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STRIKES AND IMPASSE RESOLUTION IN PUBLIC EMPLOYMENT

*Arvid Anderson**

I. INTRODUCTION: A VIEW FROM NEW YORK CITY

NINETEEN sixty-eight was the year of the strike in public employment. The New York City sanitation strike, the tragic strike of sanitation workers in Memphis, and the New York City teachers' strikes were the most dramatic public employee disputes of 1968, but there were many less publicized strikes with significant local impacts in all parts of the country. The number and effect of these disputes—particularly in New York City¹—crystallized the political positions of many candidates in municipal, state, and national elections;² candidates, newspaper editors, and government administrators

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1. The following table is illustrative:

<i>Year</i>	<i>Strikes</i>	<i>No. Workers</i>	<i>Man-days idle</i>
New York City			
1968	8 ^a	69,800	1,930,000 ^b
1967	10	63,900	785,000
1966	9	40,000	291,500
1965	3	6,750 ^c	118,000
1964	3	2,460	5,460
New York State			
1968	8 ^a	800	7,360
1967	5	64	9,000
1966	6	70	2,500
1965	1	—	— ^d
1964	1	20	30

a. Tentative 1968 figures, do not include consideration of the New York State Department of Mental Hygiene Strike.

b. Teachers—1,860,000 man-days idle;
Sanitation—60,000 man-days idle.

c. Welfare—6,500 workers involved.

d. Fewer than 1,000.

1964-1966 figures from New York State Department of Labor, Division of Research and Statistics, Work Stoppages in New York State. Figures for 1967-1968 and January to December 1, 1968, were supplied by Jack Herbst, Division of Research and Statistics, New York State Department of Labor.

2. During the New Hampshire Republican Presidential Primary, Richard Nixon backed Mayor Lindsay's firm position during the sanitation strike and supported the mayor's request for National Guard intervention. The President advocated strict compliance with state legislation and was disappointed with Governor Rockefeller's willingness to assist negotiations during an illegal strike. N.Y. Times, Feb. 15, 1968, at 33, col. 2.

Senatorial Candidate Paul O'Dwyer, counsel for the Sanitation Union, recommended suitable alternatives to the strike: "You cannot take away a public employee's right to

for the most part expressed dismay at the work stoppages and at the acts of civil disobedience which often accompanied them.

The increase in the incidence of public sector strikes may be explained in part by the extraordinarily rapid increase in the extent of unionization among government employees. In New York State, for example, more than 750,000 workers—nearly three fourths of all public employees in the state—are now organized.³ In New York City alone, more than ninety-five per cent of those city workers employed by municipal agencies which are not headed by mayoral appointees are represented by some labor organization, although the percentage of actual union membership is not that great.⁴ Legislatures in a growing number of states have contributed to the increase in public sector unionization by passing comprehensive statutes which recognize the right of public employees to organize and bargain collectively;⁵ other states have enacted enabling legislation which establishes collective bargaining rights for selected public employee groups.⁶ None of these statutes recognizes the right of all public employees to strike.

It should never have been supposed, however, that a mere prohibition on the right to strike contained in a statute conferring bargaining rights would mean the demise of public employee work

strike unless you give him something in its place." N.Y. Times, Feb. 12, 1968, at 42, col. 4. Senator Jacob Javits recommended binding arbitration in public employment labor disputes. N.Y. Times, Sept. 9, 1968, at 39, col. 1. The *New York Times* summarized editorials supporting strict compliance with the Taylor Law. This summary included opinions from the *Buffalo Evening News*, *The Rochester Democrat & Chronicle*, *The Chicago American*, *The New York Daily News*, and the *Suffolk Sun*. N.Y. Times, Feb. 2, 1968, at 38.

It is said that John DeLury, Jr., President of the New York City Uniformed Sanitation Workers Association, does not support strike action by public employees: "He doesn't believe in strikes by public employees (his union has really had only one major strike in its history, in 1968), but rather that their legitimate objectives should be achieved through political activity." Costikyan, *Who Runs New York?*, THE NEW YORK MAGAZINE, Dec. 23, 1968, at 25.

3. *Hearing on Taylor Law Before the Joint Legislative Comm. on Indus. and Labor Conditions*, at 3 (New York State Dec. 18, 1968) (statement by Mr. Robert D. Helsby on behalf of the New York State Public Employment Relations Board).

4. This high degree of organization in New York City reflects a long-standing policy of the city government to encourage unionization and collective bargaining among its employees. Mayor Wagner's Executive Order No. 49, issued in 1958, encouraged collective bargaining by employees appointed by the mayor. See also New York City Collective Bargaining Law, N.Y. CITY ADMINISTRATIVE CODE ch. 54, Local Law 53 §§ 1170.0-74.0(b), reproduced in GOVERNMENT EMPLOYEE RELATIONS REPORT No. 205, at E-1.

5. For a list of these statutes, see Smith, *State and Local Advisory Reports on Public Employment Labor Legislation: A Comparative Analysis*, 67 MICH. L. REV. 891, 892 n.5 (1969).

