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Notes and Comments: Reexamination of Maryland Policy Concerning Public Employee Strikes

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NOTES AND COMMENTS

REEXAMINATION OF MARYLAND POLICY CONCERNING PUBLIC EMPLOYEE STRIKES

The unique position held by public employees in labor has traditionally precluded public employee strikes. Maryland, as well as other jurisdictions, has adhered to this practice. However, the expansion of the government into many non-critical roles diminishes the need for this policy. The author suggests that Maryland review its attitude toward public sector strikes and adopt the view of several other jurisdictions which allow such strikes.

INTRODUCTION

The growth of public employee organizations and the corresponding increase of public sector strikes has initiated an extensive exploration of public employee policies at all levels of government.[1] Many State legislatures have addressed the issue of public employee rights, and while the majority has advocated some form of collective negotiations between public employees and public employers, most have determined that the use of the strike weapon is not a right inherent to employees in the public sector.[2]

This philosophy was reflected in 1968 by the Maryland Task Force on Public Employee Labor Relations. In accordance with traditional thinking, the Task Force proposed a public labor relations policy for Maryland which included the right to collective bargaining, but which denied the use of the strike as a tool for such collective bargaining.[3] In its thirteenth recommendation, the committee stated:

> The Task Force recognizes that there are two views concerning work stoppages among public employees, one of which advocates the absolute prohibition of any work stoppages or any other concerted interferences by employees with the operation of a public service or function; the second of which advocates a limited right to strike among groups of public employees engaged in work which has been described as "non-critical." Both views accept the proposition that no strikes should be permitted where the health and safety of the general

1. *See* Goldberg, *Changing Policies in Public Employee Labor Relations*, MONTHLY LAB. REV. 5 (July 1970).
2. *See* Goldberg, *Public Employee Developments in 1971*, MONTHLY LAB. REV. 56, 63-66 (Jan. 1972).
3. GOVERNOR'S TASK FORCE ON PUBLIC EMPLOYEE LABOR RELATIONS, REPORT AND RECOMDATIONS, Dec. 23, 1968, reprint in GOVERNMENT EMPLOYEE RELATIONS REPORT No. 278, at AA-3 (1969) [hereinafter cited as GERR No. 278].

> public is endangered and that, therefore, policemen and firemen, among others should not have the right to strike or engage in such concerted activities as described above. The statute should explicitly affirm the existing powers of the Courts to enjoin illegal strikes and should also make clear that its prohibitions are not designed to limit any inherent judicial power. The statute should also explicitly affirm the employing agency's existing authority to discipline or discharge employees engaged in such strikes. . . .[4]

The Task Force, therefore, stopped short of recommending a blanket prohibition of strikes by public employees. However, its decision in this area was not unanimous. Three panel members dissented, stating "that all work stoppages should be absolutely prohibited in the public sector."[5] It was their belief that "the public servant has a unique employment responsibility substantially unlike that of his counterpart in the private sector in that the services he renders usually cannot be obtained elsewhere nor is the citizenry able to seek that service outside the governmental apparatus."[6]

The only legislative action taken since the time of the Task Force's recommendations is still pending.[7] The Maryland policy, therefore, in relation to these strikes, remains as most recently stated in *Bennett v. Gravelle.*[8] In that case, the United States District Court of Maryland held that under Maryland law, absent an authorizing statute, a public employee has no right to strike.[9]

It is the purpose of this comment to suggest that a limited right to strike among certain groups of public employees is a more adequate and feasible solution to the problem area of public employee strikes, and that such a view should be accepted in Maryland as well as in other jurisdictions.

BACKGROUND—THE SOVEREIGNTY THEORY

Advocates of the "no-strike" view have commonly argued the "government-employer, as the ultimate repose of all legitimate societal power, cannot and should not be opposed by the countervailing power

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4. *Id.* at AA-7, 8.
5. *Id.* at AA-7 n. 12.
6. *Id.*
7. To date, at least one member of the Maryland House of Delegates has advocated, contrary to the Task Force's recommendations, that certain public strikes should be allowed. Delegate Ruben has recently introduced a bill concerning public employment relations which would allow the right to strike if collective bargaining processes have been exhausted and if the state courts determine that the strike does not create a "present danger or threat to the health, safety or welfare of the public." H.B. 47, Md. Gen. Ass., 1974 Sess., § 115(c).
8. 323 F. Supp. 203 (D. Md. 1971).
9. *Id.* at 208.

of labor unions."[10] This right of the sovereign was recognized at common law and is still widely accepted in most American jurisdictions.[11]

It is often argued that public employees serve the public welfare and not a private purpose, and that allowing them to strike is allowing them to deny the authority of the government.[12] Similarly, it is claimed that an organized strike brought to enforce the demands of a union of government employees contravenes the principle that it is the duty of every government employee to do his part to make the government function as efficiently and economically as possible.[13]

The sovereignty theory, however, hardly a viable one in modern society, becomes increasingly questionable with enlarging and wide-stretching governmental activities. "The huge growth of government and its expansion into new 'non-essential' services has produced basic changes in thought which make the foundations of any absolute notions of sovereignty obsolete. . . ."[14] Notwithstanding the expansion of the government to "non-essential" services,[15] the Maryland Task Force maintained the basic idea of sovereignty.[16] The dissenters strongly believed that those chosen to bear the public trust are held accountable and must provide adequate government or face removal.[17]

