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Patrick D. Halligan

# ENJOINING PUBLIC EMPLOYEES' STRIKES: DEALING WITH RECALCITRANT DEFENDANTS

PATRICK D. HALLIGAN*

SAYING STRIKES by those in the public service are illegal does not make them go away. The traditional mode of dealing with illegal strikes has been the injunction. Methods of enforcing injunctions are the key to their effectiveness and, as such, determine the practicality of issuing them. Enforcement of the injunction when there is a recalcitrant defendant is by the court's power of contempt.[1] There are a number of methods by which the court may use its contempt power to coerce defendants into complying with the injunction. Following a brief review of the injunction and enforcement cycle, this article will consider various methods which may be effective when dealing with recalcitrant defendants. Underlying substantive issues, such as the right to strike[2] and the right to advocate[3] strikes, are not discussed.

## INJUNCTIVE PROCESS AND THE CONTEMPT PROCEDURE

The classic procedure in obtaining an injunction may begin with a restraining order. By alleging irrevocable injury or injury unascertainable in amount and asking that the court maintain the status quo, an *ex parte* restraining order may be granted. This is an emergency procedure and is effective for only a very short period of time. A temporary injunction, which requires notice to the defendant, thus giving him an opportunity to be heard, may then be issued for a longer period of time. A permanent injunction is properly issued only after a full hearing, at which the defendant has the right to call witnesses and to cross-examine the moving party's wit-

* MR. HALLIGAN *received his B.A. from Stanford and his J.D. from the University of Chicago Law School. He is a member of the Illinois bar and is currently on active duty as a Captain in the United States Army.*

1. *See* CHAFFEE AND RE, CASES AND MATERIALS ON EQUITY (1965).

2. Absent legislation, there is no inherent right of public employees to strike. The real purpose of most statutes prohibiting strikes is either to restrict or require judicial imposition of penalties for strikes that do occur. KAPLAN, THE LAW OF CIVIL SERVICE (1958).

3. No right to strike exists, yet the right to advocate strikes may exist. *Cf.* Stewart v. Washington, 301 F. Supp. 610 (D.D.C. 1969).

nesses. Because of the increasing formalities of the process, the question is often raised whether disobedience of a restraining order should be punished in the same way as disregard of a permanent injunction. If restraining orders are issued only in true emergency situations, then they do deserve enforcement, for if such orders are not enforced the defendants may be able to substantially circumvent legal procedure and force the plaintiff to accept unfair terms in an agreement.

As previously mentioned, disobedience may be punished by the court on a motion for contempt by the injured party. But whether withdrawal of such motion by the movant divests the court of power to proceed with punishment is a question of particular importance in labor disputes involving public service employees, for amnesty is frequently sought—and granted. However, if a court is to vindicate its own authority, and if strikes are to be prevented, the possibility of irremittable liability should be presented to the union, its leaders, and its members. Otherwise, withdrawal of punishment will become a routine part of any out-of-court labor settlement, and the contempt power will become worthless. Some courts[4] have refused to dismiss contempt proceedings against unionists, notwithstanding a withdrawal of plaintiff's motion, holding that jurisdiction to punish for contempt is not dependent upon agreements of the prosecuting party. This unenforceability of amnesty agreements strengthens observations that public employees must look ultimately to political electoral pressure and persuasion, and not to collective bargaining to secure economic betterment.[5]

Understanding the troublesome distinction between civil and criminal contempt is necessary for full appreciation of the problems of enforcing injunctions. In ancient practice, such a distinction was not drawn; all contempt proceedings were summary in nature, involved no jury, and could not be appealed. Only the writ of habeas corpus could test a commitment for contempt and then only on the

4. *E.g.*, O'Malley v. United States, 128 F.2d 676 (8th Cir. 1942). *See* the following Canadian cases: Tilco Plastics v. Skurjat, 57 D.L.R.2d 596 (1966); Canadian Transport v. Alsbury, 1 D.L.R. 385 (1952); Poje v. Atty. Gen., 2 D.L.R. 785 (1953). *See also* Beatrice Alexander v. Holmes County Board of Educ., 90 S. Ct. 14 (1969); Weinstein v. N.Y. City Transit Auth., 49 Misc. 2d 170, 267 N.Y.S.2d 111 (1966).

