

Catholic University Law Review

Volume 19 | Issue 3

Article 4

1970

Public Employees – The Right to Organize, Bargain, and Strike

Catholic University Law Review

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

Recommended Citation

Catholic University Law Review, *Public Employees – The Right to Organize, Bargain, and Strike*, 19 Cath. U. L. Rev. 361 (1970).

Available at: <https://scholarship.law.edu/lawreview/vol19/iss3/4>

This Notes is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

Public Employees—The Right to Organize, Bargain, and Strike

“AFSCME¹ insists upon the right of public employees—except for police and other law enforcement officers—to strike. To forestall this right is to handicap the free collective bargaining process.”² “There is no right to strike against the public safety by anybody, anywhere, any time.”³

Employees of governmental bodies, federal, state, and local, represent the largest single group of workers not covered by federal labor relations legislation.⁴ In the United States this group totalled 12.3 million in October 1968 with 9.4 million workers being employed by states, counties, and municipalities.⁵ More significant perhaps is the fact that membership gains by public employee unions have far surpassed increases made in the private sector with government employee unions increasing their membership rolls 24.7 percent, compared to a total labor organization growth rate of only 5.4 percent during the period of 1966-68.⁶

The federal establishment has recognized the right of its employees to

1. The American Federation of State, County, and Municipal Employees, AFL-CIO is the largest nonfederal public employee union.

2. International Executive Board, AFSCME, AFL-CIO, *Policy Statement on Public Employee Unions: Rights and Responsibilities*, in R. WALSH, *SORRY . . . NO GOVERNMENT TODAY* 67, 68 (1969) [hereinafter cited as WALSH].

3. WALSH 235 (Governor Calvin Coolidge on the occasion of the 1919 Boston police strike).

4. The National Labor Relations Act (The Wagner Act) § 2, 29 U.S.C. § 152(2) (1964) specifically exempts from employer status “the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof. . . .” President John F. Kennedy, by executive order, recognized the right of employees of all federal departments (except the FBI, the CIA, and agency components having investigative or security functions) to organize and join labor unions and granted recognition rights to those organizations and unions. Federal employees were also allowed to collectively bargain with their employers and to seek advisory arbitration. See Exec. Order No. 10,988, 3 C.F.R. 521 (Comp. 1963). President Richard M. Nixon revoked this order on October 29, 1969 and replaced it with Exec. Order No. 11,491, 34 Fed. Reg. 17605 (1969). This order removes the previous recognition standards and provides only for exclusive union recognition by management. It also creates a central administrative body (the Federal Labor Relations Council), an impasse settlement panel (the Federal Service Impasse Panel), and added financial and reporting requirements for unions similar to those required in the private sector. This Executive Order did not, however, grant employee bargaining rights on such “bread and butter” issues as wages and hours.

5. Bureau of the Census, *Public Employment in 1968*, in 295 GERR D-5 (1969).

6. 322 GERR D-12 (1969).

organize, to bargain collectively and negotiate contracts, and to secure redress of grievances.⁷ A number of states and localities have also adopted legislation to secure these rights for their employees and to regulate public employee union activities and the bargaining, mediation, and arbitration processes.⁸ No governmental entity in the United States, however, sanctions strikes by public employees. This article will first discuss the rights of public employees to organize and bargain collectively as a necessary background to a discussion of the "right" of public employees to strike. Although the situation of federal employees will not be ignored, the focus of the article will be the rights of state and local employees.

Rights to Organize and Bargain

The right of public employees to organize or join labor unions is firmly settled. In *AFSCME v. Woodward*,⁹ the plaintiffs had been discharged from municipal employment for joining a union. The court found the discharge to be both discriminatory and in violation of the employees' first amendment right of freedom of association. The court held that public employees have a constitutional right to belong to a labor union and that the workers were entitled to maintain an action for damages and injunctive relief under the Civil Rights Act of 1871.¹⁰ Shortly after the decision in *Woodward*, a three-judge district court declared unconstitutional on its face a North Carolina statute prohibiting police and fire employees from joining national or international labor unions.¹¹ The court based its decision on grounds similar to those utilized by the *Woodward* court, *i.e.*, the statute violated the employees' right of freedom of association as well as their rights of freedom of speech and assembly.¹²

In the face of the recent federal court decisions cited, state or local prohibitions against public employee union membership will be unlikely to withstand constitutional attack.

It is not so well settled, however, that public employees have a right to collectively bargain. In jurisdictions lacking specific legislation providing such rights, the courts have generally held that the right to collectively

7. Exec. Order No. 11,491, 34 Fed. Reg. 17605 (1969).

8. For a compilation of these laws and their scope see *Report of the ABA Committee on State Labor Law*, 310 GERR E-1 (1969).

9. 406 F.2d 137 (8th Cir. 1969).

10. 42 U.S.C. § 1983 (1964). This Act provides any citizen deprived of his constitutional rights under color of state law the right to maintain an action against the offending officials.

11. *Atkins v. City of Charlotte*, 296 F. Supp. 1068 (W.D.N.C. 1969).

12. For a discussion of the constitutional bases of the decisions and the rationale employed by the courts in *Atkins* and *Woodward*, as well as a compilation of the Supreme Court decisions relied on by these courts, see 55 VA. L. REV. 1151 (1969).

bargain does not exist.¹³ Although employees may assert a constitutional right to join labor unions, there is no constitutional duty on the part of governmental bodies to bargain with these organizations. In *Atkins v. City of Charlotte*,¹⁴ a federal district court held that the United States Constitution did not require a city to collectively bargain with its employees and that the state statute declaring public employee agreements and contracts "illegal, unlawful, void and of no effect"¹⁵ was constitutional. The court stated that, "[t]here is nothing in the United States Constitution which entitles one to have a contract with another who does not want it,"¹⁶ in this case the State of North Carolina and its political subdivisions. Similarly, the Seventh Circuit has recently pointed out that

there is no constitutional duty to bargain collectively with an exclusive bargaining agent. Such duty, when imposed, is imposed by statute. The refusal of [School Board] to bargain in good faith does not equal a constitutional violation of plaintiffs-appellees' positive rights of association, free speech, petition, equal protection, or due process. Nor does the fact that the agreement to collectively bargain may be enforceable against a state elevate a contractual right to a constitutional right.¹⁷

Even if there is no constitutional duty to collectively bargain, a teachers' union in New Orleans has maintained that the city's failure to bargain with the teachers when other public employees had been permitted to collectively bargain was a denial of equal protection guaranteed by the fourteenth amendment.¹⁸ Although the court conceded that "a public body might bargain so universally with unions representing other employees that the denial of the right of union representation of teachers might be considered a denial of equal protection,"¹⁹ such was not the case here. In fact the

13. *Local 321, Operating Engineers v. Water Works Bd.*, 276 Ala. 462, 163 So. 2d 619 (1964) (collective bargaining invalid without legislative authorization); *Fellows v. LaTronica*, 151 Colo. 300, 377 P.2d 547 (1962) (work agreement by the city of Pueblo with the International Association of Fire Fighters ultra vires and unenforceable); *Local 507, IBEW v. City of Hastings*, 179 Neb. 455, 138 N.W.2d 822 (1965) (a lower court ruling ordering bargaining invalid because of the absence of statutory authority); *Delaware River & Bay Authority v. International Organization of Masters*, 45 N.J. 138, 211 A.2d 789 (1965) (statutory grant of collective bargaining rights for public employees could not be achieved by implication); *Turnpike Authority v. Local 1511, AFSCME*, 83 N.J. Super. 389, 200 A.2d 134 (1964) (denial of public employees of collective bargaining rights does not violate the New Jersey Constitution). *But see* *Local 611, IBEW v. Town of Farmington*, 75 N.M. 393, 405 P.2d 233 (1965) (without specific legislation authorizing public employee collective bargaining, town had authority to bargain with workers employed at its electric utility).