DIFFERENCES BETWEEN PUBLIC AND PRIVATE EMPLOYEES—THE FALLACIES

Many labor experts contend that there are essential differences in the public and private sectors which justify the strike prohibition in the

10. Edwards, *The Developing Labor Relations Law in the Public Sector*, 10 DUQ. L. REV. 357, 359 (1972).
11. *See, e.g.*, Anderson Fed'n of Teachers, Local 519 v. School City of Anderson, 252 Ind. 558, 251 N.E.2d 15 (1969); City of Manchester v. Manchester Teachers' Guild, 100 N.H. 507, 131 A.2d 59 (1957); Board of Educ. v. New Jersey Educ. Ass'n, 53 N.J. 29, 247 A.2d 867 (1968).
12. Norwalk Teachers' Ass'n v. Board of Educ., 138 Conn. 269, 83 A.2d 482 (1951).
13. City of Aloca v. International Bhd. of Elec. Workers, Local 760, 203 Tenn. 12, 20, 308 S.W.2d 476, 479 (1957), *citing* Norwalk Teachers' Ass'n v. Board of Educ., 138 Conn. 269, 83 A.2d 482 (1951).
14. Edwards, *supra* note 10, at 360.
15. Non-essential government services are those such as streets, parks, education, housing, welfare and general administration. These services are termed "non-essential" because strikes in these areas can be tolerated for indefinite duration without endangering the public health, safety and welfare. *Id.*
16. In the opening paragraphs of its report, the Task Force stated:

> The Task Force believes that while there are some similarities between public and private labor relations, there are also inherent differences. These differences arise from the nature of the public employer as a sovereign charged with obligations to all the people. Its authority stems from fundamental constitutional arrangements. Public employers cannot abdicate their legislative discretion. Both the public employer and public employees are employees of the government of the people and owe allegiance to that government. It should be the aim of every public employee to do his or her part to perform their government function as efficiently and economically as possible with uninterrupted service to all the people.

GERR No. 278, at AA-4.
17. *Id.* at AA-7, 8 n.12.

former and allow strikes in the latter. They claim that the pressure applied by private employee strikes is economic while the pressure applied by public employee strikes is solely political. These theorists justify private employee strikes, therefore, because the public can turn to alternative sources for their economic needs. Conversely, public employee strikes cannot be justified because the public cannot turn to alternative sources for their public needs.[18]

This view assumes that the demand for government services is inelastic,[19] and that substitution for these services is impossible. It also assumes that there is a cross-elasticity of demand[20] in the private sector. However, the advocates of this position fail to realize that it is based on a perfect competition model.[21] A more pragmatic viewpoint admits that while there are many private sector products for which substitutes can be found, a strike in any one private industry may very well deprive the market of a product for which there is no viable

18. This theory is advanced by R. Theodore Clark, Jr.:

> In the private sector, employees sell a product for which there are generally 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.... 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. Once this fundamental distinction is understood, it should become clear that there is no fundamental justification for permitting strikes by public employees.

Clark, *Public Employee Strikes: Some Proposed Solutions*, 23 LAB L.J. 111, 115–16 (1972).

It was pursuant to this line of thinking that the Taylor Committee recommended to New York's Governor Rockefeller that public strikes be prohibited. In their report to the Governor the Committee stated:

> Careful thought about the matter shows conclusively, we believe, that while the right to strike normally performs a useful function in the private enterprise sector (where relative economic power is the final determinant in the making of private agreements), it is not compatible with the orderly functioning of our democratic form of representative government (in which relative political power is the final determinant).

GOVERNOR'S COMMITTEE ON PUBLIC EMPLOYEE RELATIONS, FINAL REPORT at 18-19 (New York, 1966).

19. When used in this context, inelastic means insensitive to change. In other words, the demand for government services will not change if government employees go on strike. For example, if firemen go on strike, the public's need or demand for those services will be the same as it was before the strike; there are no substitutes for their services. The public cannot rely on other services (i.e., police or school teachers) for protection against fire. Therefore, there is no limit as to how far a public employee may go before he gets his demands. *See* P. SAMUELSON, ECONOMICS 359–64 (8th. ed. 1970).

20. When used in this context, cross elasticity of demand means that products in the private sector are sensitive to change. In other words, if private employees go on strike, an inevitable result is the increase in the cost of the goods they produce, inviting substitution for that good. For example, if X auto company goes on strike, and the union's demands cause the cost to produce X's car to increase, the price of X's car will go up. Assuming that monopolies are unlawful, the customer will buy a competitor's car which is less costly. This means lower sales for X, and eventually lower employment. This analysis concludes that there is a limit to how far a private employee will go, because the end result may be the loss of employment for him. *Id.*

21. When used in this context, the perfect competition model assumes that any given private industry has many producers who produce identical products. *Id.* at 67.

substitute. On the other hand, it cannot be argued that *every* government service is without a substitute.[22]

The economic implications that accompany any strike are not limited to the private sector. While most public services are provided free of charge, strikes in the areas which are not free (i.e., water, sewage, etc.) may have the same effect on the public employer as do strikes against the private employer. It must also be realized that striking employees in both the public and private sectors are affected similarly economically. "Wages lost due to strikes are as important to public employees as they are to employees in the private sector."[23]