5. *See* Cornell, *Collective Bargaining By Public Employee Groups*, 107 U. PA. L. REV. 43 (1958).

ground of jurisdiction. Later, however, the concept of civil contempt arose, which permitted appeal on the underlying private issues (*e.g.*, of contracts, conveyance, or tort) to serve as a basis for testing the propriety of the contempt finding. The doctrine of civil contempt, in that it permitted appeal, was a liberalizing concept. In later times, however, the residuum of criminal contempt has been the vehicle for liberalization.[6] The courts and bar seem again to appreciate the unavoidably punitive element in every contempt proceeding. The right to a jury trial has been extended to many cases by civil rights legislation. The existence of a right to a jury trial has been related to the severity of the punishment which the court presumes a power to impose. The United States Supreme Court has announced a "six months rule," by dicta, in two major cases. In one, the suspended six month commitment of a recalcitrant state governor, imposed without a jury trial, was upheld.[7] In the other, summary commitment for twenty-four months imposed upon a dishonest attorney who had introduced a spurious will in a probate proceeding was overturned.[8] Thus, distinguishing civil from criminal contempt may be important in regard to the right to a jury trial and limitations on possible penalties, but the distinction is fine. Pure civil contempt is difficult to find, since some element of discipline is always present. It is often said that civil contempt is coercive while criminal contempt is punitive. If a defendent had the "keys to his cell," *i.e.*, can toll his own penalty by obedience, then the penalty is coercive in emphasis and the contempt is civil. If the penalty is for a fixed term or amount of money, then the punitive element seems dominant, and the contempt is denoted criminal.[9] An interesting example of how the two elements, coercive and punitive, can merge is illustrated by the example of a suspended fixed term sentence with a possibility of permanent remission for obedience and demonstration of a purpose of amendment.[10]

Historically, only parties joined and served with process in the injunction proceedings were liable for contempt for disobedience of

6. *See* FOX, HISTORY OF CONTEMPT OF COURT (1927).
7. United States v. Barnett, 376 U.S. 681 (1964); *see* Tefft, *U.S. v. Barnett: "Twas a Famous Victory,"* 1964 SUP. CT. REV. 123.
8. Bloom v. Illinois, 391 U.S. 194 (1968).
9. *See* Canadian cases cited in *supra* note 4.
10. *See* New Jersey Zinc Co. v. Local 890, 57 N.M. 617, 261 P.2d 648 (1953); Jencks v. Goforth, 57 N.M. 627, 261 P.2d 655 (1953).

the injunction. However, notice has been held a sufficient basis for punishment for disregard of an injunction. Some courts have claimed in such situations to be punishing not disobedience, but affrontery to the court.[11] It will be argued later that this is an inappropriate method of discussing the problem.

Traditionally, there was no liability for disobedience of void orders, *i.e.*, orders issued without in personam or in rem jurisdiction. A number of cases found jurisdictional defects so readily as to suggest that appellate courts would give impunity for disobedience of erroneous orders where obedience would lead to irreparable loss to the defendant. Expeditious mandamus of the judge issuing an injunction has also been employed by higher courts to relieve defendants of the necessity of obeying erroneous orders.[12] Recently, a strictness has been shown, as in the case of *United States v. United Mine Workers*,[13] which suggested that there is a duty to obey even a void order, if it was not issued frivolously. A better test for impunity would be the degree of irreparability of damage or preclusion of merits as a result of compliance and the opportunity for expeditious appeal in a particular case.[14]

### POSSIBLE CONTEMPT PROCEDURES FOR ENFORCING INJUNCTIONS

#### UNION LIABILITY FOR FINES AND DAMAGES

A union may be fined for disobedience of an injunction; such a mechanism was employed in the case of *United States v. United Mine Workers*.[15] Similarly, in a representative suit, judgment can constitutionally be drawn to affect joint assets of the class.[16] This method is attractive in that its severity automatically adjusts to the obstinacy of the union and its members in continuing their strike. The amount assessed against the union may be held in court as a fund out of which the party moving for punishment can have compensation on a

11. *See* the following Canadian cases: Tilco Plastics v. Skurjat, 57 D.L.R.2d 596 (1966); Canadian Transport v. Alsbury, 1 D.L.R. 385 (1952); Poje v. Atty. Gen., 2 D.L.R. 785 (1953).

12. Tawas & B. C. R.R. v. Iosco, 44 Mich. 479, 7 N.W. 65 (1880).

13. 330 U.S. 258 (1947).

14. *See* Cox, *The Void Order and the Duty to Obey*, 16 U. CHI. L. REV. 86 (1948).

15. *Supra* note 13.

16. Sugg v. Thornton, 132 U.S. 524 (1889) held state statute allowing this result to be constitutional.

showing of his damages. This type of arrangement would tend to emphasize the civil element of the disobedience.[17] It is true that any contempt involves a punitive element, but the distinction between civil and criminal contempt is still maintained and may be important procedurally.