6. E.g., ILL. STAT. ANN. ch. 111½, § 328a (1967) (metropolitan transit employees); LA. REV. STAT. ANN. § 23:890 (Supp. 1969) (public transport workers); ME. REV. STAT. ANN. tit. 26, § 980-92 (Supp. 1968) (fire fighters); MD. ANN. CODE art. 64B, §§ 7(s), 14(d) (1968) (metropolitan transit authority); WYO. STAT. ANN. §§ 27-265 to -273 (1967) (fire fighters).

stoppages. Indeed, the experience in Michigan following the passage of its Public Employment Relations Act⁷ suggests that, if anything, the introduction of collective bargaining rights to public employment in an already highly unionized state might cause an *increase* in work stoppages. In the first year under the Michigan act, there were twelve strikes by municipal employees; in the previous seventeen years there had been only thirteen.⁸ New York's Taylor Committee, drawing upon the earlier Michigan experience, anticipated that the immediate impact of its proposed statewide mandate to grant exclusive recognition and bargaining rights to public employee unions in New York might be to increase the number of illegal strikes.⁹ Still, the public, which had hoped that the new Taylor Law¹⁰ would bring labor peace to the public sector, was not prepared for the rash of strikes that ensued. Governor Rockefeller, in his annual message to the 1969 New York legislature, declared that the Taylor Law "is not a perfect instrument. Judged solely on its ability to prevent such stoppage, it is indeed imperfect."¹¹ Yet, it would be misleading to conclude from the experience in Michigan and New York that the way to prevent public sector strikes is to abolish laws which confer bargaining rights on public employees. Major public employee strikes have also occurred in many states without such laws. Teachers struck in Florida, policemen in Ohio, firemen in Georgia, and hospital workers in Illinois; none of these states has a statute similar to the Taylor Law.

In a growing number of states there seems to be tacit recognition that public sector collective bargaining is here to stay; the ultimate question is what to do about the strike issue. Is collective bargaining in public employment possible without the right to strike? Given strong political pressures favoring labor peace, is it realistic to suppose that we can adapt private sector collective bargaining techniques to normalize labor relations in government employment? Closely related to the debate over the right to strike is the debate over appropriate sanctions: What can be done to avoid strikes or to terminate those that do occur? In New York State, at least, the argument seems to center on whether the penalties for violation of no-strike laws should be increased. The Taylor Committee recently reiterated

7. MICH. COMP. LAWS ANN. §§ 423.201-216 (1967) ("Hutchinson Act").

8. Rapoport, *Militant Public Employees*, Wall St. J., Aug. 9, 1966, at 14.

9. Governor's Committee on Public Employee Relations, State of New York, Final Report 42-43, 53 (1966).

10. N.Y. CIV. SERV. L. §§ 200-12 (McKinney Supp. 1968). [The present version of this law, as amended by a bill passed on March 4, 1969 (effective April 1, 1969), appears in GOVERNMENT EMPLOYEE RELATIONS REPORT No. 288, at F-1 (March 17, 1969).]

11. THE CHIEF, THE NEW YORK CITY CIVIL EMPLOYEES' WEEKLY, Jan. 17, 1969, at 1.

its original position in favor of unlimited fines against striking unions.¹² In response to this proposal and other community pressures,¹³ the New York legislature amended the Taylor Law on March 4, 1969, to provide for stiffer penalties against striking public employees and their unions.¹⁴

The short history of unionism in the public sector demonstrates graphically that merely declaring public employee strikes illegal

12. GOVERNMENT EMPLOYEE RELATIONS REPORT No. 282, at B-1 (Feb. 13, 1969) [hereinafter GERR].

13. The Citizens' Budget Commission, a New York City nonprofit taxpayer group, criticized the \$10,000 ceiling on the daily fine which could be imposed against a striking union under the original version of the Taylor Law. The Commission also preferred an indeterminate jail sentence to the thirty-day-maximum sentence then available for union leaders who urged disobedience of an injunction. New York City Citizens' Budget Commission, *Is New York Governable?*, Nov. 24, 1968 (mimeo). A spokesman for the Commerce and Industry Association of New York recommended that a union which violates the strike ban loses its dues deduction privilege for an unlimited period. GERR No. 274, at B-5. Under the original Taylor Law, a union in violation of the antistrike provision loses the privilege for no more than eighteen months. Public Employees' Fair Employment Act, ch. 392, § 210(f), [1967] N.Y. Laws 1102.

14. The amendments call for unlimited fines against striking unions and the loss of dues check-off privileges for unlimited periods. Another section provides for the loss of two days pay for each day a public employee is on strike. Moreover, a striking worker is subject to one year's probation with loss of tenure for any violation of the strike prohibition. For the text of the law as amended, *see* GERR No. 288, at F-1 (March 17, 1969).

A number of other amendments were also pending before the New York Legislature. S. 1207 was introduced January 14, 1969, by Senator Rollison to amend the Civil Service Law and the Judiciary Law to repeal the limitation of penalty for a striking union. To replace the provision providing for a fine equal to 1/52d of total annual dues of the organization or \$10,000, whichever is lesser, it provided that the method of calculation of the fine would be equal to \$100 multiplied by the number of members or \$10,000, whichever is greater. Senator Rollison also introduced S. 1206, January 14, 1969. Its purpose was to amend the Civil Service Law in order to permit a taxpayer's suit in the nature of a special proceeding in the Appellate Division of the New York Supreme Court against a striking public employee organization in cases where the chief legal officer fails, within ten days after the commencement of such strike, to apply to that court for an injunction. It might be asked whether the N.Y. CIV. PRAC. §§ 7801-06 (McKinney 1963) proceeding in the nature of mandamus is not an adequate remedy.