In observing this distinction, Chief Justice DeBruler of the Indiana Supreme Court, advanced one of the strongest arguments in favor of certain public employee strikes in his dissenting opinion in *Anderson Federation of Teachers v. School City of Anderson.*[24] He argued that in order to justify the strike prohibition against every public employee, it must be shown that any public employee strike is more disruptive than a strike by private employees.[25] In concluding that a such a showing could not be made, Chief Justice DeBruler questioned whether there would be any difference in impact between a strike by public employees of a public utility and a strike by employees of a private utility.[26] To further advance the arguments proposed by those who advocate a limited right to strike, the Chief Justice contended that it was obvious that some private employee strikes were far more destructive than some public sector strikes.[27] In the final analysis it is naive to think that every strike by any public employee will upset the whole operation of government.[28]

With these thoughts in mind let us now look at the real situations which have resulted from the application of the differing theories.

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22. One theorist explains:

> In the real world, many factors operate to distort the perfect substitutability of goods upon which this argument relies. . . . In addition it can be argued that the demand for government services is not so inelastic as might ordinarily be assumed. No constitutional prohibition prevents the government from cutting back or eliminating some services—or deciding to subcontract others. . . .

Edwards, *supra* note 10, at 362.

23. Burton & Krider, *The Role and Consequences of Strikes by Public Employees*, 79 YALE L.J. 418, 425 (1970).
24. Anderson Fed'n of Teachers, Local 519 v. School City of Anderson, 252 Ind. 558, 251 N.E.2d 15 (1969).
25. *Id.* at 568, 251 N.E.2d at 20.
26. *Id.* at 569, 251 N.E.2d at 21.
27. It seems obvious to me that a strike by some private employees would be far more disruptive of the society than the peaceful teachers' strike involved in this case, e.g., the truck drivers who deliver milk to the cities, the factory workers who work in the defense plants, construction workers who work in the defense plants, construction workers on missile and space launching sites, agriculture workers. . . .

Id.

28. "Does the majority seriously believe that a strike by employees of municipal golf courses would result in anarchy? What about city parking lot attendants? What about referees at the high school basketball games?" *Id.* at 570, 251 N.E.2d at 21.

LESSON ONE—NEW YORK'S TAYLOR LAW

While no Maryland statute specifically prohibits public employee strikes (one exception being a statute concerning public school teachers[29]), the common law prohibition against such strikes, which is operative in Maryland,[30] can be analogized to the New York statute which specifically denies this right to its public employees.

New York's Taylor Law,[31] enacted April 21, 1967, granted public employees the right to join employee organizations and to negotiate collectively with public employers. The law, however, prohibited strikes by public employees, and in lieu of allowing strike activity set up the Public Employee Relations Board (PERB) to assist in the resolution of disputes between public employers and employee organizations. This legislation, although in accord with that of other jurisdictions,[32] resulted in litigation which challenged the constitutionality of the statute. Among the leading cases was *New York v. DeLury*[33] where the defendant union contended that the statute was unconstitutional because it deprived the defendants of due process of law. In rejecting this contention, the Court of Appeals of New York stated that neither the fourteenth amendment to the federal Constitution nor the bill of rights of the state constitution (art. 1) grants to any individual any absolute right to strike.[34] In quoting the general rule laid down by the Supreme Court of the United States in *Local 232, UAW v. Wisconsin Employment Relations Board*,[35] the court went on to say that the state, in governing its internal affairs, had the power to prohibit any strike if the prohibition was reasonably calculated to achieve a valid state policy in an area which was open to state regulation.[36]

Similarly, in *Zeluck v. Board of Education*,[37] the Supreme Court of Westchester County, New York, held that the statute did not violate equal protection of the laws, nor did it infringe upon the teacher's rights of free association and speech. The main argument advanced by the Federation of Teachers in *Zeluck* was that their right of association was made meaningless by the fact that the school board was both

29. MD. ANN. CODE art. 77, § 160 (1969).
30. Bennett v. Gravelle, 323 F. Supp. 203, 208 (D. Md. 1971).
31. N.Y. CIV. SER. LAW §§ 200-12 (McKinney 1973).
32. For example, Michigan's *Hutchinson Act* provides:

> No person holding a position by appointment or employment in the government of the State of Michigan, or in the government of any 1 or more political subdivisions thereof, or in the public school service, or in any public or special district, or in the service of any authority, commission or board, or in any other branch of the public service . . . shall strike.