A proposal of this type—*per diem* fine of the union—assumes the entity liability of unions. Absent a statute providing otherwise, joinder of the members by the equitable device of a class action seems to be the sole method of suing an unincorporated association. Furthermore, it is often said that the liability of union members is several, not joint. What judges imply by such a formula is that the union assets are unavailable for damage payments or fines for contempt unless *each* member has participated in the illegal activity. Some courts, however, without completely abandoning the aggregative (non-entity) theory of unincorporated associations and unions, have nevertheless held joint assets (union treasuries) to be fully available for execution of judgments for tortious conduct by fewer than all the members.[18] One author has suggested that an approach more consistent with the entity theory would be availability of union assets pro rata with the degree of membership participation.[19] Full availability of joint assets seems to be more feasible, since such liability of unions may prompt more respect for the legal process in those leaders who must account to the membership for union finances. Furthermore the difficulty of joining many persons may often make entity liability a matter of necessity if a court is to have some means of vindicating its authority. Even requiring a plaintiff to show only ratification or authorization by all the members in order to get at the union assets effectively denies the accessibility of union assets in virtually all cases.

Since questions of procedure, liability, and agency are difficult to separate in this area, comprehensive legislation is needed. The legislature is better equipped than the courts to accomplish such a large change in the method of processing disputes with unions. An ex-

17. *See* Spelfogel, *Enforcement of No-Strike Clause by Injunction, Damage Action and Discipline*, 17 LAB. L.J. 77 (1966).

18. United Brotherhood of Carpenters v. United States, 330 U.S. 395 (1966); United Mine Workers v. Coronado Coal Co., 259 U.S. 344 (1922); and United States v. A.M.A., 28 F. Supp. 752 (D.D.C. 1939).

19. *See* Dodd, *Dogma and Practice in the Law of Associations*, 42 HARV. L. REV. 977 (1929).

ample of judicial leadership in this area, however, is the California judiciary. In a line of cases culminating in *Daniels v. Sanitarium Assn., Inc.*,[20] the California Supreme Court established: unions may be sued as entities; union assets are fully available for execution of judgments, notwithstanding the innocence of some members; and unions may sue others, the amount of recovery to be paid into the general union treasury and not to individual members.

Brief mention may be made of interpretation of statutes permitting a suit in the common name of the union. Some courts consider these statutes "procedural only," holding that only several liability of the members can be invoked by plaintiff. Other courts have effectively interpreted these statutes to impose entity liability on the union with a limitation of liability on individual members. Imposition of entity liability without a limitation on the liability of individual members is a third possibility. If a state is serious about the authority of its judges, the third possibility would seem advisable.[21] This is especially desirable if the union is poorly funded, thus presenting a meager chance for penalty assessment.[22]

MEMBERSHIP MONETARY LIABILITY—VICARIOUS LIABILITY

It seems probable that members of an unincorporated association may be held liable as members per se (rather than as individually disobedient parties) for unpaid fines of the association, but the aggregate theory of several liability alone, or even in conjunction with the entity theory, does not permit this. Much of the apparent assimilation of associations to partnerships is expressed by way of denying entity treatment to them rather than by way of imposing vicarious liability for one member's actions on the other members.[23] The imposition of liability on members based on agency principles presents questions of fairness and due process.

20. 59 Cal. 2d 602, 30 Cal. Rptr. 828, 381 P.2d 651 (1963). *See also* 6 AM. JUR. 2d, *Assn's and Clubs*, § 52 (1963).

21. *See* Dodd, *supra* note 19; United Mine Workers v. Coronado, *supra* note 18; Comment, *Unions as Juridical Persons*, 66 YALE L.J. 712 (1957).

22. For further articles relevant to the discussion in this section *see*: Forkosch, *The Legal Status and Suability of Labor Organizations*, 28 TEMP. L.Q. 1 (1954); Comment, *The Problem of Capacity in Union, Potpourri of Erie, Diversity and the Federal Rules of Civil Procedure*, 68 YALE L.J. 1182 (1959).

23. *See* Dodd, *supra* note 19; Puerto Rico v. Russell & Co., 288 U.S. 476 (1933); Chapman v. Barney, 129 U.S. 677 (1889).

Necessity may justify vicarious liability. However, the entity concept may not be powerful enough. If union funds are insufficient to pay fines initially, the entity treatment might allow satisfaction out of any funds that later come into the union treasury. To avoid payment, the union would then have to cease collecting dues. This fact alone makes entity treatment a powerful enforcement technique. Entity treatment of this sort involves vicarious liability to the extent that innocent parties have contributed to the union treasury. It is conceivable to extend such a notion of vicarious liability to permit a court either to require a union to continue to collect dues from its membership (and to require the members to pay these) and to pay them to the court until a judgment or fine against the union has been satisfied, or to require the public employer to do this for the union and its membership on a theory analogous to garnishment.