14. 296 F. Supp. 1068 (W.D.N.C. 1969).

15. N.C. GEN. STAT. § 95-98 (1965).

16. 296 F. Supp. at 1077.

17. *Indianapolis Educ. Ass'n v. Lewallen*, 72 L.R.R.M. 2071, 2072 (1969).

18. *Beauboeuf v. Delgado College*, 303 F. Supp. 861 (E.D. La. 1969).

19. *Id.* at 866.

court pointed out that some degree of latitude "may be exercised by executive officials in determining whether they should bargain collectively with school teachers as well as with various other classes of public employees."²⁰ In the absence of a constitutional obligation for a governmental body to collectively bargain with its employees, many state courts have concluded that the common law forbids imposing such a duty on governments.²¹ Both governmental sovereignty and the "public interest" have been cited as bases for this conclusion. The former, while still used in some jurisdictions as an argument against public employee collective bargaining, lacks the persuasive force it had in the first half of the twentieth century;²² if a state possesses sovereign powers, it has the right to delegate²³ or surrender some of those powers.²⁴ The latter argument maintains that the public interest demands that government services, *e.g.*, police and fire protection, sanitation and public works, and, in some jurisdictions, utilities and transportation, be efficient and dependable and that to permit collective bargaining by government workers would subvert these ends.²⁵

These arguments, based on the common law, militate against the notion that governmental bodies can be required to collectively bargain with their employees. However, it is suggested that a view of the "common law" from a different perspective, one which recognizes a "common law of labor relations" *demands* the recognition of a right to collectively bargain. The status of the common law in regard to public employee labor relations must be determined in a realistic manner. The Supreme Court in *Brotherhood*

20. *Id.*

21. *See, e.g.*, *Local 611, IBEW v. Town of Farmington*, 75 N.M. 393, 405 P.2d 233 (1965) where the court held that public employees had a right to bargain, but noted that courts had generally held that public employees did not enjoy the same rights to bargain collectively as do employees in private industry, citing an annotation to illustrate this position: Annot., 31 A.L.R.2d 1142, 1155 (1953).

22. For a discussion of the decline of the sovereignty issue see Anderson, *Recent Developments Involving Public Employee Organization and Bargaining*, in *PUBLIC EMPLOYEE ORGANIZATION AND BARGAINING* 19, 24 (H. Anderson ed. 1968) [hereinafter cited as *ORGANIZATION AND BARGAINING*].

23. A challenge to the constitutionality of the Missouri collective bargaining statute on the ground that it was a violation of representative government was not accepted by the Missouri Supreme Court in *State ex rel. Missey v. City of Cabool*, 441 S.W.2d 35 (1969). The court stated that the statute, Mo. REV. STAT. §§ 105.500 to .530 (Supp. 1967), was a valid exercise of legislative discretion and not violative of any state constitutional provisions.

24. The Pennsylvania Supreme Court ruled in *Harney v. Russo*, 435 Pa. 183, 255 A.2d 560 (1969), that a state statute providing for collective bargaining and arbitration for police and firemen was constitutional under the state and federal constitutions.

25. However it has also been asserted that the public interest demands and is served by public employee bargaining:

Today over one-sixth of the total work force in the United States is employed by local, state and federal agencies. . . . In this period of labor market shortages and rising prices and wages it is a growing problem for public service

of *Railway Trainmen v. Jacksonville Terminal Co.*,²⁶ a case involving employees covered by the Railway Labor Act,²⁷ but dealing with a secondary boycott, a subject not covered by the Act, looked to the law as developed under the Labor-Management Relations Act²⁸ for assistance in reaching a decision. Justice Harlan, writing for the majority, noted that “[t]o refer to the ‘general’ labor law, as it existed around the time the Act came into being, would be ahistorical. Like forays into economic due process . . . this judge-made law of the late 19th and early 20th centuries was based on self-mesmerized views of economic and social theory”²⁹ The Court further defined the standard by which the “common law” of labor relations should be determined:

To the extent that there exists today any relevant corpus of “national labor policy,” it is in the law developed during the more than 30 years of administering our most comprehensive national labor scheme, the National Labor Relations Act. This Act represents the only existing congressional expression as to the permissible bounds of economic combat. . . . Indeed, even if we were to revive the “common law” of labor relations, the common law has always been dynamic and adaptable to changing times, and we would today look to these legislatively based principles for guidance.

. . . We refer to the NLRA’s policies not in order to “apply” them . . . but only to determine whether it is within the general penumbra of conduct held protected under the Act or whether it is beyond the pale of any activity thought permissible.³⁰

Based upon the law as it has been applied in extending to public employees full rights of freedom of expression and association to organize and to join labor unions, it is conceivable, based upon the above view of the “common law” of labor relations,³¹ that a court will decide that a refusal to bargain is an unfair labor practice not permitted to any employer, including the states and their political subdivisions.

A recent report lists thirty states which have now adopted public employee

to attract and retain qualified employees. . . . [P]ublic employees now insist on their status as first-class citizens.

Address by A. Zwerdling before the Briefing Conference on Collective Bargaining in Public Employment, Jan. 23, 1969, in 282 GERR E-1, E-2 (1969).

26. 394 U.S. 369 (1969).

27. 45 U.S.C. § 151 (1964).

28. 29 U.S.C. § 141 (1964).

29. 394 U.S. at 382.

30. *Id.* at 383-84.

31. It appears that the “common law of labor relations” was applied by the Supreme Court of New Jersey recently when, in determining that the state public employee labor relations act’s provisions for exclusive representation is constitutional under the New Jersey constitution, it looked to the federal labor laws and their appli-

collective bargaining laws.³² The report divides this legislation into three areas, reflecting the obligation of the employer to bargain: "permissive" ("may bargain"), "mandatory" ("must bargain"), and laws allowing employees to "present proposals" without any employer obligation to bargain. Twenty-six states have "mandatory" bargaining laws covering some or all of their public employees.³³

Any solution to the problem of public employee rights to collectively bargain lies immediately with the state and local legislative bodies. The reluctance of the courts to grant this right is being eroded. Court decisions, if favorable to the employees will, however, only acknowledge rights and will not provide bargaining machinery, unit determination, grievance procedures, or the complex body of rules necessary to cover all the pitfalls of bi-lateral bargaining and contract administration.³⁴ The legislatures must act, not only to insure employee rights, but to regulate bargaining in an orderly manner. Without meaningful legislation, each impasse could end up in the courts, with attendant delay and difficulties that should not characterize responsible government.³⁵

The possibility of federal regulation of public employee labor relations remains as an alternative. The state legislatures have been warned: "If the states do not act . . . to ensure sound, stable, and successful public employer-employee relations, you may find the federal government once again taking the initiative."³⁶

cation by the NLRB in construing the statute. *Lullo v. Local 1066, Fire Fighters*, 340 GERR E-1 (1970). The court cited *NLRB v. Allis-Chalmers* for the proposition that "exclusivity . . . is now at the core of our national labor policy." 340 GERR at E-6 (emphasis added).

32. *Report of the ABA Committee on State Labor Laws*, 310 GERR E-1 (1969).

33. *Id.*

34. In upholding a lower court injunction against a public employee strike, the Supreme Court of Iowa recently determined that the State Board of Regents may, without permissive legislation, voluntarily bargain with an employee group or groups (unions), but not as a representative for exclusive representation. The court further declared that public employees in Iowa may picket for informational purposes, but not for the purpose of coercing the Board of Regents into collective bargaining. A separate concurring opinion points out the ambiguities and lack of guidelines in the opinion and notes that this decision places the "public agencies in an impossible position." *State Bd. of Regents v. United Packing House Workers, Local 1258*, 339 GERR F-1, F-7 (1970).