S. 2168, introduced by Senators Ballesta and Jonas, January 20, 1969, would amend the Civil Service Law to require a no-strike pledge of every public employee and a penalty for violation consisting of forfeiture of all rights of tenure, accumulated sick leave and vacation time, and that portion of the pension fund which has been paid by the employer. Furthermore, dismissal of striking public employees would be mandatory. On the same date, Senators Ballesta and Jonas also introduced S. 2170 to provide for the appointment by the governor of seven public-spirited citizens to act as arbitrators. S. 2170 would also resolve impasses by final referral to compulsory arbitration by the named governor's panel. Any person found guilty of refusing to implement or obey the panel's decision could be found in contempt, fined \$500, imprisoned 60 days, or both.

In addition, the second interim report of the governor's "Taylor Panel" recommended that limits on fines for the contempt convictions of public employee union leaders be repealed. Governor's Committee on Public Employee Relations, State of New York, Second Interim Report 18 (Jan. 23, 1969).

will prevent neither collective bargaining from developing nor strikes from occurring. At all levels of government, legislatures, executives, and the courts have been forced to deal with the problem. But they can no longer afford the luxury of debate about what the public policy toward public employee strikes should be; rather, they must deal realistically with a situation in which strikes—although illegal—remain a constant possibility. In this regard it is submitted that the existence of collective bargaining in the public sector does not depend upon a resolution of public policy concerning the strike issue. For amidst all of the outcry about public employee strikes, the fact remains that a great many collective bargaining contracts are concluded without strikes. New York City, for instance, is obligated to deal with more than eighty unions in approximately 170 different collective bargaining relationships. The vast majority of these negotiations are resolved without a strike or the threat of a strike.¹⁵ In those instances in which impasse panels have been appointed under the city's collective bargaining statute,¹⁶ the city and the public employee organizations involved have accepted the recommendations. At the state level, of 370 impasses that were referred to the New York Public Employer Relations Board (PERB) in its first year of operation, only five cases (which involved a total of fewer than 1,700 employees) resulted in work stoppages. Although there were nine other work stoppages in the state during that year, in those instances the impasse procedures of the Taylor Law were not utilized.¹⁷ The experience in other states which have adopted public sector collective bargaining laws is similar; countless contracts have been negotiated without strikes or the threat of strikes. But strikes, when they do occur, make the headlines because of their great political—if not economic—impact on the public.

Experience indicates that in most instances the right to strike is not an *essential* part of the public employment collective bargaining process.¹⁸ Thus, the crucial issue is not really whether strikes should be permitted or prohibited in the public sector, but whether the collective bargaining process itself can be made so effective absent the right to strike that the need for work stoppages will be obviated. It is my conclusion that certain proven impasse resolution procedures—mediation, fact-finding, and in some cases, even arbitration—can be

15. More than one hundred agreements were negotiated in 1968 between the City of New York and its municipal unions. *THE CHIEF, THE NEW YORK CITY CIVIL EMPLOYEES' WEEKLY*, Jan. 17, 1969, at 4.

16. For the text of the statute, see GERR No. 205, at E-1 (Aug. 14, 1967).

17. *Hearing, supra* note 3, at 7.

18. *But see* Kheel, *Strikes and Public Employment*, 67 MICH. L. REV. 931, 941 (1969).

substituted for the strike weapon in public employment without substantial loss in the effectiveness of collective bargaining as it is known in the private sector. If this is in fact the case, it will be unnecessary for state legislatures to resolve the difficult policy dispute over whether public employees should be given the right to strike. Still, it may be useful to examine the arguments for and against the right to strike in public employment in order to evaluate the various proposals for making public sector collective bargaining orderly and effective.

II. THE RIGHT TO STRIKE IN THE PUBLIC SECTOR: THEORETICAL AND PRACTICAL CONSIDERATIONS

The debate over the right to strike in public employment has tended to center around two polar extremes. On the one hand, some argue that public employees should have an unequivocal right to strike.¹⁹ Others contend that strikes in the public sector must be prohibited in *all* circumstances. However, to present the issue in such stark black and white terms is to miss the point that there is a viable middle position. Those who favor the right to strike seem to take the position that *true* collective bargaining depends upon a balanced power relationship between the negotiating parties. They assume that, absent the strike weapon, public employees would not have sufficient power with which to achieve real bargaining leverage. In support of this assumption, they state that the right to strike has been the equalizer in employer-employee relations for one third of a century in private employment collective bargaining and that the transfer of private sector collective bargaining procedures into the public sector must necessarily be accompanied by the strike weapon as it is known in the private sector.²⁰

But this position, if taken literally, tends to overlook the fact that there is no such thing as an unlimited right to strike in private employment. The Congress, state legislatures, and the courts have for many years prescribed limitations on the right to strike; occasionally legislatures have enacted emergency provisions to delay strikes or prevent them altogether when necessary to protect the public's health, safety, and welfare.²¹ The right to strike has never been equated with any constitutional guarantee. Moreover, restrictions on concerted work stoppages do not raise an issue of involuntary