MICH. STAT. ANN. § 17.455(2) (1968).
33. 23 N.Y.2d 175, 243 N.E.2d 128 (1968), *application denied*, 23 N.Y.2d 766, 244 N.E.2d 472 (1968), *appeal dismissed*, 394 U.S. 455 (1969), *rehearing denied*, 396 U.S. 872 (1969).
34. *Id.* at 181, 243 N.E.2d at 131.
35. 336 U.S. 245, 259 (1949).
36. 23 N.Y.2d at 182, 243 N.E.2d at 131.
37. 62 Misc. 2d 274, 307 N.Y.S.2d 329 (1970).

negotiator and ultimate arbiter of the disputes arising out of negotiation.[38] In answering this argument, which, incidentally, is an adamant contention of pro-striking advocates, the court maintained that procedures set forth in the Taylor Law were designed to bring about the settlement of disputes.[39]

Notwithstanding such rulings, strikes by New York's public employees continued, and the procedures set forth in the law to bring about the settlement of disputes were not working. Both unions and employers continually rejected the recommendations of the fact-finding panel.[40] The rejection rate for reports was thirty per cent.[41]

In search for a solution to the continuing public employee strikes, the New York legislature aggravated the problem by amending the Taylor Law on March 4, 1969. The amended version imposed penalties directly on the unions, subjecting them to unlimited fines and loss of check-off for unlimited periods. Also, in contrast to the 1967 law, the 1969 amendment provided specific penalties for individual strikers—striking employees would lose two days pay for each day off the job, and would be placed on probation without tenure for one year.[42]

Notwithstanding this imposition of penalties on both the unions and their members, the strikes continued. In 1969 New York experienced fifteen work stoppages, which involved 2,390 workers and resulted in 7,140 idle man-days.[43] In 1970, the number of work stoppages increased to 36. These strikes involved 65,930 workers and resulted in 394,780 idle man-days.[44] Although the figures declined in 1971, the number of stoppages in that year were still substantial. During that period there were 19 strikes, involving 32,900 workers, and resulting in 136,300 idle man-days.[45]

The cold fact remains that the Taylor Law has not prevented strikes and has not solved the public employee dilemma. Theodore W. Kheel,

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38. *Id.* at 275, 307 N.Y.S.2d at 332.
39. *Id.*
40. One theorist observed:

> The framers of the Taylor Law apparently assumed that the unions would be the only ones to reject recommendations and that the pressure of public opinion would eventually induce them to accept the findings of a distinguished panel. But experience has proven that public agencies also reject recommendations and that neither employers nor employees are forced to agreement by critical editorials or public dismay. In the famous sanitation strike in February 1968, Mayor Lindsey rejected as "blackmail" a panel's recommendation for an additional increase of fifty cents a week and was widely praised for this action. The fact is that either side can reject recommendations with impunity, leaving open the question of how the dispute is then to be settled.

Kheel, *Strikes and Public Employment*, 67 MICH. L. REV. 931, 934 (1969).

41. *See* GOVERNMENT EMPLOYEE RELATIONS REPORT No. 249, EL-4 (June 17, 1968).
42. Appears, as amended, in GOVERNMENT EMPLOYEE RELATIONS REPORT No. 288 at F-1 (March 17, 1969).
43. BUREAU OF LABOR STATISTICS, GOVERNMENT WORK STOPPAGES, 1960, 1969 and 1970, SUMMARY REPORT 8 (1971).
44. *Id.*
45. BUREAU OF LABOR STATISTICS, GOVERNMENT WORK STOPPAGES IN 1971 (March 1973).

one of the strongest opponents of the Taylor Law from the outset, sums up the situation as follows:

> It would be unfair to place upon the legal machinery the sole responsibility for these interruptions of critical services on which the welfare of New York depends. But the fact remains that the machinery—including the prohibition on strikes with attendant penalties and the fact-finding boards with their power to make recommendations—did not work to settle these disputes or stop the strikes, slowdowns, or threats. In fact it is probable that the Taylor Law exacerbated these conflicts. For one thing, it made subversive a form of conduct society endorses for private workers. It encouraged unions to threaten to strike to achieve the bargaining position participants in collective bargaining must possess. It made the march to jail a martyr's procession and a badge of honor for union leaders. It hardened positions by calling upon representative organizations to declare publicly their acceptance or rejection of fact-finders recommendations. In simple point of fact, it did not and is not likely to work as a mechanism for resolving conflicts in public employment relations through joint determination, whether called collective bargaining or collective negotiations.[46]

LESSON TWO—PENNSYLVANIA'S PUBLIC EMPLOYE[47] RELATIONS ACT

Maryland's neighboring state of Pennsylvania has enacted legislation allowing public employes the right to strike. In order to adequately consider Maryland's position, an inquiry into the Pennsylvania law is necessitated.

In 1968, pursuant to a directive by Pennsylvania's Governor Schaefer to assess the then present public employe relations law, the Hickman Commission reported:

> The 1947 Act forbids any and all strikes by public employes. Twenty years of experience has taught us that such a policy is unreasonable and unenforceable, particularly when coupled with ineffective or non-existent collective bargaining. It is based upon a philosophy that one may not strike against the sovereign. But today's sovereign is engaged not only in government but in a great variety of other activities. The consequences of a strike by a policeman are very different from those of a gardener in a public park.[48]

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46. Kheel, *supra* note 40, at 936.
47. The Pennsylvania legislature has adopted this shortened spelling.
48. GOVERNOR'S COMMISSION TO REVISE THE PUBLIC EMPLOYE LAW OF PENNSYLVANIA—REPORT AND RECOMMENDATIONS, JUNE 1968, in GOVERNMENT EMPLOYEE RELATIONS REPORT No. 251, at E-2 (1968) [hereinafter cited as GERR No. 251].