35. The Advisory Commission on Intergovernmental Relations recommends that the states enact legislation "establishing the basic relationship between public employers and employees and their organizations in arriving at the terms and conditions of employment" since without such legislation labor-management relations, particularly at the local government level, are often chaotic. The Commission believes the "meet and confer in good faith" approach to be the most appropriate type of collective bargaining that should be mandated by state legislation. *ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, REPORT ON LABOR-MANAGEMENT POLICIES FOR STATE AND LOCAL GOVERNMENT* 99 (1969).

36. Address by W. Colman, Executive Director of the Advisory Commission on

The Right to Strike

Public employees are not permitted to strike by permissive legislation or by court decision in any state or locality. Over thirty states, as well as the federal government,³⁷ expressly prohibit public employee strikes;³⁸ many, in addition, provide penalties for strikes, *e.g.*, loss of employment, fines, and cessation of dues check-off.³⁹

Despite judicial, administrative, and legislative prohibitions, public employees do strike, and the number of strikes is increasing. From 15 work stoppages in 1958 the total increased to 254 in 1968. Workers involved in these strikes increased from 1720 in 1958 to over 200,000 in 1968.⁴⁰ This trend has continued and accelerated and was recently magnified by the postal employees' strike.⁴¹

The reasons generally given for prohibiting government employee strikes are that the sovereignty of the state demands prohibition, that essential and nonessential state services are difficult to determine, and that the strike is solely an economic method of pressure for the private sector, not suitable to dealing with governments.⁴² Recent court decisions have upheld the prohibition of public employee strikes. For example, the New York Court of Appeals, in *City of New York v. De Lury*,⁴³ replying to an attack upon the constitutionality of the Taylor Act's anti-strike provision⁴⁴ as violative of the equal protection and due process requirements of the fourteenth amendment and the Bill of Rights of the New York Constitution,⁴⁵ held that the right of the legislature to bar such strikes is "reasonably designed to effectuate a valid State policy in an area where it has authority to act"⁴⁶

Intergovernmental Relations, to the National Legislative Conference, Aug. 28, 1969, cited in 312 GERR B-16 (1969).

37. 5 U.S.C. § 7311 (Supp. IV, 1969).

38. See Ross, *Public Employee Unions and the Right to Strike*, MONTHLY LABOR REV. 14-18 (Mar. 1969).

39. Perhaps the best example of a state anti-strike law is New York's Taylor Act, N.Y. CIV. SERV. LAW §§ 200-12 (McKinney Supp. 1969).

40. White, *Work Stoppages of Government Employees*, 329 GERR D-3 (1969).

41. The Federal Government suffered its largest strike in history when postal service employees began walking out on March 18, 1970. Over 160,000 employees participated in the walkout and picket lines were set up in several major cities. The mail service in the New York metropolitan area was paralyzed and the Postmaster General placed an embargo on mail entering that area. The major cause of this strike is believed to be worker dissatisfaction with wages and the belief that neither the Congress nor the Administration had given sufficient priority to postal wage reform. See N.Y. Times, March 23, 1970, at 1, col. 5; 341 GERR A-5 (1970).

42. For a discussion of these arguments see Stieber, *A New Approach to Strikes in Public Employment*, in WALSH 245-49.

43. 23 N.Y.2d 175, 243 N.E.2d 128, 295 N.Y.S.2d 901 (1968).

44. N.Y. CIV. SERV. LAW § 210 (McKinney Supp. 1969).

45. N.Y. CONST. art. 1.

46. 23 N.Y.2d at 185, 243 N.E.2d at 133, 295 N.Y.S.2d at 908.

The court commented further that a right did not exist for a group of public workers, through a strike, to paralyze a city and force a settlement that was out of line with economic and social reality; such a right would be contrary to the democratic processes, achieving through coercion the budgets and priorities which are properly the functions of elected representatives. The United States Supreme Court dismissed the appeal from this decision for want of a properly presented federal question.⁴⁷

In Indiana, which has neither a legislative strike ban nor a public employee bargaining statute, the state Supreme Court recently held, in a three to two decision, that public employees in Indiana do not have the right to strike.⁴⁸ The court ruled that Indiana's anti-injunction statute,⁴⁹ which provides that no court in Indiana has jurisdiction to issue an injunction in a labor dispute unless certain express conditions are met, did not apply to public employee labor disputes. The court relied upon *United States v. United Mine Workers*,⁵⁰ plus a long list of cases from other jurisdictions allowing injunctions to be used against public employee strikes. The decision does not cite any Indiana precedents or legislation favorable to its conclusions. In dissenting, Chief Judge DeBruler attacked the argument that "A strike by public employees is a strike against government itself, a situation so anomalous as to be unthinkable" as not being a rational argument, "but a technique for avoiding dealing with the merits of the issue."⁵¹ He went on to note similarities between private and public employers and stated that the prohibition of strikes must have some rational public policy basis in order to differentiate between the right of public and private employees to strike. Disruption and impact on the community are not enough; there is little difference between strikes by employees of privately owned utilities and transportation companies. DeBruler went on to compare instances where private sector strikes may be far more disruptive of society than public employee walkouts, e.g., strikes by milk drivers, defense workers, and farm harvesters, compared to strikes by city golf course attendants, municipal parking lot

47. 394 U.S. 455 (1969). The Court also dismissed the appeal in *Rankin v. Shanker*, 23 N.Y.2d 111, 242 N.E.2d 802, 295 N.Y.S.2d 625 (1968), *appeal dismissed*, — U.S. — (1969) for the same reason. *Shanker* is the result of the New York City teachers' strike in 1968 and was appealed on the issue of the right to a jury trial in a criminal contempt action.

48. *Local 519, Anderson Fed. of Teachers v. School City of Anderson*, — Ind. —, 251 N.E.2d 15 (1969).

49. IND. ANN. STAT. § 40-501 (1965).

50. 330 U.S. 258 (1947). The Court upheld issuance of anti-strike injunctions by a federal district court in a federal employee labor dispute. The federal government was not specifically included in the anti-injunction Norris-LaGuardia Act, 29 U.S.C. § 101 (1964).

51. — Ind. at —, 251 N.E.2d at 20.

employees, or high school sports referees. Citing *Garrity v. New Jersey*⁵² and *Keyishian v. Board of Regents*,⁵³ he argued that the state may not draw unreasonable and unconstitutional distinctions between public and private employees as a condition of employment.⁵⁴ He further argued that the court should not substitute "a *per se* rule against peaceful strikes by public employees regardless of the impact"⁵⁵ when the legislature has failed to act to create collective bargaining machinery to prevent strikes. The dissent concludes with a comprehensive examination of the Indiana anti-injunction statute which in the opinion of Chief Judge DeBruler bars the use of injunctions in public employee labor disputes.

This dissenting opinion marshals all of the arguments in favor of extension of the right to strike to some, if not all, public employees: (1) state sovereignty does not forbid collective bargaining and strikes, (2) in many cases, the difference between public and private employees is almost non-existent, (3) impact from a public employee strike is not always greater, and may be much less than, impact from a private sector strike, (4) public employees, not unlike their private counterparts, are guaranteed certain, irrevocable rights by the Constitution, and (5) in the absence of meaningful legislation regulating and insuring collective bargaining rights, public employees must have some method of asserting their rights. The majority opinion did not effectively address itself to any of these issues.

The number of public employee strikes is rapidly increasing, mainly because employees are unable to achieve desired collective bargaining goals or have problems of administration with their government employers. Public employees are also more likely to strike for recognition (organization) than employees in the private sector,⁵⁶ possibly because of an anti-union animus on the part of the public employer.

52. 385 U.S. 493 (1967).

53. 385 U.S. 589 (1967).