19. See, e.g., *id.* at 940-41.

20. See, e.g., *id.* at 941-42.

21. E.g., Pub. L. No. 90-54, 81 Stat. 122 (1967) (special resolution and mediation of dispute under Railway Labor Act).

servitude. The courts have always interpreted the constitutional provisions on involuntary servitude as running to the individual; they have never found that these provisions extend so far as to create a collective right to terminate employment.²²

Indeed, those who advocate the right to strike in public employment usually make it clear that they are not actually calling for an unqualified or an unlimited right. Instead, they argue that lifting the strike ban in public employment labor disputes and granting a qualified right to strike in nonessential public services would move the parties toward more equal collective bargaining power and greater labor peace. Various legal mechanisms to distinguish between essential and nonessential government services have been suggested. Some of these provide for prior settlement of the issue of essentiality.²³ Other mechanisms contemplate modes of emergency dispute resolution in which conditions after a strike has begun determine the essentiality of a service in terms of the community's health, safety, and welfare.²⁴ The Pennsylvania Governor's Commission, for instance, would confer the right to strike only after the exhaustion of mediation and fact-finding procedures, and then only if a strike would not endanger the public's health, safety, and welfare.²⁵ The right to strike, as envisioned by the Pennsylvania Commission, would not apply to policemen and firemen, who would be prohibited from striking by a compulsory arbitration provision.²⁶

22. *Dorchy v. Kansas*, 272 U.S. 306 (1926).

23. *E.g.*, Public Service Staff Relations Act, ch. 72, § 101(1)(c), [1966-67] Can. Stat.; see Arthurs, *Collective Bargaining in the Public Service of Canada: Bold Experiment or Act of Folly*, 67 MICH. L. REV. 971, 988-89 (1969).

24. Quebec Civil Service Act, ch. 14, § 75, [1965] Que. Stat. (vol. 1) 157. Albert Shanker, President of the United Federation of Teachers, in proposing an end to the blanket New York State strike ban, suggested that it would be the best public policy to make a determination of essentiality only after a strike revealed the essential nature of the public service involved. GERR No. 276, at B-5 (Dec. 23, 1968). See text accompanying notes 29-31 *infra*.

25. Governor's Commission To Revise the Public Employee Law of Pennsylvania, Report and Recommendations 14 (1968).

26. This proposal was subsequently embodied in PA. STAT. ANN. tit. 43, § 217 (Supp. 1969). The increase in the incidence of public employee strikes affecting essential services has made the idea of compulsory arbitration seem more attractive—or at least less objectionable—as an alternative method of dispute resolution in the public sector. For instance, virtually no one would suggest that policemen should have the right to strike, and arbitration has been accepted as an alternative in an increasing number of states. ILL. REV. STAT. ch. 24, § 10-3-8 to -11 (1967) (advisory arbitration of municipal firemen disputes); ILL. REV. STAT. ch. 111-213, § 301-44 (1967) (Chicago Transit Authority Employees); LA. REV. STAT. ANN. § 23:890 (Supp. 1969) (public transportation and municipal employees); ME. REV. STAT. ANN. tit. 26, §§ 980-92 (Supp. 1968) (fire fighters); PA. STAT. ANN. tit. 43, §§ 213.1-16 (1947) (arbitration of public utility disputes); Fire Fighters' Arbitration Act, R.I. GEN. LAWS ANN. §§ 28-9.1-1 to -14 (1969); Policemen's Arbitration Act, R.I. GEN. LAWS ANN. §§ 28-9.2-1 to -14 (1969); School Teachers' Arbitration Act, R.I. GEN. LAWS ANN. §§ 28-9.3-1 to -16 (1969);

Theodore Kheel, the able and experienced mediator of public employment disputes, has suggested a plan which would protect the community from "strikes that imperil the health and safety of the people," but which would still permit public employees to resort to the strike in other situations.²⁷ Under this plan, modeled after the emergency provisions of the Taft-Hartley Act, the disputing parties would be subject to a cooling-off period during which they would be expected to continue bargaining. In the event that the dispute was not settled during the eighty-day cooling-off period, compulsory arbitration or indefinite postponement of the strike would still be available. Mr. Kheel maintains the hope that "resort to this machinery need seldom be required especially if we seek affirmatively to improve the practice of collective bargaining."²⁸

Similarly, Albert Shanker, President of the New York City United Federation of Teachers, has suggested that although "society has a right to protect itself" against walkouts which endanger the public health and safety, many government services are nonessential.²⁹ Accordingly, only those strikes that are a genuine threat to the public should be banned. The decision as to whether a particular service is nonessential should be left to a "top official or the courts," or to an impartial public agency.³⁰ Mr. Shanker insists that the decision on the essentiality of a service cannot be made in advance of a strike because in each case there are varying factual circumstances that go to show essentiality or nonessentiality. In cases in which a service is deemed essential, Mr. Shanker acknowledges that "sanctions" short of a strike would be the only available union weapon.³¹

These proposals for a qualified right to strike, while theoretically appealing, present some difficult practical problems. For one thing, the ultimate resolution of public policy toward the strike issue is likely to affect the private as well as the public sector because it is difficult to distinguish between essential public and private services.