However, the Commission qualified its statement by contending that no one should have the right to strike unless all collective bargaining procedures have been exhausted.[49] Likewise, the Commission believed that public employes should have no right to strike if the health, safety or welfare of the public were endangered. It recommended that the appropriate courts should be empowered to enjoin any strike of public employes once that danger point had been reached.[50]

Realizing that not all public employe strikes endanger the public health, safety and welfare, the Committee stated:

> [W]here collective bargaining procedures have been exhausted and public health, safety or welfare is not endangered, it is inequitable and unwise to prohibit strikes. The period that a strike can be permitted will vary from situation to situation. A strike of gardeners in a public park could be tolerated longer than a strike of garbage collectors. And a garbage strike might be permissible for a few days but not indefinitely, and for longer in one season than another.[51]

In contending that the collective bargaining process would be strengthened by recognizing the right to strike, the Commission concluded that a limited and carefully defined right to strike would operate as a safety valve that would in fact prevent strikes.[52]

In accepting the Hickman Commissions's recommendations, the 1970 Session of the Pennsylvania legislature enacted the Public Employe Relations Act (hereinafter called Act 195).[53] Act 195 gives the employes of Pennsylvania the right to bargain collectively and a limited right to strike. Before the strike can be called, however, certain bargaining procedures must be exhausted.[54]

Not all public employes are covered by the act. Realizing the inherent danger posed by strikes by firemen and policemen, the legislature excluded them from Act 195's coverage. These groups are covered separately and have only the right to bargain collectively.[55] Similarly, guards at prisons and mental hospitals, and employes involved with the necessary functioning of the courts were also excluded.[56]

Despite the Hickman Commission's feeling that the law would in fact prevent strikes, it was inevitable that certain public employes would test the strength of Act 195. In 1971, Pennsylvania witnessed a total of 87 work stoppages. These stoppages involved 36,100 workers and resulted in 257,800 idle man-days.[57] While these figures evidenced the

49. *Id.*
50. *Id.* at E-3.
51. *Id.*
52. *Id.*
53. 43 PA. STAT. ANN. §§ 1101.101–.2301 (Supp. 1973).
54. *Id.* § 1101.1003.
55. *Id.* § 217.1.
56. *Id.* § 1101.1001.
57. BUREAU OF LABOR STATISTICS, GOVERNMENT WORK STOPPAGES IN 1971 (March 1973).

largest amount of strike activity of any state,[58] it must be noted that Pennsylvania's public employes had, even prior to the enactment of Act 195, a history of substantial striking activity.[59]

Most of the strikes were called by the public school teachers.[60] This is understandable when one realizes that school teachers are among the most highly organized of public employes.[61] The constitutions of both the American Federation of Teachers and the National Education Association have no reference to strikes, but the former association goes on the record as supporting stoppages as of 1963.[62]

While it must be admitted that a firm reason for the strikes was a demand for better economic security, a good deal of the strikes can be attributed to the different interpretations given to the act by both employers and employees. For example, one section of Act 195 states that employers shall not be required to bargain over matters of inherent managerial policy while at the same time requires employers to meet and discuss on policy matters affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by public employe representatives.[63] Arguments arose as to what was and what was not a proper subject for bargaining.[64]

Despite the strike figures, one analyst has concluded that Act 195 has proved to be a realistic and workable law.[65] He contends that the

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58. The closest state was Ohio where public employees do not have the right to strike. During the same period Ohio had 40 stoppages, involving 7,100 men, resulting in 25,200 idle man-days. *Id.*

59. In the four years preceeding the enactment of Act 195 there had been a combined total of 91 stoppages, involving 81,730 workers resulting in 238,660 idle man-days. 1967-68 figures: BUREAU OF LABOR STATISTICS, WORK STOPPAGES IN GOVERNMENT, 1958-68, REPORT No. 348, at 15-17 (1970). 1969-70 figures: BUREAU OF LABOR STATISTICS, GOVERNMENT WORK STOPPAGES, 1960, 1969 and 1970, SUMMARY REPORT 8 (1971).

60. One analyst of Act 195 observed:

> During the first year, the greatest scope of action by far under it was by the public school teachers. By Thanksgiving of 1971, a total of 64 school strikes were called, keyed to demands for increased salary schedules, broader fringe benefits, and wider participation of the school system.

Alderfer, *The 1971 Pennsylvania Public School Strikes*, 23 LAB. L.J. 41 (1972).

61. The American Federation of Teachers increased its membership more than 250% between 1962 and 1972 from 71,000 to 249,000. BUREAU OF LABOR STATISTICS, NEWS, UNITED STATES DEPARTMENT OF LABOR (Aug. 22, 1973).

As of May, 1968, the National Education Association had a membership of well over 1,000,000. Ross, *Public Employee Unions and the Right to Strike*, MONTHLY LAB. REV. 14, 16 (March 1969).

62. Ross, *supra* note 61, at 16.

63. 43 PA. STAT. ANN. § 1101.702 (Supp. 1973).

64. Alderfer notes:

> While the teachers put forth impressive lists of non-economic demands, most of the school boards stood firm against including such demands in their negotiations as bargainable, but in some cases teachers won certain rights in matters of "inherent managerial policy." In fact, in many strikes the teachers claimed that the non-economic items were paramount over the economic demands in the negotiations. As a result, there was a great deal of confusion.

Alderfer, *supra* note 60, at 46.