Such a procedure would impose entity liability on the union without any limitation upon the liability of the members and would further require that the individual members assume the status of indemnitors of the union. This is what is meant by joint and several liability at common law.[24] This type of several liability, each liable for the whole amount, has occasionally been imposed upon members of unincorporated groups.[25] Such a procedure presents questions of fairness to innocent members. However, in *Southern Ornamental Iron Works v. Morrow*,[26] an absent party, a member of a defendant class in a class action suit, was required to pay plaintiff on execution of a money judgment in the main suit. The defendant class consisted of the members of an unincorporated association with whom plaintiff had had dealings. Professor Moore suggests that such membership liability is not available under the Federal Rules.[27] However, a class action mechanism can be made to apply to all the

24. Where a number of defendants are jointly and severally liable, joint assets are available for execution in a suit against one (which is not the case in several liability alone), but not all right to recovery is merged in the first judgment so that it does not bar judgment against another defendant in a subsequent suit (as it would in joint liability alone). *See* PROSSER, TORTS 258-78 (3d ed. 1964).

25. Gross-Loge Der Deutschen Ordens Der Harugari Des Staates Massachusettes v. Cusson, 301 Mass. 332, 17 N.E.2d 316 (1938); Webster v. San Joaquin Fruit and Vegetable Growers Protective Ass'n, 32 Cal. App. 264, 162 P. 654 (1916).

26. 101 S.W.2d 336 (Tex. Civ. App. 1947). *See also* Richardson v. Kelly, 144 Tex. 497, 191 S.W.2d 857 (1945).

27. MOORE, 3B FEDERAL PRACTICE, § 23.11(2) n.32 (1969); 3A *id.* § 17.25. ***But see infra*** note 58 and text.

members of a union and to serve as the basis for contempt proceedings against any one of them.[28] In a recent case, however, where the members of a union were sued as a class and the union was not joined, the court held that the effect of the judgment was not entity treatment of the union but several liability of the members. The court suggested that the quantum of each member's liability would have to be determined and that due process considerations would prevent levying on a member without a showing of such quantum.[29] It appears that, under the rules, some matters can be concluded against absent individual members by virtue of their membership in a class, but ultimate liability cannot be so determined.

Requirements of due process will be satisfied if an individual member is given the opportunity to remove himself from the class of illegal strikers by communicating to his public employer his good faith, by presenting himself for duty, or by allowing a subsequent judicial hearing. Once these opportunities are provided, the initiative and burden of proof should be on the individual member. Proof of each individual's quantum of liability should not be made impossible for the moving party. In concerted activity such as a strike, separability of damage causation is difficult. If the moving party makes a reasonable effort to identify various differentially active groups within the whole class, the burden of showing further individual differences should be placed on individual members. The evidentiary topics of burden of proof and theories of presumptions will not be discussed in this article.[30] It is sufficient to remark that presumptions both of concerted activity[31] on the one hand, and of participation[32] in concerted activity on the other, have frequently been employed to convict and sentence individuals to imprisonment for crime.

In general, though the prospect of imposing liability on innocent members is unfavorable, necessity may support vicarious liability in some cases. Perhaps a type of prima facie vicarious liability of the membership with provision for an individual member to prove his

28. MOORE, 3B *id.* at § 23.11, n.29-30.
29. Oskoian v. Canuel, 269 F.2d 311 (1st Cir. 1959).
30. *See* Morgan, *Further Observations on Presumptions*, 16 So. CAL. L. REV. 245 (1943); Ashford and Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165 (1969).
31. *See* 18 U.S.C.A. § 371 n.439 (Supp. 1969).
32. 18 U.S.C.A. § 371 n. 439 (Supp. 1969).

own failure to participate, authorize, or ratify the illegal strike would be a reconciliation of policies in some cases. Otherwise, for the plaintiff to be required to make a showing of mutual authorization, or the like, might be almost as difficult as establishing individual liability for illegal action of all the members. If injunctions can be enforced only by making the penalty for disobedience felt widely among the membership, then some practical way of imposing liability on members for concerted action seems necessary. How to categorize such liability and how to invoke it are difficult problems.

It must again be observed that liability, agency, and procedure are inextricably intertwined in this area.[33] In the private sector, Congress has expressed, in the form of anti-injunction legislation, a strong policy preference against the imposition of liability upon innocents for the acts of others.[34] There are similar statutory provisions in seventeen states.[35] A similar policy against membership liability is expressed in the National Labor Relations Act.[36] The problem of strikes in the public service sector of the states is an independent question.

*Constitutional Limitations on Vicarious Liability And on Liability Without Fault*

Constitutional limitations on the imposition of vicarious liability may depend upon the severity of the penalty on the individual rendered liable and on the civil-criminal distinction. The broad scope of vicarious liability in civil actions has not raised serious constitutional objections. There seem to be, however, some limitations on both strict and vicarious liability doctrines in criminal law.[37] For that reason, the distinction between civil and criminal contempt is important.