Municipal Employees' Arbitration Act, R.I. GEN. LAWS ANN. §§ 28-9.4-1 to -19 (1969); WYO. STAT. ANN. §§ 27-265 to -273 (1967) (fire fighters). The New York City sanitation strike of 1968 was resolved in the end by final and binding arbitration. Indeed, the New York City Citizens Budget Commission had proposed that a system of compulsory arbitration replace the fact-finding procedure that presently exists under the Taylor Law. New York City Citizens' Budget Commission, *Is New York Governable?*, Nov. 24, 1968 (mimeo).

27. Kheel, Report to Speaker Anthony J. Travia on the Taylor Law, with a Proposed Plan to Prevent Strikes by Public Workers, 2 (Feb. 21, 1968); Kheel, *supra* note 18, at 941.

28. Kheel, Report, *supra* note 27, at 32.

29. GERR No. 276, at B-5.

30. *Id.*

31. *Id.*

Resolution of this problem is in turn complicated by the fact that federal law protects the right to strike in private employment, while public employment disputes are a matter for state regulation. The impact of certain critical disputes in the private sector has recently raised the question whether the NLRA machinery is adequate to deal with local emergencies. For example, during the strike against Consolidated Edison Company in the New York City area, the New York City Corporation Counsel considered whether the emergency procedures of the Taft-Hartley Act could be applied.³² A strike by fuel oil drivers resulted in the declaration by the Emergency Control Board of the City of New York that the city was in a state of imminent peril. The strike, which occurred during the midst of a flu epidemic, brought severe hardships to apartment dwellers, home owners, and hospital patients.³³ Thus, any test which purports to relate the right to strike to the essentiality of the service involved cannot operate to prohibit strikes in the public sector alone; the private sector also provides countless vital services affecting the health and safety of the public. A determination of essentiality might easily be made in advance with respect to police and fire services, but it would be difficult to categorize many other situations. Of course, the fact that making such determinations would be difficult for administrators and judges should not by itself cause us to discard the idea. After all, such determinations are frequently made under the Taft-Hartley Act in the private sector.³⁴

Still, the question remains whether the essential-services distinction is an equitable method for determining wage and employment policies in the public sector. This distinction puts a premium upon

32. For a report of this strike, see *N.Y. Times*, Dec. 6, 1968, at 1, col. 7; *Id.*, Dec. 8, 1968, at 1 col. 8.

33. *N.Y. Post*, Dec. 19, 1968, at 1; editorial, *N.Y. Post*, Dec. 26, 1968, at 52; editorial, *N.Y. Times*, Dec. 23, 1968, at 38, col. 2; *N.Y. Times*, Dec. 23, 1968, at 1, col. 2.

34. The experience under Taft-Hartley and under the Railway Labor Act has been critically examined in H. NORTHRUP, *COMPULSORY ARBITRATION AND GOVERNMENT INTERVENTION IN LABOR DISPUTES: AN ANALYSIS OF EXPERIENCE* (1966). Northrup notes that between 1934 and June 30, 1964, 159 cases (35 of them involving airlines) were handled by emergency boards and 58 additional boards were selected from the National Railway Labor Panel. Northrup's three major conclusions from this experience were:

- (1) The appointment of emergency boards had become commonplace;
- (2) recommendations of emergency boards at critical times have been handled with political expediency; and
- (3) the procedure has severely inhibited collective bargaining.

Id. at 64.

The criticisms of the Taft-Hartley emergency procedures at least recognize the problems associated with the administration of any emergency provisions. But, it is doubtful that the problem is intrinsic to the procedure as a whole. Our society is filled with all kinds of complex administrative problems and consideration of emergency procedures should not be discarded merely because their administration is difficult.

an employee group's capacity to injure the public: those employees with the greatest capacity to cause a disruption of public services will be able to exert considerable pressure by way of a strike, provided the disruption is difficult to predict; those employees whose services can occasionally be interrupted without serious consequences will be given the right to strike precisely because it will give them little leverage.

Whether the individual states will be willing to enact the sophisticated labor relations legislation necessary to provide for the professional administration of emergency procedures remains to be seen. It seems likely that such legislation, if it is enacted, will be confined to the larger states or will come from Congress.

The advocates of a qualified right to strike in public employment generally recognize that state legislatures must provide the judiciary or some administrative official with the authority to fashion appropriate remedies for the violation of a limited strike prohibition. But fashioning realistic penalties for violations of strike prohibitions has proved to be an inordinately difficult task. In 1967 the New York State legislature repealed the rigid penalties of the Condon-Wadlin Law as unworkable.³⁵ The Governor of Pennsylvania recently

