the discretionary authority regarding when and whether to release it is a significant power for the fact finder. The benefit of the procedure is for the parties to have sufficient discussion upon the recommendation before it is publicized. An ill-timed disclosure tends to freeze the parties into their positions and prevents meaningful attempts at resolution.[116] The fact finder should have the final decision regarding this matter since he is the most familiar with both sides of the dispute and is in the best position to evaluate the effect of publication on the parties' negotiations.

Fact-finding frequently is utilized so that the parties to a dispute can argue that they have made a genuine attempt at conflict resolution when in fact they have been negotiating in bad faith. To foster a more serious effort at resolving the dispute, it has been advanced that the parties should bear the cost of fact-finding. This would lessen the excessive utilization of the process and would also coerce the parties into greater efforts for earlier settlement.[117] Moreover, the parties "should be required as a condition of good faith bargaining to meet and act on the recommendations."[118] Again, this would strengthen the possibility of settlement and would require at least some discussion which could lead to settlement. Statutory procedures regarding fact-finding vary considerably as to who bears the cost and the degree of contact and negotiation between the parties following the formulation of the recommendation.[119]

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[114] Kheel, *supra* note 8, at 938.

[115] Zack, *supra* note 10, at 112.

[116] *Id.* at 117.

[117] Krinsky, *supra* note 14, at 467.

[118] *Id.*

[119] *E.g.*, ORE. REV. STAT. § 243.722 (1973) (parties split cost); PA. STAT. ANN. tit.

As an alternative to the strike in conflict resolution, fact-finding leaves much to be desired. It does permit the parties to make the ultimate decision on settlement but it also depends upon the acceptability to the parties of the recommendation and upon public reaction to the parties' failure to settle once the recommendation is publicized. Like mediation, it does not impose a sufficient economic cost upon the parties to require genuine and good faith efforts at settlement. Finally, it is too easy for one of the parties, especially the employee, to adopt an immovable position at the bargaining table and exhaust the statutory machinery in order to exercise its power of imposing a unilaterial settlement.[120]

C. *Arbitration*

Arbitration has received substantial support as an alternative impasse-resolution procedure. This method involves the submission of the dispute to a neutral party who formulates a plan for settling the unresolved problems in a manner which is final and binding upon the parties. The arbitrator's goal is to fashion his solution to fairly and justly balance the needs and demands of the parties. The most significant aspect of this procedure is the uncertainty of the outcome for the parties; in this respect, it is a valid substitute for the strike. A substantial cost is imposed upon each party for failing to reach prior agreement due to the possibility of a less than satisfactory resolution.[121] Benefits are derived from the doubtful result since the parties are forced to act sensibly, fairly and reasonably in submitting their proposals to the arbitrator lest he give the opponent its entire suggested award.[122] Also, pressure is upon the parties to resolve the dispute at an early date in order to avoid the utilization of arbitration.[123] This is, of course, one of the desired consequences of any impasse-resolution alternative.

Like the previously discussed procedures, however, arbitration as a settlement mechanism is subject to criticism. A

43, § 1101.802(2) (Supp. 1974) (state pays one half of the cost and parties split the other half).

[120] Wollette, *supra* note 111, at 35.

[121] Herman, *supra* note 11, at 64.

[122] S. MAKIELSKI, EMPLOYEE RELATIONS IN STATE AND LOCAL GOVERNMENT, 45 (1971).