54. This distinction has been made in the federal sector. A three-judge district court recently decided that Post Office employees may no longer be required to take an oath against strike participation, holding such an oath violates first amendment free speech rights, and is an unconstitutional infringement upon the rights of government employees. *National Ass'n of Letter Carriers v. Blount*, 305 F. Supp. 546 (D.D.C. 1969), *appeal docketed*, No. 1270, 38 U.S.L.W. 3425 (U.S. Mar. 2, 1970). The United Federation of Postal Clerks, AFL-CIO has filed a suit in the United States District Court for the District of Columbia challenging those federal laws and the pertinent provisions of Exec. Order No. 11,491 which prohibit federal employee strikes and provide criminal penalties for strikers. The suit asserts that federal employees are denied equal protection of the laws in violation of the first and fifth amendments since private sector employees may strike under federal laws to enforce their collective bargaining demands. *United Fed. of Postal Clerks v. Blount*, No. CA 3279-69 (filed Nov. 19, 1969).

55. — Ind. at —, 251 N.E.2d at 23.

56. See *White, Work Stoppages of Government Employees*, 329 GERR D-3, D-4 (1969).

Anti-strike legislation is increasingly less effective in preventing public employee strikes. The reason for this may be that in a democracy, only occasional and small numbers of offenders can be effectively punished. "The use of fines and prison sentences to enforce a judicial edict against large numbers of employees is out of the question."⁵⁷ The Congress turned to legislation regulating organization, negotiations, and collective bargaining in order to prevent and lessen labor-management strife and economic and social disruption, rather than continue to permit labor-management issues to be inefficiently decided on a case by case basis in the courts.

One rational solution to the public employee strike problem is the proposal that public services and public employees be divided into two or more categories, with no right to strike for employees in the first category, where public welfare cannot countenance disruption, *e.g.*, police and fire protection, and a limited right to strike for employees in other categories, subject to injunctive relief in extreme cases, *e.g.*, employees in hospitals, schools, utilities, and sanitation.⁵⁸ This viewpoint is not too far removed from the position of the AFSCME which insists that all public employees, excepting police and law enforcement officers, have the unqualified right to strike.⁵⁹ Perhaps the absolute bar to strikes in some public service areas such as law enforcement must be retained; possibly a complete and total right to strike for public employees performing nonessential, basically nongovernment function, *e.g.*, city hall snack bar and cafeteria employees, municipal park attendants, city stadium ticket-takers, or county swimming pool employees, is in order.⁶⁰

It is appropriate to take note here of the development of the right to strike in Canada. There, federal government employees, with some exceptions (the armed forces and the "Mounties"), have the unlimited right to strike, if they so choose.⁶¹ The only condition imposed is that the bargaining agent (union) must decide at the time of certification whether impasses are to be resolved either by binding arbitration or by resort to a conciliation board, with the right to strike. The decision remains in force until expiration or renegotiation of the agreement.⁶²

57. A. COX & D. BOK, *CASES AND MATERIALS ON LABOR LAW* 685 (7th ed. 1969).

58. See Stieber, *supra* note 42, in WALSH 249, 250.

59. WALSH 67-70.

60. The Advisory Commission on Intergovernmental Relations has taken the position that state labor relations laws should prohibit public employee strikes, but the laws should provide for mandatory procedures such as fact-finding, mediation, and advisory arbitration to resolve dispute impasses. REPORT, *supra* note 35, at 96.

61. Public Service Staff Relations Act, Feb. 23, 1967 (Can.).

62. For further information concerning Canada's experiences with public employee strike legislation see Herman, *An Evaluation of the Canadian Public Service Staff Relations Act*, in ORGANIZATION AND BARGAINING 105-12; Address by J. Finkleman, Chairman of the Public Service Staff Relations Board of Canada, "The Settlement of

Conclusion

As a matter of law, government employees—federal, state, and local—have the right to organize and to join labor unions. In some states and localities, however, the employees may still have to file suits in federal courts in order to secure this right.

Public employees not guaranteed collective bargaining rights by statute are presently in limbo; court decisions have not, at present, secured these rights. These employees are dependent upon the enlightenment of the bureaucracy which employs them as to how much influence they may have upon their wages, hours, grievances, and working conditions. The state legislatures should act to secure bargaining rights and to regulate the bargaining and negotiations processes so that order will prevail. Failure of the legislative bodies to act meaningfully, or the passage of repressive statutes, will probably bring about future court decisions in favor of the right of public employees to collectively bargain, or possible federal legislation extending and regulating this right.⁶³

The complete answer to the question of the right of government employees to strike may not be settled for some time. Public employment is rapidly becoming a major entity in the total employment picture; if work stoppages continue to increase as in the past, the taxpayer will ultimately demand orderly regulation of the government labor management relations arena in order to minimize further disruption of government services. Such orderly regulation, however, will probably include some limited right to strike, since the demands of a significant number of taxpayers, who happen to be employed by governments, cannot long be ignored.⁶⁴

It is entirely possible that, because of the due process and equal protection

Disputes in Public Employment: The Canadian Experience," 1969 Labor Relations Yearbook 189 (1970).

63. Representative Jacob H. Gilbert of New York has introduced legislation entitled "National Public Employee Relations Act," H.R. 17383, 91st Cong., 2d Sess. (1970). Under this bill, a National Public Employee Relations Commission, modeled on the NLRB and appointed by the President would administer the Act. The Commission would have powers to conduct hearings and make findings on unit determination, certification of exclusive representatives, and unfair labor practices.

The bill, which was drafted by the AFSCME staff, grants organization and collective bargaining rights to all employees of the states and their political subdivisions including housing authorities, school boards, and all other public and quasi-public authorities. The legislation permits negotiated union shop contracts and includes no anti-strike provisions. It provides dispute settlement machinery, charging the Federal Mediation and Conciliation Service with specific impasse resolution duties.

This legislation is designed to be the exclusive method for regulating non-federal public employee labor relations, superseding all previous and conflicting regulations and legislation; however, a state which establishes a system similar to that called for in the bill might apply to the Commission for exemption from the federal legislation. See 347 GERR B-6, E-3 (1970).

64. A contrary view holds that, "advocacy of a limited right to strike is likely to be

requirements of the fifth and fourteenth amendments to the Constitution, the courts will find that public employees performing essentially the same services as their counterparts in the private sector cannot be deprived of their right to strike.

The Keeler Case: Feticide as Murder

In *Keeler v. Superior Court*¹ an intermediate California appellate court upheld a murder conviction of a defendant whose beating of his pregnant wife resulted in the death of the fetus. The defendant, before the court on a writ of prohibition, argued that an unborn fetus was not a human being for purposes of the California homicide statute² and that therefore he had killed no one.³

After learning that his estranged wife was pregnant by the man with whom she was then living, defendant stopped her on a California highway. During their confrontation the defendant struck his knee to his wife's abdomen and struck her in the face several times. After the attack, with his victim unconscious, the defendant left the scene. Mrs. Keeler eventually reached a hospital where doctors performed a Caesarean section and found that the "head of the fetus had been extensively and severely fractured." The doctors opined that the fetus had been alive eight hours before its delivery, and therefore before the time that Mrs. Keeler was assaulted. Mrs. Keeler herself testified that she had felt the baby move within her earlier

a mere academic exercise because implementation of that approach will probably remain politically impossible," and, that while the public may tolerate public employee strikes, permissive legislation will not be accepted. Comment, *Collective Bargaining for Public Employees and the Prevention of Strikes in the Public Sector*, 68 MICH. L. REV. 260, 272 (1969).

This conclusion fails to take into consideration the probability that public employees will represent over one-quarter, and possibly almost one-third of the total work force in the United States before the end of this decade. The political impact of this numerically large group will necessarily have a significantly greater and more potent effect upon public opinion and legislatures than was possible in the 1960's. As of this writing, the Hawaiian Legislature has passed a comprehensive public employee collective bargaining act which grants organized public employees the right to strike. See 349 GERR B-9, F-1 (1970).

1. 80 Cal. Rptr. 865 (Dist. Ct. App. 1969).