35. Law of March 27, 1947, ch. 391, [1947] N.Y. Laws 842, *as amended*, Law of April 23, 1963, ch. 702, [1963] N.Y. Laws 2432 (repealed 1967). The law was invoked many times and injunctions were granted. *New York City Transit Authority v. Quill*, 48 Misc. 2d 940, 266 N.Y.S.2d 296 (Sup. Ct. 1965) (transit employees); *City of N.Y. v. Social Serv. Employees Union*, 48 Misc. 2d 820, 266 N.Y.S.2d 277 (Sup. Ct. 1965), *aff'd*, 25 App. Div. 2d 953, 271 N.Y.S.2d 585 (1966), *motion granted*, 18 N.Y.2d 675, 219 N.E.2d 871, 273 N.Y.S.2d 421 (1966); *Pruzan v. Board of Educ.*, 25 Misc. 2d 945, 209 N.Y.S.2d 966 (Sup. Ct. 1960), *aff'd*, 12 App. Div. 2d 923, 215 N.Y.S.2d 718 (1961), *aff'd*, 9 N.Y.2d 911, 176 N.E.2d 96, 217 N.Y.S.2d 86 (1961) (teachers); *New York City Transit Authority v. Loos*, 2 Misc. 2d 733, 154 N.Y.S.2d 209 (Sup. Ct. 1956), *aff'd*, 3 App. Div. 2d 740, 161 N.Y.S.2d 564 (1957) (transit employees).

Attempts by taxpayers to enforce provisions of the act that applied to striking employees rather than to union leaders and union treasuries failed when the legislature excluded the particular group of employees from the penalty provisions. *Weinstein v. New York City Transit Authority*, 49 Misc. 2d 170, 267 N.Y.S.2d 111 (Sup. Ct. 1966); Law of July 6, 1966, chs. 807-08, [1966] N.Y. Laws 2292-93. The Department of Marine and Aviation of New York City in 1967 sought to enforce provisions of the Condon-Wadlin Law against striking ferry operators. The case was remanded to determine the scope of the constitutional rights of the employees involved and to determine if there had been a violation, since, in view of the recent exclusion of transit employees, there may have been a denial of equal protection of the law. In order to find a denial of equal protection, the court below would have had to hold that an intentional and insidious plan of discrimination against employees was being conducted by the Department of Marine and Aviation. A mere showing of nonenforcement as to some other city employees was not enough. While the issue of constitutional rights was thus unsettled, the legislature acted to protect the ferry operators and the injunction forbidding officials from paying striking employees any amount in excess of their compensation prior to the strike was vacated. Employees who had been dismissed were rehired. *DiMaggio v. Lindsay*, 53 Misc. 2d 1036, 281 N.Y.S.2d 152 (Sup. Ct. 1967). It was within this political climate that the Condon-Wadlin Act, Law of March 27, 1947, ch. 391, [1947] N.Y. Laws 842, *as amended*, Law of April

signed a teacher amnesty bill which enabled local school boards to grant pay increases to teachers who had participated in illegal strikes.³⁶ A governor's study commission in that state pointed out that because of the difficulties of teacher recruitment, the prohibitions against re-employment of striking teachers had worked to the disadvantage of several school districts which were forced to impose penalties; other communities were more than anxious to hire teachers who had been disciplined by denial of pay raises.³⁷ The imposition of jail sentences against union leaders has done little more than provide them with an aura of martyrdom which has enhanced their prestige and job security. The practical necessity of bringing union leaders to the negotiating table in order to settle a strike led to delays in the sentencing process and persuasive requests for their early release from jail by the very authorities who prosecuted them. Furthermore, limited fines on some union treasuries have been too small to deter strike action; even a large fine is not excessively burdensome if it can be spread among the membership of a large union. And, as we have seen in New York City, individual and union fines may even be paid by other segments of the labor movement. Summarizing these difficulties, it has been suggested that prohibitions of strikes will not survive in the American political climate if their maintenance depends primarily on the severity of the penalties for violation.³⁸

Those who argue against the right to strike for public employees point to the public sector collective bargaining laws which have been enacted to date by various states and municipalities.³⁹ These statutes, all of which prohibit public employees from striking, are based on the conviction that the *political process* can be substituted for the strike weapon as an orderly method of dispute resolution. The rationale for this point of view is that decisions affecting the wages, hours, and working conditions of public employees are primarily political rather than economic. In short, public sector collective bargaining concerns the allocation of public resources: Which government employees receive how much of the tax revenues of various

23, 1963, ch. 702, [1963] N.Y. Laws 2432, was repealed, effective Sept. 1, 1967. In addition to the legal anomaly that appears in reported cases showing arbitrary exclusions from the act's penalty provisions, there were many cases where the provisions of the act were applicable but were not invoked at all. See Rosenzweig, *The Condon-Wadlin Act Re-Examined*, 9 INDUS. LAB. REL. REP. 5-7 (1965).

36. GERR No. 277, B-2 (Dec. 30, 1968).

37. Governor's Commission, *supra* note 25, at 14.

38. Raskin, *How To Avoid Strikes by Garbagemen, Nurses, Teachers, Subwaymen, Welfare Workers, Etc.*, N.Y. Times, Feb. 25, 1968, § 6 (Magazine), at 34.