[123] Brookshire and Holly, *supra* note 90, at 664.

chief argument against compulsory arbitration is that it does not follow the concept that the terms and conditions of public employment should be determined by the employer and employees who are directly affected.[124] Arbitration imposes a solution by a third party, external to the continuing employment relationship. Secondly, arbitration at times has a debilitating impact on the bargaining process.[125] This is particularly true when one party, especially a union, is in a weak position and has little to gain from negotiations.[126] This effect is also felt when a party is reluctant to alter its demands or compromise during collective bargaining for fear of jeopardizing its stronger position when arbitration begins.[127] The use of arbitration is also challenged as being a device which simply shifts the decision-making process from one segment of government to another, since the arbitration service is frequently a governmental department or commission.[128] Lastly, arbitration has been attacked as encouraging the parties to adopt extreme positions during collective bargaining, knowing that the dispute will ultimately be submitted to an arbitrator and anticipating that a compromise solution will be proposed.[129]

The validity of the last criticism is hard to challenge. To avoid the possibility of such inflated demands, "final-offer arbitration" has been developed. This approach, often treated as a separate alternative procedure, embodies many of the characteristics of arbitration but differs in that the arbitrator is bound to choose between the final offers made by each of the parties. It is obvious that the parties will attempt to be as reasonable as possible with the hope that their last proposal will be adopted.[130] "Each side is bound to frame its last offer in light of what it believes will be forthcoming from the other side"[131] and what it feels the arbitrator will select as reasonable.

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[124] Wollette, *supra* note 111, at 35.

[125] *Id.*

[126] Bernstein, *supra* note 9, at 467.

[127] Wollette, *supra* note 111, at 35.

[128] *Id.*

[129] Note, *National Emergency Disputes in the Transportation Industry: An Analysis of Final Offer Selection As A Solution to the Problem*, 42 U. CIN. L. REV. 101, 110 (1973) [hereinafter cited as Note].

[130] Zack, *supra* note 10, at 120.

[131] *Id.*

Through this process, the parties are forced to consider in good faith the claims made by the opposition and to weigh the various disputed issues in order to arrive at a somewhat balanced proposal. Certainly, each party realizes that the arbitrator cannot accept a one-sided proposal if a more reasonable one is submitted. The parties are thus encouraged to bargain earnestly in order to narrow the number of issues in dispute and to converge toward agreement as the settlement deadline draws near.[132] The general result is a movement toward reconciliation and agreement, so that final-offer arbitration is capable of preventing the divergence of positions which compulsory arbitration often promotes.[133]

Nevertheless, final-offer arbitration is no panacea for the arbitration process. First, it is commonly believed that final-offer arbitration will not really drive the parties together. Instead each side will attempt to forecast what the selection panel will deem most reasonable and then alter its position only to the point that its offer will be selected.[134] Second, considering the number of issues which traditionally constitute an impasse it is impossible for the arbitrator to select "the most reasonable."[135] Likewise, it is often inequitable to choose one proposed contract over the other.[136] This is especially true if both parties present unfair proposals and the arbitrator is forced to choose the relatively more reasonable offer.[137] Third, compliance with the selected procedure would probably be more difficult to secure since all of the provisions by necessity would be from one party.[138] Certainly, the losing party would be reluctant to abide by a decision in which none of its proposals had been included. Finally, this procedure is based on an

[132] Note, *supra* note 129, at 116.

[133] *Id.*

[134] *Id.* at 117.

[135] Zack, *supra* note 10, at 120.

[136] Note, *supra* note 129, at 120-22.

[137] Herman, *supra* note 11, at 65. The parties, however, would have little room to complain of this outcome as they could easily avoid the situation by submitting less biased proposals. Still, it has been suggested that the arbitrator be permitted to reject both proposals and require the submission of further offers. Of necessity, this would involve delays in the settlement procedure and would lessen the positive aspects of the final-offer remedy.

[138] Note, *supra* note 129, at 121.

incorrect presumption that the proposal adopted is the best solution to the dispute.[139]

Several other problems exist with arbitration and final-offer arbitration which render them less than acceptable strike substitutes. Foremost among these is that the success of arbitration depends upon the legislature's delegation of its ultimate authority to an arbitrator.[140] This delegation of authority was objectionable with regard to strikes, and while here it would be made to an acceptable institution, it would probably not be tolerated. If this delegation should be effected, the government would not be at the complete mercy of the opposing parties and arbitrator because in making a decision the arbitrator would consider the government's financial condition and ability to support the resolution.[141] Additionally, it is generally difficult to select an arbitrator acceptable to both parties, as well as to determine a standard to guide the arbitrator, should the parties so desire.[142]

Despite the numerous criticisms of arbitration as an impasse-resolution procedure, it should be noted that the process can be particularly useful after other steps have been employed. Thus, while containing objectionable qualities, arbitration is still probably superior to a strike, with all its accompanying negative consequences.