In a variety of regulatory or *mala prohibita* cases, the Supreme Court has upheld convictions for crimes without a showing of *mens rea*, such as convictions for narcotics violations, pure food laws, and

33. *See* Witmer, *Trade Union Liability*, 51 YALE L.J. 40 (1941).
34. 29 U.S.C.A. § 101 (1958).
35. *See* AARON, *The Labor Injunction in the U.S., in* REPORT OF A STUDY OF THE LABOR INJUNCTION IN ONTARIO (Carrothers ed. 1966). Other states *require* judicial intervention in some strikes. *See* KAPLAN, *supra* note 1, at 236.
36. 29 U.S.C.A. § 185b (1965).
37. *See* Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107.

trespass. Shifting the burden of proving *mens rea* of the defendant has been upheld,[38] but the Court seems unwilling to construe criminal statutes as not including *mens rea* requirements unless the language of the statute is clear. In the case of passive crimes, the Court has required notice to defendant of the duty imposed by the criminal law in order to sustain conviction. First amendment limitations on strict liability are also to be found, and some statutes have fallen for reason of "vagueness." A concern for the severity of punishment is also evidenced in the cases. This suggests that due process considerations are susceptible of balancing individual and societal interests in this area. The "cruel and unusual punishment" test has invalidated one strict liability crime.[39]

Vicarious liability is to be distinguished from strict liability. Strict liability is the imposition of liability for one's own acts done without *mens rea*, while vicarious liability is the imposition of liability for the acts of another. However, the doctrines often seem to merge. Vicarious liability is often discussed in terms of imputation of knowledge of another to the defendant. In such cases, not only the knowledge but the *acts* of another are assigned to the defendant. By whatever formula, such liability for the acts of another has been imposed in the economic, regulatory and welfare law areas. Furthermore, strict and vicarious liability have been combined to convict a master for the unauthorized acts of his unknowing servant; that is, the master has been held vicariously liable for the acts of a strictly liable servant who acted without *mens rea*. However, such liability has been held valid only to support a penalty of fine and not imprisonment.[40] The limitations found in the strict liability cases seem properly to be applied to the vicarious liability cases. Both theories are doctrines of liability without fault.[41]

If there is room for criminal convictions based on the combination of strict and vicarious liability, then vicarious liability of union members for deficiencies of the union treasury in a contempt proceeding

38. *See supra* note 30.

39. *See* Packer, *supra* note 37, discussing various cases which dispensed with the requirement of *mens rea*.

40. *See* Commonwealth v. Koczcwara, 397 Pa. 575, 155 A.2d 825 (1959).

41. *See* Sayre, *Criminal Responsibility for Acts of Another*, 43 HARV. L. REV. 689 (1930); Young, *Vicarious Liability for Crime, Part 1*, 1967 JUR. REV. 1; MECHEM, OUTLINE OF AGENCY, §§ 407-11 (1952); WILLIAMS, CRIMINAL LAW: THE GENERAL PART 285-86 (1953).

seems possible. Another analogy which might help put any proposal for vicarious liability in perspective can be drawn from the law of municipal corporations. If the treasury of a local governmental body is insufficient to fulfill a judgment or a bond payment, it is often said that the person possessing the judgment[42] or claim[43] has standing to sue for a writ of mandamus[44] against the tax collector ordering him to levy[45] a tax sufficient to satisfy the judgment or claim. Presumably a new resident of such taxing district could not object to the tax levied to fulfill the judgment. This analogous situation points out that the recovery by a judgment creditor in a tort suit against a municipality is not limited to the size of its treasury, for the plaintiff can effectively pierce the governmental veil to recover from the constituents of the municipality, and taxpayers must pay in such a case whether or not they acted tortiously as individuals. To require a union to assess its members to satisfy a judgment is no more shocking than ordering a tax collector to levy on the citizens to satisfy a judgment. Similar analogies can be found in cases where creditors compel a corporation to exercise its charter powers to assess[46] or call upon[47] the stockholders for more money. Such provisions are sometimes statutorily required[48] in charters of financial savings institutions.

Further support for the view that some explicit provision for vicarious liability may be constitutionally acceptable is the observation that entity and joint individual liability both imply a degree of vicarious liability. The funds collected from nonparticipating members are liable under the entity treatment. A jointly liable participating member may be required to pay not only damages attributable

42. 17 McQUILLIN, MUNICIPAL CORPORATIONS, § 51.46 (1968), *citing* Meriwether v. Garett, 102 U.S. 472 (1880).

43. *Id.* at § 51.45, *citing* Vallette v. Vero Beach, Fla., 104 F.2d 59 (5th Cir. 1939).

44. *Id.* at §§ 51.02-.16 discussing the history and prerogative (discretionary) nature of the wait at common law as well as traditional pleading requirements.

45. *Id.* at § 51.44 *citing* County of Cook v. Columbia Ins. Co., 329 Ill. 189, 160 N.E. 351 (1928).