39. See Smith, *State and Local Advisory Reports on Public Employment Labor Legislation: A Comparative Analysis*, 67 MICH. L. REV. 891, 892 n.5 (1969).

governmental jurisdictions? Since this is a political matter, a system of political settlement is preferable to an impasse resolution mechanism which depends upon economic coercion. Thus, some state legislatures have provided for fact-finding with recommendations as a substitute for the strike weapon.⁴⁰ Other legislatures have provided for advisory arbitration and in some instances even compulsory arbitration as a method of dispute settlement.⁴¹ The theory behind these laws is that fact finders or arbitrators who are empowered to make recommendations, advisory awards, or final and binding determinations will be able to provide an effective political substitute for the strike. The laws are also premised upon the assumption that the recommendations or decisions of neutral parties will be binding, or at least persuasive, to the body politic as well as to the unions, the employees, and the employing agencies involved.

Opponents of the right to strike in the public sector point out that for many categories of nonessential public employees, the legislative grant of the right to strike would be virtually meaningless unless work stoppages could be carried out in association with other groups of public employees engaged in more critical services. Preserving the right to strike for librarians, custodians of cultural institutions, or tax collectors, for instance, is not likely to confer on such employees or their representatives a powerful bargaining weapon. This observation is in no way intended to demean the importance of these public services; their interruption would obviously be felt in due course. For example, payroll clerks and some computer operators would be missed on the very first payday, but a strike of tax collectors could last somewhat longer before the day of reckoning occurred. Thus, the power of political persuasion through the utilization of fact-finding or arbitration accompanied by public recommendations is likely to be a much more effective balancing force for such employees than the strike. This argument is supported by the experience which some white-collar employees in the private sector have had with unionization. This experience demonstrates that collective bargaining based upon the right to strike and upon militant union activity has not been as effective a balancing force for white-collar groups as it has been for blue-collar employees.⁴²

In light of the political nature of public employee bargaining, it is important to consider whether the results of collective bargaining

40. *E.g.*, MICH. COMP. LAWS ANN. § 423.25 (1967); WIS. STAT. § 111.88 (1969).

41. *E.g.*, ALASKA STAT. § 23.40.010 (1962) (compulsory); ILL. REV. STAT. ch. 241½, § 38b3(3) (1964) (compulsory); MINN. STAT. §§ 179.36-38 (1965) (compulsory); NEB. REV. STAT. §§ 48-801 to -823 (1960) (advisory).

42. Wall St. J., Jan. 28, 1969, at 1.

under laws which prohibit the strike would have been significantly different had the strike been legalized. First, in some emergency situations involving essential services, a strike would have to be enjoined in any event. For instance, even if the strike of sanitation workers in New York City had been lawful initially, it is likely that an injunction would have been sought against the work stoppage on the ground that its prolongation constituted a health emergency. Second, legalizing the strike might force some labor organizations to engage in a strike when they might not otherwise have done so in order to demonstrate to their membership that they have exhausted every possible avenue of dispute resolution. Finally, if public employee strikes were permitted, the attitude of government employers toward collective negotiations might change drastically. The public employer would be forced to assume the role of a private employer in many situations: for instance, in order to balance its bargaining power against that of a strong union, the governmental unit might engage in a lockout if this could be done without disrupting essential services. It might also attempt to break strikes by hiring replacements; if this is not feasible, the employing unit could initiate other lawful reprisals against striking employees. But it would be difficult as a practical matter for a public employer who has political responsibilities not shared by his counterparts in private employment to play this role. In the first place, supervisory employees are themselves highly organized in many jurisdictions; moreover, automation is less prevalent in public employment than in private industry. Both factors would make it particularly difficult for an employing agency to bring in replacements even in nonessential services.

Legalizing the strike in the public sector would tend to increase the occasions for confrontation between the public employer and employee organizations. Public employee strikes increasingly involve disputes over social policy as well as over conditions of employment.⁴³ The recent teachers' strike in New York City, for instance, involved questions of decentralization and community control of schools; the dispute was not limited to economic benefits for teachers. Earlier strikes of welfare employees in New York City involved questions of the level of benefits to be made available to relief recipients. Resolution of such public policy questions has traditionally been the responsibility of the legislative and executive branches of government.

43. Klaus, *The Evolution of a Collective Bargaining Relationship in Public Education: New York City's Changing Seven-Year History*, 67 MICH. L. REV. 1033 (1969); Wollett, *The Coming Revolution in Public School Management*, 67 MICH. L. REV. 1017 (1969).

The scope of bargaining can, of course, be limited by statute to reserve to the government the authority to make these decisions; but if strikes were legalized, it would be difficult as a practical matter to confine the subjects of bargaining to the statutory boundaries.

For these and other reasons, it is not clear that legalizing strikes by public employees would contribute significantly to equality of bargaining power in the public sector. From a strictly policy point of view, therefore, it would seem that substitution of a political process of impasse resolution for the strike weapon would move us closer to an orderly pattern of public sector collective bargaining. It remains to be seen whether the political and economic differences between public and private employment are sufficient to support a differential treatment of the right to strike in the two sectors.