2. CAL. PENAL CODE §§ 187, 192 (West 1955). Since neither of these provisions which covered murder and manslaughter included a definition of "human being," defendant urged that the common law, whereby an infant must be born alive to be a homicide victim, should be relied upon.

3. Brief for Defendant at 10-11, *Keeler v. Superior Court*, 80 Cal. Rptr. 865 (Dist. Ct. App. 1969).

on the day of, but not after, the attack. The fetus weighed about five pounds and was estimated to be from 31 to 36 weeks old when delivered. At the hearing there was testimony that "with reasonable medical certainty" a premature separation from the mother at that point of pregnancy would not have ended the child's life.⁴

When formulating its decision, the California court was in a position analogous to the court in *Bonbrest v. Kotz*,⁵ where the court was confronted with long years of precedent but nevertheless held that the inequity of denying civil recovery for prenatal injuries should no longer be continued. The precedents before the *Keeler* court were equally impressive and the break with them was no less abrupt. The court raised significant reasons for making the common law adapt to changes in medicine and science, applied an updated common law standard to the *Keeler* infant, and found it to be a viable human being. Assuming the requisite elements for murder could be adduced at trial, the court held the defendant could be tried for murder.

Bearing in mind the inherent difference between criminal and tort actions, a survey of criminal and tort law regarding unborn infants is helpful to put the *Keeler* decision in perspective. In the early development of the criminal law under the common law of England, formation and especially animation of a fetus were stressed in determining whether that fetus could be the subject of a homicide.⁶ Later, the distinction between formation and animation was emphasized so that by the mid-seventeenth century the killing of a fetus which was formed but not animated, *i.e.*, not quickened,⁷ was not considered a crime whereas if the fetus had quickened the killing was considered an offense but not homicide. If, however, the fetus was

4. 80 Cal. Rptr. at 865-66.

5. 65 F. Supp. 138 (D.D.C. 1946).

6. "If there be anyone who strikes a pregnant woman or gives her a poison whereby he causes an abortion, if the foetus be already formed or animated, and especially if it be animated, he commits homicide." H. DE BRACON, *THE LAWS AND CUSTOMS OF ENGLAND* III, ii, 4, as translated from the Latin in Means, *The Law of New York Concerning Abortion and the Status of the Fetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411, 419 (1968).

7. There is general agreement that quickening takes place during the second trimester of pregnancy. One source sets the time between the 18th and 20th weeks of pregnancy. N. EASTMAN & L. HELLMAN, *WILLIAMS OBSTETRICS* 268 (13th ed. 1966). These authors note, however, that this abdominal fluttering and first perception of life may be noticed as early as the 10th week, or, rarely, not at all. This sign provides only corroborative evidence of pregnancy. Another source sets quickening as usually beginning between the 16th and 18th weeks of pregnancy. *DORLAND'S ILLUSTRATED MEDICAL DICTIONARY* 1261 (24th ed. 1965).

Courts have avoided setting a specific time when quickening occurs but rather have faced the issue on a case by case basis. *See, e.g.*, *State v. Brown*, 171 Kan. 557, 236 P.2d 59 (1951); *State v. Patterson*, 105 Kan. 9, 181 P. 609 (1919). "A woman is said to be pregnant with a quick child, or quick with child, when the motion of the fetus

born alive and subsequently died of the prenatal injuries it was homicide.⁸

The reports do not abound with cases involving the killing of infants before or immediately after birth. But the cases which have been reported frequently illustrate the evidentiary problems in determining whether the infant was born alive and thus was a proper subject for homicide. A number of cases have expounded the view that, in proving that the infant was born alive, it must be proved that the infant both breathed and had a complete and separate existence after separation.⁹ Courts have also stressed the importance of proving independent circulation in the infant in order to prove live birth.¹⁰

A 1947 California decision, however, departed from the strict requirement of proving complete separation of the infant from the mother's body. In *People v. Chavez*,¹¹ a district court of appeals held that "a viable child in the process of being born is a human being within the meaning of the homicide statutes, whether or not the process has been fully completed."¹²

becomes perceptible, usually about the middle of the period of pregnancy." *Id.* at 10, 181 P. at 610.

8. If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe, or if a man beat her, whereby the childe dyeth in her body, and she is delivered of a dead childe, this is a great misprision and no murder; but if the childe be born alive, and dyeth of the potion, battery, or other cause, this is murder; for in law it is accounted a reasonable creature, *in rerum natura*, when it is born alive.

3 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND* 50 (1648). A later commentator has observed: "Destruction of the infant after quickening is agreed on all sides to be an offense at common law; though whether it is so before the infant has quickened has been doubted at common law." 1 WHARTON, CRIMINAL LAW 1074 (12th ed. 1932). As pointed out in Means, *supra* note 6, at 420, American courts usually interpret Coke's "misprision" to mean "misdemeanor." Note that Coke's definition makes the killing of a fetus before quickening no crime at all.

9. *E.g.*, *Rex v. Sellis*, 173 Eng. Rep. 370 (K.B. 1837); *State v. Winthrop*, 43 Iowa 519, 22 Am. R. 257 (1876); *Cordes v. State*, 54 Tex. Crim. 204, 112 S.W. 943 (1908). *But see Rex v. Brain*, 172 Eng. Rep. 1272 (K.B. 1834); *cf.* Annot., 159 A.L.R. 523 (1945).

10. *See, e.g.*, *Shedd v. State*, 178 Ga. 653, 173 S.E. 847 (1934). The question of whether the umbilical cord was severed has been variously weighed in proving this independent circulation. Thus in *State v. Winthrop*, 43 Iowa 519, 22 Am. R. 257 (1876), the child was born alive but the umbilical cord was not severed. Based on this finding, the court found that independent circulation and independent life were impossible. *But see Jackson v. Commonwealth*, 265 Ky. 295, 96 S.W.2d 1014 (1936), and *Regina v. Trilloe*, 174 Eng. Rep. 674 (K.B. 1842), where the courts found severance of the cord unnecessary to create a subject for homicide since the infant had been wholly brought forth from the body of the mother. For cases illustrating the evidentiary controversies caused by these tests, *see, e.g.*, *Singleton v. State*, 33 Ala. App. 536, 35 So. 2d 375 (1948); *Montgomery v. State*, 202 Ga. 678, 44 S.E.2d 242 (1947); *People v. Hayner*, 300 N.Y. 171, 90 N.E.2d 23 (1949); *Morgan v. State*, 148 Tenn. 417, 256 S.W. 433 (1923); *Berryman v. State*, 51 Tex. Crim. 192, 101 S.W. 225 (1907); *State v. Osmus*, 73 Wyo. 183, 276 P.2d 469 (1954). *See Note, Proving Live Birth in Infanticide*, 17 Wyo. L.J. 237 (1963).

11. 77 Cal. App. 2d 621, 176 P.2d 92 (Dist. Ct. App. 1947).

12. *Id.* at 623, 176 P.2d at 94.

The defendant in *Chavez* was a girl who gave birth privately in her family's home to her second illegitimate child. It was conceded that the defendant completely neglected the child in the minutes immediately after birth. The defendant argued, however, that there was not proof beyond a reasonable doubt that the infant was born alive. It was revealed at the trial that the autopsy surgeon used inflation of the lungs and heart action as his main tests to determine live birth. However, the doctor admitted that these two indications could have resulted from the child's breathing after presentation of the head but before completion of birth.¹³ Nevertheless, the court found the evidence sufficient "to support a finding, beyond a reasonable doubt, that a live child was actually born here, and that it died because of the negligence of the [defendant] in failing to use reasonable care in protecting its life, having the duty to do so."¹⁴ Although the *Chavez* decision was itself a departure, it is still a long step from recognizing, as a subject for homicide, an infant totally within the womb and not in the process of being born.