46. Porter v. Northern Fire and Marine Ins. Co., 36 N.D. 199, 161 N.W. 1012 (1917).

47. Seyberth v. American Commander Mining and Milling Co., Ltd., 42 Idaho 254, 245 P. 392 (1926).

48. Leach v. Arthur Sav. Bank, 203 Iowa 1052, 213 N.W. 772 (1927).

to his own acts, but entire damages.[49] Thus, the participating member is liable for his own fault and also that of others. It may be argued, however, that imposing liability for the acts of others on one who has in no way participated is a more difficult undertaking. The point, though, is merely that the presently accepted doctrine already contains some element of vicarious liability.

Having suggested that a limited degree of vicarious liability of union members could pass constitutional scrutiny if the possibility of liability for acts of their fellows were made known to unionists, the constitutional problems of individual liability take on a new light. To make the imposition of individual liability effective, as has been suggested earlier, there must be some restrictions on the number of issues each member may individually argue. In terms of the class action device, individuals must be required to follow the lead of representative litigants in some issues. If each member is given an opportunity to be heard on matters unique to his position, due process seems satisfied. The proposal of vicarious liability suggests that participation *vel non* by an individual member not be a question as to which a member has a right to be heard. A public service worker under such a system, by taking employment, would be submitting himself to the chance of liability without opportunity to be heard regarding participation. The right to engage in certain businesses and to adopt certain forms for doing business is similarly conditioned. If a potential government employee can know at the outset what the scope of his vicarious liability might be, then his choice to enter the public service would be deemed an acceptance of that liability.

The question would be more difficult if vicarious liability of coworkers for illegal strikes were imposed on all occupations, because no alternatives would be available, and the employee's choice of employment could not be characterized as a waiver. On the other hand, singling out public service as an occupation to be dealt with specially may be criticized. Vicarious liability in some areas is reasonably related to the goal of prevention of strikes in the public service, although not in all areas, and is therefore not an unreasonable classification. Control of strikes in the public service sector is

49. A dramatic example is the infamous case of Lowe v. Lawlor, 208 U.S. 274 (1908).

thought to be especially important, because they are especially injurious to the community. The economic factors making such strikes of special significance are beyond the scope of this article.[50] Some notion of "burden" shifting[51] or a requirement that an individual member affirmatively take himself out of the defendant class seems tolerable if such devices are viewed against the alternative of simple vicarious liability. Otherwise, the members could require the moving party to incur very large legal expenses in proving the same issue many times. By putting the initiative on the members, some of the expenses of litigation are placed upon them.

Once the notion of membership liability is accepted to some degree, the question of the scope of the liability arises. The question then becomes the ascertainment of the "scope of the membership." The issues of equal protection and due process raised in connection with the general question of membership liability arise again with each proposed increment in the scope of the membership.

Although the special necessity of enjoining strikes in the public service may justify membership liability as to some actions of members, the categorization of such actions would have to be carefully drawn. They should be clearly related to the purpose of preventing strikes in a critical area. Identification of acts done in furtherance of the position of the union or the membership should not be impossible. Any new legislation should offer clear guides to the identifi-

50. In the long run, public service unions can keep their prices higher than competitive levels only by restricting supply. In that respect, the states are their own worst enemy in some areas. Teachers' licensing requirements and tenure guarantees are examples. If such requirements were eliminated, then recruitment of personnel willing to work at competitive rates would be the corrective to demands for higher rates by present employees. The actual employees at any given time do have a temporary disruptive power but this is true in private activities also. Some differences, however, between private and public industries may cause concern. First, the processes of sub-contracting, relocation of firms and industries, and founding of new firms—by which institutional (union) restrictions on available supply of labor are overcome in the long run—may not operate in the public sphere. The Chicago Police Department cannot delegate its duties to Peoria and cannot relocate in Springfield. Secondly, the short run disruptive effects of strikes in the public service may be very severe; that is, the derived demand for public service labor may in a certain range be very inelastic, because the demand for the product is inelastic in certain ranges and because in the short run technical substitutes for the labor factor are unavailable. There is a feeling that public service employees might be in a better position to exploit short run considerations than other striking workers would be. Transit workers are a good example. If these arguments are valid, then granting the right to strike without more is not enough.

51. *See supra* note 30.

cation of acts done within the scope of the membership, *i.e.*, acts for which co-members may be vicariously liable.

The inhibitions on vicarious liability and mass membership liability are more practical and political than constitutional. Practically, the administration of a scheme requiring a levy on the assets of many individuals may be very cumbersome. Such schemes may also prolong the controversy and cause lingering bitterness after the strike, which could be disastrous in public service occupations where *esprit* is important to efficiency. Voluntary incorporation by the union, furthermore, might prevent vicarious liability of the members. In the private sector, such penalties upon strikers have formally been prohibited and would likely have become politically impossible, even without anti-injunction legislation.