65. Schmidman, *Collective Bargaining in Pennsylvania's Public Sector: The First Three Months*, 24 LAB. L.J. 755 (1973).

incidence of strikes has been over-emphasized, and points to the decline in the number of strikes as collective bargaining in the public sector becomes more sophisticated.[66]

THE SITUATION IN OTHER JURISDICTIONS

Other jurisdictions are faced with the same problem. In Michigan, for example, despite the provisions of the "Hutchinson Act"[67] which prohibits public sector strikes, there were 28 work stoppages in 1971.[68] In the previous two years, Michigan's public employees led the nation in strikes with 129.[69]

Similarly, in New Jersey, where the Employer-Employee Relations Act provides for mediation and fact-finding to resolve impasses, but does not allow strikes,[70] there were 23 strikes in 1971.[71] In 1969 and 1970, the public employees of the state were involved in 41 strikes.[72]

Ohio, also, has a history of public sector disputes. Apparently highly susceptible to public employee strikes, that state witnessed 40 stoppages in 1971.[73] Ohio was also among the highest in the previous two years with a total of 119 strikes.[74] All of this activity took place notwithstanding Ohio's explicit prohibition against strikes.[75]

It would be fair to state, however, that not all states are subject to such a high amount of striking activity. In 1971 sixteen states experienced no stoppages at all, and ten more were the victims of only one public sector strike.[76] However, since strikes are either expressly prohibited or prohibited via common law in most of these states,[77] we

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66. The incidence of strikes under Act 195 has been relatively minimal and certainly overemphasized.... It would appear that the novelty of collective bargaining and the inexperience of the negotiators played a major role in the incidence of strikes during the first two and one-half years of the Public Employe Relations Act. The decline in the number of strikes may be expected to continue as negotiators become more accustomed to collective bargaining and bilateral decision making.

Id. at 762.

67. MICH. STAT. ANN. § 17.455(2) (1968).
68. BUREAU OF LABOR STATISTICS, GOVERNMENT WORK STOPPAGES IN 1971 (March 1973).
69. BUREAU OF LABOR STATISTICS, GOVERNMENT WORK STOPPAGES, 1960, 1969 and 1970, SUMMARY REPORT 8 (1971).
70. N.J.S.A. 34:13A-1 *et seq.* (Supp. 1973).
71. BUREAU OF LABOR STATISTICS, GOVERNMENT WORK STOPPAGES IN 1971 (March 1973).
72. BUREAU OF LABOR STATISTICS, GOVERNMENT WORK STOPPAGES, 1960, 1969 and 1970, SUMMARY REPORT 8 (1971).
73. BUREAU OF LABOR STATISTICS, GOVERNMENT WORK STOPPAGES IN 1971 (March 1973).
74. BUREAU OF LABOR STATISTICS, GOVERNMENT WORK STOPPAGES, 1960, 1969 and 1970, SUMMARY REPORT 8 (1971).
75. OHIO REV. CODE § 4117.02 (1973).
76. BUREAU OF LABOR STATISTICS, GOVERNMENT WORK STOPPAGES IN 1971 (March 1973).
77. To date, five states have enacted legislation giving certain public employees a limited right to strike. ALAS. STAT. § 23.40.200(d) (1972); HAWAII REV. STAT. § 89-12 (1972); MONT. REV. CODES ANN. § 41-2209 (Supp. 1973); 43 PA. STAT. ANN. § 1101.1003 (Supp. 1973); 21 VT. STAT. ANN. § 1730 (Supp. 1973).

must ask the question as to whether or not these jurisdictions are properly approaching the problem.

WHY HAVE THE RIGHT TO STRIKE?

The main reason why public employee strikes are prohibited is because they are said to endanger the public health, safety and welfare. Public employee strikes at common law did endanger the public health, safety and welfare, and in many instances can do so today. It is, however, in those areas where the government has expanded itself into a "non-critical" position that public sector strikes should be allowed. Because of the many "non-critical" roles played by the government today the public health, safety and welfare are not endangered by every strike. If this problem no longer exists, then there is no reason why every public employee strike should be prohibited.[78] Only those strikes that result in a genuine threat to the public should be banned.[79]

Conversely, one of the claimed reasons why private employee strikes are permissible is because they do not endanger the public health, safety and welfare. This latter generalization is just as invalid as the former, yet both are accepted. However, while many jurists have followed the rule, several others have spoken out against its injustice. In *Rankin v. Shanker*,[80] Judge Keating of the New York Court of Appeals observed in his dissent that:

> [E]mployees of private utilities have the power to plunge one of the great cities of the world into total darkness or complete silence. . . . [E]mployees of privately owned railroads and shipping lines have the power to deprive the residents of that city of vital food and fuel. . . . [P]rivate sanitation workers, who carry

78. One observer comments:

> Whatever impasse resolutions are adopted, a limited right to strike should be granted to public employees engaged in non-essential services. The right to strike has become a fundamental part of the American labor movement and, both for psychological and economic reasons, it should not be abridged without cause. In non-essential services, a strike may be inconvenient (but certainly no more inconvenient than a strike by electrical or telephone company employees). This inconvenience should not produce a perversion of the political process and the public outcry over such a strike should not be critical, if by definition, the services are non-essential. Indeed, such a strike may be needed by this class of employees to make their demands heard in a political arena beseiged by a plethora of organized interest groups. Such a strike is not likely to disrupt the government process any more than the pressure of a lobby, to which it may be likened.