The common law position in this area is supported by the fact that no state has a statute which classifies the killing of a fetus as murder, although some do have laws which include under the crime of manslaughter the killing of an unborn but quickened infant.¹⁵ The fact that California had no such manslaughter statute makes the *Keeler* decision even more novel.

A few jurisdictions provide for more severe penalties for the killing of a fetus which has quickened than one which has not.¹⁶ Under California law

13. *Id.* at 622, 176 P.2d at 93.

14. *Id.* at 624, 176 P.2d at 95.

15. *See, e.g.*, FLA. STAT. ANN. § 782.09 (1965): "The willful killing of an unborn quick child, by any injury to the mother of such child which would be murder if it resulted in the death of such mother, shall be deemed manslaughter." FLA. STAT. ANN. § 782.10 (1965) provides that a person administering medicine to a woman pregnant with a quick child shall be guilty of manslaughter should the child die.

In Georgia there was an express statute dealing with feticide which provided, as punishment, life imprisonment or death. GA. CODE ANN. § 26-1103 (1935). This section was construed by the Georgia Supreme Court to require that an indictment charging an offense under this section allege that the injury inflicted upon the mother of the unborn child was done with malice and with the intent to kill the mother. *See Passley v. State*, 194 Ga. 327, 21 S.E.2d 230 (1942).

Under Georgia's revised criminal code, this section is dropped in favor of a broader abortion statute. *See* GA. CODE ANN. §§ 26-1201-to-1202 (1969). Under this new statute, no attempt has been made to classify the punishment with respect to the developmental stage of the fetus. The committee notes to Sections 1201-02 recite that "[a]t no stage of fetal development prior to birth is the unborn child considered such a human being that its destruction would be punished under homicide statutes. Consequently, there would seem to be little reason to distinguish between the quick and non-quick fetus." Committee Note to GA. CODE ANN. §§ 26-1201-to-1202 (1969) at 80.

16. Among these states are: Hawaii, which provides for a \$1,000 fine and a five year sentence for killing a quickened fetus and a \$500 fine and a two year sentence if the fetus is not yet quickened (HAWAII REV. STAT. § 768-6 (1968)); New York, which classifies as second degree abortion the killing of a fetus less than 24 weeks old, and as

the penalty for abortion does not vary with the age of the fetus.¹⁷

Tort law was static in the area of fetus injury until the middle part of this century. With few exceptions¹⁸ courts refused to recognize a cause of action for injuries to an unborn infant. Acting as a barrier to recognition of these claims was an 1884 Massachusetts decision, *Dietrich v. Northampton*,¹⁹ written by then Judge Holmes, which denied recovery under a wrongful death statute to the administrator of an unborn child's estate. The case concerned a woman between four and five months pregnant whose slip on a defect in a highway in the defendant town of Northampton resulted in a miscarriage. There was testimony that, based on motion of the infant's limbs, the child lived for 10 or 15 minutes after the accident.²⁰ After citing Lord Coke's description of the English criminal sanctions for causing death of a quick fetus,²¹ Judge Holmes questioned whether that rule would be applicable in determining civil liability. Then, noting that the fetus was unable to live apart from its mother (despite the testimony at trial about the few minutes of life), Judge Holmes said that recovery in this case would, first, be contrary to precedents that one owes no duty to a person not yet in being, and, second, would force the assumption that causing a premature birth was the same as wounding or poisoning, two specific actions covered by Lord Coke's definition.²² In addition, Judge Holmes pointed out that the state's wrongful death statute did not cover the infant here since it was still a part of the mother at the time of the injury.²³ Holmes' decision was repeatedly cited to deny recovery in cases involving prenatal injuries and

first degree abortion the killing of an older fetus (N.Y. PENAL LAW §§ 125:40, 125:45 (McKinney 1967)) although technically abortion in the first degree is made a homicide by N.Y. PENAL LAW § 125.00 (McKinney 1958); and Wisconsin which provides for a 15-year penalty for destruction of an unborn quick child and a three-year penalty for destruction of a younger unborn child (WIS. STAT. ANN. § 940.04 (1958)).

17. CAL. PENAL CODE § 274 (West Supp. 1968), covering abortion on a woman by an outside party, and Section 275, covering the taking of drugs or other actions by the woman herself, provide the penalties for bringing about the miscarriage without making any distinction as to the age of the fetus.

18. See, e.g., *Drobner v. Peters*, 194 App. Div. 696, 186 N.Y.S. 278, *reversed*, 232 N.Y. 220, 133 N.E. 567 (1921). A lower Pennsylvania court allowed recovery in *Kine v. Zuckerman*, 4 Pa. D. & C. 227 (C.P. Phila. 1924), but this position was reversed by the state's supreme court in *Berlin v. J.C. Penney Co.*, 339 Pa. 547, 16 A.2d 28 (1940).

19. 138 Mass. 14.

20. *Id.* at 15.

21. Note 8 *supra* and accompanying text.

22. 138 Mass. at 15.

23. *Id.* at 17. In addition to finding the child to be part of the mother, Judge Holmes cited as supporting his position the lack of precedent to hold otherwise and the difficulty of proof of causation of the infant's death. In discussing the reasons for this "old rule" Prosser also mentions the now-discarded supposition that the defendant owes no duty to a person not in existence at the time of his action. W. PROSSER, *THE LAW OF TORTS* 355 (3d ed. 1964) [hereinafter cited as PROSSER].

death.²⁴ The opinion, for example, was relied on to bar recovery in an Illinois case where a surviving child was crippled as a result of prenatal injuries.²⁵ The lack of common law precedent supporting the child's right to recover, difficulties in proof of causation, and the chance of fictitious claims were the problems most frequently raised in support of the no-recovery rule.²⁶

California, in 1872, was among the leaders in providing a statute specifically recognizing an unborn infant as a person with interests which may be protected should it be born alive.²⁷ This statute was applied in *Scott v. McPheeters*,²⁸ which concerned a seven-month-old child allegedly injured during childbirth by the attending physician. Significantly the court admitted that absent the statute the infant's claim would not have been sustained since at common law such causes of action were not recognized.²⁹

24. In Massachusetts, for example, the *Dietrich* decision was cited as controlling in *Bliss v. Passanesi*, 326 Mass. 461, 95 N.E.2d 206 (1950) and later in *Cavanaugh v. First Nat'l Stores, Inc.*, 329 Mass. 179, 107 N.E.2d 307 (1952). Finally, when the Massachusetts Supreme Court recognized causes of action for unborn infants it saw no need to overrule *Dietrich* but rather limited its application to facts which were essentially the same. *Keyes v. Construction Serv., Inc.*, 340 Mass. 633, 165 N.E.2d 912 (1960).

25. *Allaire v. St. Luke's Hosp.*, 184 Ill. 359, 56 N.E. 638 (1900). Interestingly, it is a dissenting opinion in this case which was later frequently cited as a cogent argument for setting aside the no-recovery point of view. The dissent stated that if the unborn child

reaches that prenatal age of viability when the destruction of the life of the mother does not necessarily end its existence also, and when, if separated prematurely, and by artificial means, from the mother, it would be so far a matured human being as that it would live and grow, mentally and physically, as other children generally, it is but to deny a palpable fact to argue there is but one life, and that the life of the mother.

Id. at 361, 56 N.E. at 641.