Doctrinal arguments to the contrary notwithstanding, the common expectation of laymen is not that labor unions, even in the public sector, will be dealt with by the law of agency.[52] Many persons, if asked, might say that strikes in the public service should be disallowed. But if asked whether they would be in favor of remedies necessary to suppress such strikes, most would likely hesitate or respond in the negative. That is, when forced to consider remedial consequences of prohibition of strikes in the public service, most persons would likely discover they are *not* fundamentally opposed to strikes in that area. A key problem is that many state judges have not considered what might be required in order to deal with disobedience. Injunctions of illegal strikes have issued, but they have not been enforced by the issuing courts. In that respect, the issuing judges have diminished the prestige of the court. Though the state of the law regarding the public service might, in many states, allow judicial intervention by courts with equity powers, it may be predicted that legislative change would render such judicial inventions of but fleeting use. Just as cases in the private sector imposing liability on individual members of a striking union became infamous, so also the use of such remedies in the public sector would likely be viewed unfavorably by the citizenry and the agencies of government.

52. MECHEM, *supra* note 41, at § 8.

LIABILITY TO FINE AND JAIL TERMS OF INDIVIDUALLY ENJOINED PERSONS

Each employee is individually enjoinable from striking, and his own deliberate disobedience may be punished by fines or imprisonment. Whether one who has not been made a party to the action by service may be punished is the difficult question. As a matter of necessity it may be argued that proof of his knowledge of the injunction and disregard thereof should be sufficient ground for punishment. Some cases imposing penalties on knowing actors not parties to the injunction have claimed that affrontery to the court and not disobedience of the injunction is the reason for penalty. These cases would better have been justified as a matter of necessity and practicality. In fact they were cases punishing disobedience.[53]

The issue of fairness revolves about fair notice. If a court makes a reasonable effort to notify all employees of its order, it should be able to vindicate its authority with regard to those persons. The older requirement of joinder for liability for contempt because of disobedience of an injunction seems unduly restrictive and should give way to a test of *knowing disregard*. Even the older cases recognize the necessity in some instances of a broader effect for injunctions.[54]

Selective enforcement against more obvious offenders such as those on a picket line is a technique which may be effective;[55] however, the results of such action may lead to greater solidarity of the membership generally. Other efforts to make penalization of many strikers feasible have experimented with putting the burden of proving nonparticipation partially on the individual employee.[56] A procedure of this sort might be a defendant class action, as seen below, with an opportunity for individuals to come into court and petition to be removed from the class. The important thing is to be able to avoid relitigation of all matters in the case of every member. The existence of an illegal strike, for example, should be susceptible of

53. *See* the following Canadian cases: Tilco Plastics v. Skurjat, *supra* note 11; Canadian Transport v. Alsbury, *supra* note 11; Poje v. Atty. Gen., *supra* note 11.

54. *See* Seward v. Paterson, 1 Ch. 454, 66 L.J. Ch. 267 (1897).

55. *See* Spelfogel, *supra* note 17.

56. *See* 9 ILR RES. BULL., No. 1 (1965). FED. R. CIV. P. 23(c)(2) puts the burden on defendant class members to remove themselves from the class proposed. *See supra* note 30.

determination in one hearing.[57]

CLASS ACTIONS

The technique of using a class action in a motion for punishment for contempt is more available under the revised Federal Rule 23.[58]

57. *See* Kalvan & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 696, 710 (1941).

58. FED. R. CIV. P. 23, 28 U.S.C.A. (Supp. 1970) relates:

"(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) *Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Action.*

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

The impact of the revision is two-fold. First, it makes class action suits more available in the federal courts. Second, and more importantly, the adoption of the new rule is an indication to state courts that under certain circumstances due process to individual defendants is fulfilled by notice which puts the initiative on them to remove themselves from the class.

The circumstances for use of class action under Rule 23 are contained in sections (a) and (b). Section (a) contains unvarying prerequisites of numerous parties, common questions, and typicality of representatives. Section (b) contains three alternative requirements, any one of which will justify a class action when accompanying the requisites in (a). However, the procedural rights to be accorded class members as a condition to effectiveness against them of judgment in the case vary with the alternatives in (b). Section (c) describes these procedural rights.

Section (b) (1) allows a class suit where there is risk of inconsistency should multiple suits be required while (b) (2) alterna-

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(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) *Orders in Conduct of Actions.* In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) *Dismissal or Compromise.* A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. As amended Feb. 28, 1966, eff. July 1, 1966."

tively allows a class suit when the party opposing the class has acted toward the class as a whole. In class action situations of either of these types, section (c) (2) provides that judgment, favorable or not, will affect *all* members of the class.