Edwards, *supra* note 10, at 381–82.

79. Two close followers of the public employee movement have admitted this fact: "The emergency dispute problem does not compel a complete ban on strikes. Many public employee strikes are not a danger to health and safety, at least not immediately. And while non-emergency strikes cause inconvenience, that may not be reason enough to ban strikes." Wellington & Winter, *Structuring Collective Bargaining in Public Employment*, 79 YALE L.J. 805, 846 (1970).

80. 23 N.Y.2d 111, 242 N.E.2d 802 (1968).

> away a substantial portion of the refuse in New York City, have the power to endanger the health of millions of its inhabitants. . . .[81]

Can it be said that the result of the strikes described by Judge Keating is any less harsh than that of some public employee strikes? To the contrary, such strikes definitely endanger the public health, safety and welfare. It cannot be denied that the private sector provides countless vital services affecting the health and safety of the public. Since most states have legislation to handle such emergency situations in the private sector, it cannot be validly argued that similar legislation cannot be applied when public employee strikes result in emergencies. Realizing the need for such legislation, several U.S. Representatives have introduced three proposals in Congress for a federal law which would regulate labor relations of all state and local employees.[82] Each of these proposals grant state and local employees the right to strike.[83]

The basic purpose behind any strike, public or private, is to apply pressure on the employer to concede or at least meet the employees "half-way" at the bargaining table. Realistically speaking, in the absence of this tool of collective bargaining, collective negotiations are a meaningless one-sided affair.[84] Once impasse has been reached and all the procedures provided by the legislature in the form of fact-finding panels and mediation boards have been exhausted, the employees have no other recourse than to remain on the job under those conditions which the employer wishes to concede. While one solution might be compulsory arbitration, the implementation of this device has proven to be inadequate in that it tips the scales too far in the other direction. "For example, many municipal employers in Michigan have claimed that the state's compulsory arbitration act for policemen and firemen has produced arbitrated settlements far in excess of what might have been produced by traditional collective bargaining."[85]

It follows, therefore, that the only adequate solution to ensure equality on both sides of the table is the qualified right to strike. As

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81. *Id.* at 134, 242 N.E.2d at 816.
82. For a discussion of these proposals see Erstling, *Federal Regulation of Non-Federal Public Employment*, 24 LAB L.J. 739 (1973).
83. *Id.* at 751-53.
84. Wellington and Winter have formulated the argument:
> In the private sector collective bargaining depends on the strike threat and the occasional strike. It is how deals are made, how collective bargaining works, why employers agree to terms and conditions of employment better than they originally offered. Intuition suggests that what is true of the private sector is also true of the public. Without the strike threat and the strike, the public employee will be intransigent; and this intransigence will, in effect, deprive employees of the very benefits unionization was intended to bring them. Collective bargaining, the argument goes, will merely be a facade for "collective begging."

Wellington, *supra* note 79, at 823.
85. Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 MICH. L. REV. 885, 892 (1973).

stated by Pennsylvania's Hickman Commission, the collective bargaining process will be strengthened if this qualified right to strike is recognized.[86]

Advocates of the no-strike policy seldom take into account the psychological effect of the strike ban on public employees. It would be naive to suggest that the employees do not resent this limitation imposed on them, and that they will continue to work with the same vigor and enthusiasm once they have been "commanded" back to work. Notwithstanding a strike is banned and the employees must return to work, there is nothing to stop the employees from "throwing a wrench into the works."[87]

By developing negotiation processes without providing the tools for negotiation, legislatures have avoided the question. "In the main, the statutes have not worked because they merely postpone the eventual strike confrontation by creating fact-finding commissions or compulsory arbitration tribunals in which the employees have no trust."[88]

The problem consists less in the sheer number of strikes in the public sector than in the results of those strikes. If the strike presents a clear danger to the public health, safety, and welfare it should not be allowed. The jurisdictions which allow the strikes have stressed this point in their enactments. The proposed bill in Maryland is also explicit on this point.[89]

Since Pennsylvania's Act 195 is the most controversial of the enactments, a viable analysis of the strike position can be made by evaluating the results of the strikes in that state. Act 195 initially resulted in increased stoppages, but is slowly beginning to show the results intended by the legislature. The "growing pains" attendant to any piece of legislation are beginning to disappear. As of September 24, 1973, 27 teachers' strikes had taken place during the 1973-74 school year. Most of them, however, were settled quickly and little time was lost by either teachers or students.[90] The president of the Pennsylvania State Education Association observed:

> This trend indicates two things, a greater acceptance on the part of the school boards of the bargaining processes and the continued desire on the part of the teachers to go the extra mile

86. GERR No. 251, *supra* note 48, at E-3.

87. In regard to public school teachers, one commentator suggests:

> [I]n situations involving skilled public employees, the public may be harmed more by slipshod performance than by a temporary suspension of services. Indeed, a delay in the opening of school may be more desirable than an extended period during which teaching occurs under judicial coercion.

Comment, *Collective Bargaining for Public Employees and the Prevention of Strikes in the Public Sector*, 68 MICH. L. REV. 260, 266 (1969).