26. *E.g.*, *Magnolia Coca Cola Bottling Co. v. Jordan*, 124 Tex. 347, 78 S.W.2d 944 (Comm'n of App. 1935) cited the lack of a statute changing the common law and difficulties in proof of causation of the injuries to the child. This decision was later overruled in *Leal v. C.C. Pitts Sand & Gravel, Inc.*, 419 S.W.2d 820 (Tex. 1967). In *Drobner v. Peters*, 232 N.Y. 220, 133 N.E. 567 (1921) lack of a statute alone was held as sufficient to bar recovery by the child. *Drobner* and *Allaire* were subsequently overruled. *Amann v. Faidy*, 415 Ill. 422, 114 N.E.2d 412 (1953); *Woods v. Lancet*, 303 N.Y. 349, 102 N.E.2d 691 (1951). Another early decision barring recovery rested on the narrower grounds that the fetus was only in its fifth month of development and would not be viable outside the womb of the mother. *Lipps v. Milwaukee Elec. Ry. & Light Co.*, 164 Wis. 272, 159 N.W. 916 (1916). The Wisconsin court subsequently held that it would recognize causes of action for prenatal injuries although the court denied recovery in this particular case because of weakness in plaintiff's proof of causation. *Puhl v. Milwaukee Auto. Ins. Co.*, 8 Wis. 2d 343, 99 N.W.2d 163 (1959).

27. "A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth" CAL. CIVIL CODE § 29 (West 1954).

28. 33 Cal. App. 2d 629, 92 P.2d 678, *petition for hearing denied*, 33 Cal. App. 2d 629, 93 P.2d 562 (1939).

29. The court did not reach the merits of the child's malpractice claim against the physician, rather it overruled the lower court's sustaining of the defendant physician's demurrer to the complaint as failing to state a cause of action. Moreover, the court

In a 1946 decision, *Bonbrest v. Kotz*,³⁰ which did not rest on such a statute, a federal court provided the most dramatic break from the old rule. The opinion, referring to the Holmes view as a "rather anomalous doctrine," distinguished *Dietrich* in reaching its own conclusion. While in *Dietrich* Holmes found that the unborn child was a part of the mother and therefore not a separate person, in *Bonbrest* there was a "viable child—one capable of living outside the womb—and which has demonstrated its capacity to survive by *surviving*"³¹ The court found that a viable although unborn child has all the characteristics of individuality and possesses those functions which make it ready to enter the outside world.³² The *Bonbrest* court was also impressed by a 1933 decision of the Supreme Court of Canada³³ which held that denial of recovery to a living person for permanent injuries sustained while in the womb would require that individual "to go through life carrying the seal of another's fault and bearing a very heavy burden of infirmity and inconvenience without any compensation therefor."³⁴ The *Bonbrest* court found the logic of that case "unassailable."³⁵

Similar state court decisions followed in rapid succession. The Ohio Supreme Court became the first American court of final jurisdiction to hold that a viable child, though still in its mother's womb, was a person with a right to bring tort actions.³⁶ Although most jurisdictions required the child to be born alive in order to maintain a cause of action, some courts held that as long as the injuries were sustained while the fetus was viable, recovery would be permitted through a wrongful death action even when the

emphasized that only the statute permitted its decision. "We are satisfied the weight of authority determines that such an action for injury to an unborn child does not lie at common law." 33 Cal. App. 2d at 631, 92 P.2d at 681.

30. 65 F. Supp. 138 (D.D.C.). Prof. Prosser has cited *Bonbrest* as starting a series of cases which "have brought about the most spectacular abrupt reversal of a well settled rule in the whole history of the law of torts." PROSSER at 355-56.

31. 65 F. Supp. at 140.

32. *Id.* at 141.

33. *Montreal Tramways v. Leveille*, 4 D.L.R. 337 (1933).

34. *Id.* at 345.

35. 65 F. Supp. at 142. The court also noted that "[t]he absence of precedent should afford no refuge to those who by their wrongful act, if such be proved, have invaded the right of an individual. . . ." *Id.* As to the possibility of fictitious claims the court found:

That a right of action in cases of this character would lead to others brought in bad faith and might present insuperable difficulties of proof—a premise with which I do not agree—is no argument. The law is presumed to keep pace with the sciences and medical science certainly has made progress since 1884. We are concerned here only with the right and not its implementation.

Id. at 142-43.

36. *Williams v. Marion Rapid Transit, Inc.*, 152 Ohio St. 114, 87 N.E.2d 334 (1949). *But see* 63 HARV. L. REV. 173 (1949). This note argues that recovery should not be allowed for a child born dead simply because it was once viable since

infant was born dead.³⁷ A New York court further extended this trend by holding that an infant born alive could recover for injuries sustained any time before birth, regardless of viability.³⁸ Since 1946 virtually all jurisdictions have adopted a change in tort law whereby a special legal status is granted to unborn infants. Criminal abortion laws, by recognizing an unborn child as a legal entity with a right to be born, are compatible with this point of view although admittedly the nature of the action and the remedies in civil and criminal actions are different.³⁹

This, in brief, was the state of tort and criminal law when the California court was faced with the *Keeler* case. To get past the obstacle posed by the common law "born alive" rule of homicide, the court first pointed out the need to make the common law consistent with "conditions of modern life, rather than those of past centuries in which the rule evolved."⁴⁰ The court also noted that the common law did not become a rigid structure upon arrival in America nor did the "born alive" rule become "crystalized" in California law.⁴¹

The court cited *McPheeters*⁴² as an example of the more enlightened view that a fetus past the age of seven months could be considered a person. Although *McPheeters* was a civil action, the *Keeler* court felt it was used as a

this position would broaden the viability test too much and would deny recovery to a surviving child injured when not viable.

37. The first decision to allow recovery for the death of an unborn child under a wrongful death statute was *Verkennes v. Corniea*, 229 Minn. 365, 38 N.W.2d 838 (1949). Typical cases which followed were *Mitchell v. Couch*, 285 S.W.2d 901 (Ky. 1955); *Rainey v. Horn*, 221 Miss. 269, 72 So. 2d 434 (1954). In *Porter v. Lassiter*, 91 Ga. App. 712, 87 S.E.2d 100 (1955) it was held that a wrongful death action may be maintained even though the unborn child was not viable at the time of its death as long as the fetus was quickened. The issue was held to be one of fact for the jury to determine. Cf. *Annot.*, 15 A.L.R.3d 992 (1967). As to wrongful death actions, a California court has held that an unborn viable child is not a "minor person" within the meaning of the wrongful death statute. *Norman v. Murphy*, 124 Cal. App. 2d 95, 268 P.2d 178 (1954).

38. *Kelly v. Gregory*, 282 App. Div. 542, 125 N.Y.S.2d 696 (1953). The Georgia Supreme Court was the first American court of final jurisdiction to adopt this view. *Hornbuckle v. Plantation Pipe Line Co.*, 212 Ga. 504, 93 S.E.2d 727 (1956).

39. For a discussion of apparent conflicting legal treatment of unborn infants, see Note, *The Unborn Child: Consistency in the Law?* 2 SUFFOLK U.L. REV. 228 (1968). It is here pointed out that property law also extends certain rights to the unborn child. The English view and that adopted by American courts was that as regards property law an unborn child was to be considered a being from the moment of conception and may, for example, take an estate provided it be subsequently born alive. The American courts would recognize the unborn child only if it was for the infant's benefit and not, for example, if the recognition would diminish the child's rights or subject the estate to some liability. *Id.* at 230.

40. 80 Cal. Rptr. at 867.

41. *Id.* at 867-68. To support this lack of common law crystallization, however, the court cited only *McPheeters* and *Chavez*.