D. *Semi-Strike or Non-Stoppage Strike*

The semi-strike or non-stoppage strike essentially is no strike at all. It is, instead, an alternative procedure designed to impose the costs of a strike upon the parties to an impasse without a concomitant cessation of work. This method requires that each week the employer pay a certain percentage of the governmental unit's budget and the employees pay a comparable percentage of their salaries into a special fund after the onset of an impasse or the passing of the termination date of an existing labor contract.[143] Because the employees continue

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[139] Brookshire and Holly, *supra* note 90, at 665.

[140] Makielski, *supra* note 122, at 47.

[141] Comment, *Public Employees: No Right to Strike*, 38 TENN. L. REV. 403, 422 (1971).

[142] Comment, *Prohibition Revisited*, *supra* note 40, at 943.

[143] Bernstein, *Alternatives to the Strike in Public Labor Relations*, 85 HARV. L. REV. 459, 470 (1971).

to work their full number of hours, the government is able to continue providing the vital services it performs. The benefit of this procedure is that it places a financial burden on both parties without harming the public through a cessation of services and goods. The parties are each stimulated toward reaching a mutually satisfactory agreement so that the economic losses will be minimized. Of course, it is essential that the funds diverted from each of the parties be utilized for a purpose not normally supported by government and not beneficial to the employees or else there would be no economic coercion for settlement. This is, however, not an obstacle to implementation of the mechanism as there are various charities and other worthwhile causes that could utilize the funds.

The strongest point in favor of this alternative is that it would allow the legislature to maintain control of policy determinations and budget allocation since it could reject any proposal failing to properly consider governmental resources. In so doing, the legislature would not be coerced into accepting an agreement in order to achieve the resumption of essential services.[144] The employee, however, might be slightly disfavored by this proposal since he would be receiving less income but would not have the additional leisure time that he has during a strike. Of course, this factor would be more than offset by his ability to maintain an income during the labor dispute. Also, he could refrain from settlement until a satisfactory agreement was reached, whereas during a strike the economic consequences generally would force him to alter his demands in order to return to work and earn income.

E. *Income-Work Time Gradual Pressure Strike*

The income-work time gradual pressure strike more closely resembles a strike than does the semi-strike. This mechanism provides for the employees to work a gradually reduced number of hours each week following a bargaining impasse. The employee's salary would not be reduced in proportion to his decreased number of hours but would be less than full-time earnings. Each week a greater percentage of the wages representing the "unworked" hours would be withheld. This money saved

[144] Brookshire and Holly, *supra* note 90, at 666.

by the employer would be diverted to a charitable cause or a government project not normally conducted.

Utilizing this mechanism the pressure to settle the dispute would arise from several sources. For the employee, the gradual decrease in wages would stimulate compromise. The government's inability to adequately perform the vital services at the optimum level would exert pressure on the employer to alter its position. Finally, the public, dissatisfied with the less efficient services received, would bring pressure to bear on both parties to reach a rapid settlement.[145] Once normal working conditions are resumed it is essential that the time lost not be recouped through the utilization of overtime. Otherwise, the coercive effect of the reduced pay and services would be lessened.[146] This procedure, as well as the semi-strike, would provide job security for the employees since, unlike during a strike, they could not be fired, fined, or placed on probation.[147]

F. *Arsenal of Weapons*

The "arsenal of weapons" approach actually is not a distinct alternative. Instead it is a combination of the procedures discussed above. When an impasse is reached during negotiations, the parties must report to a neutral body which will designate one or a combination of the above alternatives to be utilized to resolve the dispute. The theory behind this method is that "[t]he uncertainty as to what 'weapons' the impasse could unlock might prove to be a far greater stimulus to meaningful negotiations than would be the ready availability of known machinery."[148]

VI. CONCLUSION

The public strike issue has emerged in recent years as one of the most controversial and significant questions in labor relations and government. Sparked by the recent upsurge in

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[145] *Id.* at 667.