Section (b) (3) allows class action in a situation where there is no risk of inconsistency from multiple suits and where there has been no action toward the class as a whole, but where the court finds that the "common questions" of section (a) dominate other questions and finds that a class suit is preferable to multiple suits after explicitly weighing: the interests of absent members, pending suits, difficulties of the class action, and the desirability of concentrating the litigation. However, if a class suit is directed on this more tenuous basis, section (c) (2) limits the effectiveness of judgment and accords greater procedural rights to absent members. In particular, the best notice available must be given to all class members sought to be bound. The notice must inform them that they have an unconditional right to remove themselves from the class, but that they will be bound unless they do so. The rule is defended in two cases which stand for the principle that "best effort" notification can be sufficient to grant a court personal jurisdiction over absent parties.[59]

Due process questions are, arguably, more urgent when the proposed class is a defendant class. The rule allows a class to "sue *or be sued*" however, and a recent case uses the most tenuous (*i.e.*, section (b)(3)) type of class situation in the new rule to justify a defendant class action.[60]

While the class action technique may seem primarily relevant to placement of individual liability on many persons, it also adds to the earlier discussion on vicarious liability. This is so because use of the class action procedure can, as a practical matter, lead to the same results as the substantive doctrine of vicarious liability.

TRUST FUNDS AND OTHER REMEDIES

Where separate trust funds are involved, they are unavailable

59. Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950); Hansberry v. Lee, 311 U.S. 32 (1940).

60. Technograph Printed Circuits, Ltd. v. Methode Electronics, Inc., 356 F.2d 442 (1966). Defendant classes were sued occasionally under the old Rule 23 as well; *see* U.S.C.A. Rules, Rule 23, Notes of Decisions section 15 and *supra* note 28.

in enforcement proceedings,[61] but where pension schemes are established by the public employer, not pursuant to a collective bargaining agreement and without surrender of funds to a trust outside the government, the pension rights may be able to be categorized, at least to the extent of employer contributions, as unilateral contracts or as gratuities rather than as vested in the employees. In such cases, they may present opportunities for enforcement. However, what are considered as *employer* contributions for purposes of punishment is difficult to determine. Even where separate accounts are maintained, imposition of the penalties may be administratively costly.[62]

Loss of seniority or tenure, a freeze on salary raises, cancellation of employer pension contributions for a period, selective layoff, and dismissal are all possible post-strike disciplinary measures which have been employed.[63]

Decertification of a union as a bargaining agent for a certain period after the strike has terminated is a further remedy for disobedience of an injunction, which will lead to cessation of check-off dues payments to the union.

## CONCLUSION

The practical problems of enforcing injunctions of strikes are great. Furthermore, imposition of certain penalties might be so unpopular as to result in legislative limitation upon the jurisdiction of the courts in such matters. Such an event would not only decrease the power of the courts in this area but might diminish their prestige generally. Voluntary abstention from issuing injunctions where prospects for effective enforcement are unfavorable seems preferable.

The legislative response in the face of judicial inaction might be to allow strikes in the public service. The effect of strikes on the price of certain services in the long run might not be great if the bargaining positions of the public employer and the union are equal. Still, the legislature should provide some control over strikes in areas found to be critical. However, legislatures are not

61. *See* Lewis v. Benedict, 361 U.S. 459, 489 (1960).

62. *See* AARON, LEGAL STATUS OF EMPLOYEE BENEFIT RIGHTS UNDER PRIVATE PENSION PLANS (1961).

63. *See* Rosenzweig, *Condon-Wadlin Re-Examined*, 9 ILR RES. BULL., No. 1 (1965).

readily capable of dealing with specific cases. If strikes are to be controlled, some non-legislative agency will have to act in particular disputes. The legislature should provide any such agency with the personnel and procedures necessary to control strikes. The procedures and remedies which the agency is authorized to employ should be varied and flexible. If a single, extremely harsh mechanism which must be applied on an all-or-nothing basis is provided, then frequently judges or other officials will not act. The legislature should also support the actions of such an agency politically and should attempt to make the actions of the agency acceptable to the community. In order to do this it must provide some method of allowing public employees to register their demands and exercise influence over decisions on their demands short of a strike. Arbitration is a possible method. If that is done, then the actions of the strike control agency, including imposition of penalties on individuals if necessary, will hopefully be perceived by the community as acts necessary to the implementation of good general policy, as procedures associated with substantial non-strike alternatives of the workers, and not as acts of mere prohibition. At the present time, it appears that the courts frequently have been provided with neither the administrative personnel and procedures nor the legislative endorsement necessary[64] to accomplish the task of controlling strikes in the public service. Nor have alternatives to strikes been given to the workers by the legislative authorities, the provision of which would perhaps make strike control more popularly acceptable. Courts might therefore be advised to abstain from issuing injunctions against strikes in the public service sector until the legislatures provide integrated processes for wage determination and strike control in that area.

64. *See supra* notes 1 and 20.

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