42. 33 Cal. App. 2d 629, 92 P.2d 678 (1939). See notes 8, 9 *supra* and accompanying text.

starting point for the criminal decision in *Chavez*.⁴³ In its *Keeler* opinion the California court hailed both the *Chavez* and *McPheeters* decisions as "implicit with recognition of 20th-century advances in obstetrics and pediatrics."⁴⁴ These advances, the court found, would enable a premature infant to survive outside the womb after seven months of normal development. To ignore these scientific advances, the court noted, would prevent the common law from emerging from the 17th century.⁴⁵

Turning to the facts of this case, the court found the evidence sufficient to support a finding of murderous intent directed against the unborn infant, *i.e.*, the defendant's actions evinced a "general intent to harm and destroy."⁴⁶ The questions of the fetus' viability could be made the subject of expert medical testimony. The jury in turn would have to be certain beyond a reasonable doubt that the fetus was viable before returning a verdict of guilty. Even where the malicious intent was aimed only at the mother, the court said, this evidence could support a felony murder conviction for killing the unborn child during the attack.⁴⁷

On its face, the *Keeler* decision gives an elevated status to a fetus which appears to conflict with the status given a fetus by liberalized criminal abortion statutes. This conflict is more apparent than real since the liberalized abortion statutes require, among other things, the consent of the mother, a factor which was missing in the *Keeler* case. The court was forced, however, to reconcile its holding with the earlier decision in *People v. Belous*⁴⁸ which held that the state's abortion statute⁴⁹ was unconstitutionally vague. In reaching that result the California Supreme Court pointed out the vagueness of the phrase "necessary to preserve her [the mother's] life" which was the sole criterion for permitting an abortion under the 1850 statute. The court held that to require certainty of death would abridge the woman's constitutional right to life (because of the dangers in childbirth) as well as her

43. In *Chavez*, the court, while questioning the traditional "born alive" rule for homicide, apparently limited its holding to cover, as a subject for homicide, a viable child in the process of being born but where that process had not yet been completed. 77 Cal. App. 2d at 624, 176 P.2d at 95. Although this holding could be applied to a murder of a child in the process of being born, the facts of this case merited a conviction under the California manslaughter statute. CAL. PENAL CODE § 192 (West 1955).

44. 80 Cal. Rptr. at 867.

45. Infants the age and weight (31 to 36 weeks, 2205 grams) of the *Keeler* infant, for example, have only a 10 percent mortality rate. S. BABSON & R. BENSON, PRIMER ON PREMATURITY AND HIGH-RISK PREGNANCY 2-3 (1966).

46. 80 Cal. Rptr. at 868.

47. *Id.* at 868-69. The court conceded that an assault as occurred in *Keeler* was not a felony enumerated in the state's felony murder statute, CAL. PENAL CODE § 189 (West 1955). Since defendant's actions were inherently dangerous to life, a resulting death could still be murder, although not necessarily murder in the first degree.

48. — Cal. 2d —, 458 P.2d 194, 80 Cal. Rptr. 354 (1969).

49. CAL. PENAL CODE § 274 (West Supp. 1968).

right to choose whether to bear children. This latter right, the court held, was based on the right of privacy in matters related to marriage, family, and sex.⁵⁰ On balance with these rights, the court found no compelling state interest to regulate this subject and further observed that, in light of advances in surgical technique and safety, the considerations which led the legislature to pass the law in 1850 were no longer valid.⁵¹

The *Belous* court also had to construe statutes and distinguish cases which would appear to show concern for the unborn child. The court found that the law of California required the child to be born alive in order to recover for injuries sustained before birth. Similarly, the child must be born alive before the parents could recover in an action for wrongful death.⁵² More significantly, the court held that "[t]he intentional destruction of the embryo or fetus is never treated as murder, and only rarely as manslaughter but rather as the lesser offense of abortion."⁵³ The *Keeler* court considered this statement to be dictum and viewed it as a nonbinding general view of the law.⁵⁴

The court in *Keeler* did not find that the *Belous* decision demeaned the fetus so as to prevent it from qualifying as a subject for homicide.⁵⁵ If

50. — Cal. 2d at —, 458 P.2d at 197-99, 80 Cal. Rptr. at 357-59. The vagueness, the court said, and possible abridgement of constitutional rights as a result, is compounded by placing on a doctor the burden of determining whether the woman should have an abortion. With criminal penalties a very real consequence if the "necessary to preserve her life" test is not met, doctors predictably will most often conclude that a woman does not need an abortion. *Id.* at —, 458 P.2d at 206, 80 Cal. Rptr. at 366. In the *Belous* case, the defendant referred an unwed pregnant girl to an unlicensed doctor whom defendant knew was competent rather than let the girl risk mutilation or death by going to Mexico for an abortion as she had threatened.

51. The court noted, "In the light of modern medical surgical practice, the great and direct infringement of constitutional rights which would result from a definition requiring certainty of death may not be justified on the basis of considerations of the woman's health where, as here, abortion is sought during the first trimester." *Id.* at —, 458 P.2d at 202, 80 Cal. Rptr. at 362.

52. The court specifically found no binding precedent as to the legal status of the fetus in *McPheeters* or *Chavez*. According to the *Keeler* court these two cases recognized increased rights of the fetus in both tort and criminal actions.

53. — Cal. 2d at —, 458 P.2d at 203, 80 Cal. Rptr. at 363. The court found that even in jurisdictions where the parents may maintain an action for the loss of an unborn child it is actually the loss to the parents which is the basis for compensation and not any right to life of the child which is recognized. The only instance where the state reflected an interest in continuing the life of an unborn child was in suspending the execution of a pregnant woman. But the court said these sections of the law (CAL. PENAL CODE §§ 3705-06 (West 1956)) "do not affect any other significant private interests and thus furnish no basis to evaluate the interest protected or to conclude that the embryo or fetus is equivalent to a born child." *Id.* at — n.12, 458 P.2d at 202-03 n.12, 80 Cal. Rptr. 362-63 n.12.

54. 80 Cal. Rptr. at 869.

55. The court noted that even California's Therapeutic Abortion Act, CAL. HEALTH & SAFETY CODE § 25953 (West Supp. 1970), prohibited termination of pregnancy after the 20th week. The fetus in *Keeler* had progressed beyond this point. The Therapeu-

the Supreme Court found that feticide could constitute manslaughter in *Chavez*, it could also constitute murder in other circumstances. With the question an open one in California, the court held that a fetus which had reached the stage of viability is a human being for the purpose of California's homicide statutes.⁵⁶

To determine whether the *Keeler* decision is as radical a break with the past as might first appear, one should first consider both criminal and therapeutic abortion laws in the states. Criminal abortion is still a felony in all the states.⁵⁷ Although an increasing number of states have adopted liberalized therapeutic abortion laws, these laws, rather than removing the felony status for an illegal abortion, have broadened the grounds for legal abortion. Thus far only one state, Hawaii, has adopted the most liberalized abortion law possible, permitting abortion simply at the request of the mother.⁵⁸ But even under this liberal statute, the abortion would be voluntarily sought by the woman. It must be assumed that Mrs. Keeler wished to give birth to the deceased child. Thus, even with liberalized abortion laws, a special legal status is retained by a fetus whose life could not be terminated within the limits of a therapeutic abortion statute.

Extension of homicide would of course be limited to viable fetuses since before that stage the infant's existence is dependent on the mother. This is consistent with the approach in civil cases permitting recovery for wrongful death only if the child was viable at the time of its death and recovery for injuries prior to viability only if the infant is born alive. If a defendant attacks the mother to kill the fetus and the fetus is found not to have been viable, no homicide can be found simply because one cannot kill a nonliving person.

The advances in medical science provide a solid foundation for updating the common law principles concerning the killing of unborn infants. With the chances for life of unborn infants so much improved, an unborn viable infant may properly be considered a subject for homicide. Various factors keep this position from conflicting with liberalized abortion statutes. Among these are the lack of the consent of the mother to the killing of the fetus and the presence of premeditation, deliberation, provocation, and other features which typify homicide. Whether the fetus had advanced to the

tic Abortion Act, passed by the legislature in 1967 is a separate statute from the criminal statute found unconstitutional in *Belous*.

56. 80 Cal. Rptr. at 869.

57. Gampell, *Legal Status of Therapeutic Abortion and Sterilization in the United States*, 7 CLINICAL OBSTETRICS AND GYNECOLOGY 22-23 (1964).

58. HAWAII REV. STAT. § — (1970).

viability stage is a question of fact. Courts should find this question no more difficult than the current problem of determining whether the infant was born alive.⁵⁹

59. *Cf.* cases cited *supra* note 10.