88. Lev, *Strikes by Government Employees: Problems and Solutions*, 57 A.B.A.J. 771, 774 (1971).

89. H.B. 47, Md. Gen. Ass., 1974 Sess., § 115(c).

90. *Fewer Strikes . . . Quicker Settlements*, VOICE OF THE PENNSYLVANIA STATE EDUCATION ASSOCIATION 1 (Sept. 24, 1973).

> to reach a settlement before going on strike. And things are working out under Act 195 just about as we predicted. As sophistication on the part of both sides increased, the number of strikes decreased.[91]

As a result of the strikes school teachers and other public employes are receiving the wages and benefits they justifiably deserve. Such activity is not endangering the public health, safety and welfare, but rather is finding at the outcome a better educational system,[92] and better public service. Such results can only be reached by sophistication and open-mindedness at the bargaining table. But even this cannot be attained until the legislatures become sophisticated enough to allow such employees the right to strike.

CONCLUSION

To date, the Maryland legislature has only addressed itself to public employee strikes in one area: that of public school teachers.[93] That statute imposes upon local boards of education the obligation to meet and negotiate with teachers' associations. Strikes are prohibited under the statute and penalties are provided for violations.[94] In lieu of any other applicable statutes,[95] the common law rule is applicable to all other public employees, the right to strike being prohibited.[96]

Notwithstanding these rules, Maryland has witnessed stoppages in the public sector. In the years between 1958 and 1966 there were only

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91. *Id.*
92. The Pennsylvania Department of Education, in preparing to meet the teachers' associations at the bargaining tables, has stated in its guidelines:
> [I]n the maelstrom of the additional activity in which we are about to be involved, there is one very fundamental thing which must be front and center in the thinking of everyone connected with bargaining in the public schools. *This is the undeniable fact that the end result of all bargaining must be a better education for a boy or girl in the Commonwealth.*

PENNSYLVANIA DEPARTMENT OF EDUCATION, A LOOK AT THE PUBLIC EMPLOYE RELATIONS ACT 195, at 20 (May 1971) (emphasis added).
93. MD. ANN. CODE art. 77, § 160 (1969).
94. The statute provides, *inter alia:*
> Employee organizations shall be prohibited from calling or directing a strike. If an employee organization designated as exclusive representative shall violate the provisions hereof, its designation as exclusive representative shall be revoked by the public school employer, and said employee organization which violates any of the provisions hereof, shall be ineligible to be designated as exclusive representative for a period of two (2) years thereafter. If any employee organization violates the provisions hereof, the public school employer shall refrain from making payroll deductions for that organization's dues for a period of one (1) year thereafter.

Id. § 160 (1).
95. It should be noted that the City of Baltimore has an ordinance which specifically prohibits strikes, secondary boycotts and picketing by city employees. BALTIMORE, MD., CITY CODE art. 1, § 124 (Supp. 1973).
96. 323 F. Supp. 203, 208 (D. Md. 1971).

three public employee strikes.[97] These strikes resulted in 1460 idle man-days and involved 410 workers.[98] In the next five years, however, the number of strikes increased to 18, resulting in a loss of 58,010 idle man-days, and involved 11,710 workers.[99]

As the statistics indicate, and as recognized by the 1968 Task Force,[100] Maryland is not exempt from the potential threat imposed by public employees throughout the country. Is there any indication that the strikes will decline? To the contrary, "an increasing number of unions and employee associations in public services are reexamining the use of strikes to resolve contract disputes."[101] This was evidenced by the recent Baltimore City teachers' strike which stopped that city's schools for four weeks in February and March of 1974.[102] While one can only hypothesize as to the underlying factors leading up to that strike, it can be suggested that the city's reluctance to enter a contract was partially prompted by the knowledge that the teachers would be hesitant to take part in an illegal strike.[103]

The time has come when all must realize that public employees performing essentially the same services as their counterparts in the private sector cannot be deprived of the right to strike. The expansion and growth of the government into "non-essential" areas must inevitably be paralleled with the demise of common law thinking.

Initially the number of strikes may increase to bring the public employee bargaining status up to par with his private sector counterpart. Eventually, however, the numbers will decline when equality is restored and when the public bargaining tables attain the sophistication of private industry negotiations. There should be no doubt that the end result of these strikes will be better public services for all.

Joseph L. Persico

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97. BUREAU OF LABOR STATISTICS, WORK STOPPAGES IN GOVERNMENT, 1958-68, REPORT NO. 348 at 15-17 (1970).
98. *Id.*
99. 1967-68 figures: *Id.*; 1969-70 figures: BUREAU OF LABOR STATISTICS, GOVERNMENT WORK STOPPAGES, 1960, 1969 and 1970, SUMMARY REPORT 8 (1971); 1971 figures: BUREAU OF LABOR STATISTICS, GOVERNMENT WORK STOPPAGES IN 1971 (March 1973).
100. Although not citing isolated instances, the Task Force did state that Maryland has experienced work stoppages and disputes involving, among others, teachers, sanitation workers, firemen, policemen, social workers and laborers. GERR No. 278, at AA-4 n.2.
101. Ross, *supra* note 59, at 14.
102. *See* Baltimore Evening Sun, Mar. 5, 1974, at A1, col. 7.
103. BALTIMORE, MD., CITY CODE art. 1, § 124 (Supp. 1973).