[146] Bernstein, *supra* note 143, at 471.

[147] *See, e.g.*, GA. CODE ANN. § 89-1303 (1971); MASS. ANN. LAWS. ch. 150E, § 9A (Supp. 1973); MINN. STAT. ANN. § 179-64 (Supp. 1974); N.Y. CIV. SERV. LAW 210 (McKinney 1973); OHIO REV. CODE ANN. §§ 411.03, 411.05 (Anderson 1973); WIS. STAT. ANN. § 111.89 (1974).

[148] Zack, *supra* note 10, at 120.

work stoppage among governmental employees, numerous state legislatures have sought to institutionalize public employment relations by adopting regulatory statutes.[149] Most of them, however, have maintained the traditional prohibition on strikes among public employees. Unfortunately, this codification of the anti-strike philosophy has not been accompanied by a more persuasive rationale for its existence than was present at common law. Instead, it is still argued that public strikes cannot be tolerated because: (1) they threaten the sovereignty of the government; (2) they prevent legislative control of the budget and policy determination of the government; (3) they permit public employees to exert a grossly disproportionate degree of pressure in comparison to the services they perform and (4) they undermine the basic principles of the democratic form of government. Of the various reasons asserted for prohibiting public-employee strikes, perhaps the most acceptable one is that they affect goods and services vital to the maintenance of social order and the protection of the public welfare. Nevertheless, even assuming this to be true, it is questionable whether it is fair and just to require public employees to suffer under unfavorable working conditions and poor salaries and benefits, while permitting their private counterparts, who often provide the same sort of services, to improve their situation by striking.

Legislatures, in enacting the various statutes now in force, cannot, however, be totally condemned. By far the greatest percentage of those laws include alternative impasse resolution procedures designed to balance the bargaining leverage of the respective parties. It is, of course, a significant step for the employees to be included in the contract formulation phase. The disquieting fact, though, is that these alternative procedures are not as effective as the strike in bringing about an equalization of the parties' relative positions and therefore cannot insure that the eventual contract terms will always be fair and acceptable to the employee. Moreover, it is doubtful that these alternative settlement mechanisms, designed to elimi-

[149] Kentucky is among the states where this subject is undergoing current study. *See* Walker, *Public employees' right to bargain under study*, Louisville Courier-Journal, Nov. 12, 1974, § B, at 3, col. 5.

nate the strike as a viable and productive economic weapon, will necessarily have that effect.

The answer to the problem posed by the public strike is far from simple. It appears that it is unrealistic to attempt to legislate the strike out of existence in the public sector. Since the strike is so frequently and successfully employed in the private sector, it will remain (despite its illegality) a real possibility to public employees in their struggle for improved working conditions. To outlaw the strike serves little purpose except to promote a disregard for the law within public employees and among those who are influenced by their actions. This particularly rings true when teachers who are in a constant relationship of guidance and education with children and when firemen and policemen who so often serve as heroes to be emulated by the young, flout the law and the authoritative institutions of our society. The solution then is not to outlaw the strike but to permit it as a final alternative when all other procedures have failed. Since the strike imposes high costs on all parties concerned—the employees, the government employers, and on the public—its use as a tool of last resort could have a threatening and coercive effect capable of invoking compromise and agreement. In this way, it would enhance the effectiveness of the prior procedures for resolution and often avoid the need for a strike at all.

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