III. POLITICAL AND ECONOMIC DISTINCTIONS BETWEEN PUBLIC AND PRIVATE EMPLOYMENT

As discussed earlier,⁴⁴ the distinction which state legislatures have frequently drawn between public and private employment is not always immediately apparent; often it is difficult to see why strikes should be permitted in the private sector but not in the public sector. In *Rankin v. Shanker*,⁴⁵ the majority of the New York Court of Appeals distinguished public from private employment in order to deny a right to jury trial to public employees in a criminal contempt case. Judge Keating, in a strenuous dissent, emphasized the point that public sector strikes cannot be distinguished from private sector strikes solely on the basis of the essentiality of the services involved:

When it is remembered that employees of private utilities have the power to plunge one of the great cities of the world into total darkness or complete silence, that employees of privately owned railroads and shipping lines have the power to deprive the residents of that city of vital food and fuel, that private sanitation workers, who carry away a substantial portion of the refuse in New York City, have the power to endanger the health of millions of its inhabitants and that thousands of other workers, carrying out activities vital to the life and safety of the city, may demand a trial by jury if they are charged with violation of a court order restraining a strike, the fallacy in the reasoning which would deny a jury trial to these defendants is really exposed. References to the dangers to the children from the teachers' strike, real as those dangers may be, are not a substitute for a penetrating analysis of the labels "public" and "private" employees.⁴⁶

44. See note 32 *supra* and accompanying text.

45. 23 N.Y.2d 111, 242 N.E.2d 802, 295 N.Y.S.2d 625 (1968).

46. 23 N.Y.2d at 134, 242 N.E.2d at 816, 295 N.Y.S.2d at 644.

If the distinction between public and private employment is not in fact legitimate, denial of the right to strike to public employees alone could be challenged under the equal protection clauses of the federal and state constitutions. However, it should be remembered that state legislatures have been accorded wide discretion to draft laws which affect one group of citizens differently than another, as long as the distinction is rationally related to some lawful objective.⁴⁷ And there are a number of grounds upon which public sector employment can be rationally distinguished from its private sector counterpart.

The strike is, after all, an instrument for applying *economic* coercion. In the private sector, it has been an effective weapon in the hands of employees because employers have been constrained by the need to compete in a product market or else go out of business. But *political*, rather than economic, forces are the dominant constraints in the public sector; it is this distinguishing factor which most judges and commentators rely upon to justify the prohibition on public employee strikes. In *City of New York v. DeLury*,⁴⁸ a case which upheld the ban on strikes in the Taylor Law, Chief Judge Fuld wrote for a unanimous New York Court of Appeals:

[T]he necessity for preventing goods or services being priced out of the market may have a deterrent effect upon collective bargaining negotiations in the private sector, whereas, in the public sector, the market place has no such restraining effect upon the negotiations and the sole constraint in terms of the negotiations is to be found in the budget allocation made by responsible legislators.⁴⁹

From this, Judge Fuld reasoned that "the orderly functioning of our democratic form of representative government and the preservation of the right of our representatives to make budgetary allocations free . . . from the compulsion of crippling strikes"⁵⁰ requires the prohibition of public employee work stoppages. Dr. Taylor himself stated: "[I]n a democratic society, consumer choice with respect to governmental services is ultimately exercised, not in the market place, but in the legislative authorization of laws to be passed, taxes to be levied,

47. See *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961): "The constitutional safeguard is offended only if the classification vests on grounds wholly irrelevant to the achievement of the State's objective. . . . A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

48. 23 N.Y.S.2d 175, 243 N.E.2d 128, 295 N.Y.S.2d 901 (1968), *appeal dismissed*, 37 U.S.L.W. 3363 (U.S. March 31, 1969).

49. N.Y.2d at 186, 243 N.E.2d at 133-34, 295 N.Y.S.2d at 909.

50. N.Y.2d at 186, 243 N.E.2d at 134, 295 N.Y.S.2d at 909.

and budget expenditures to be made, and of loans to be floated. This is the final arbitrament of conflicts of public interest."⁵¹

Thus, although the existence of a product market is a relevant consideration in private sector or public utility bargaining, political factors often overshadow economic considerations in public sector bargaining. This predominance of political over economic constraints will frequently lead to inefficiency or inequity in the management of public sector services. Reasoning by analogy, if pricing decisions in the private sector are separated from wage determinations, there is an obvious tendency toward economic irresponsibility, especially in those instances in which neither the price nor the wage rate is set by a perfectly competitive market. In a study of pricing and wage determination Professor John Dunlop noted:

Governmental administrative agencies have not always been organized to recognize clearly these market relations. For example, wage-rate decisions may be made in the railroads by emergency boards. Yet freight rates are decided by the Interstate Commerce Commission. The separation of decision-making can result in a failure to consider the later impacts of wage changes.⁵²

Correspondingly, in the public sector decisions affecting the political "price"—or the loss to the community of one service in order to effectuate a settlement with employees who provide another service—may bring about serious inequities. In a similar vein, Professor George Hildebrand predicts that in pure public sector wage negotiations, if the employing agency has "continuing access to subsidies from other jurisdictions, its labor cost profile will be warped upward on comparative tests."⁵³ Similarly, "[i]f a union of strategically situated public employees covers only a small fraction of the municipal labor force and is the only government union in the community, its wage

51. *The Public Interest in Collective Negotiations in Education*, June 1968 (address delivered at University of Pennsylvania, mimeo). A joint Harvard-M.I.T. metropolitan study of the political economy of the New York City region noted that economic models were inadequate explanations for a government process in which interactions, "typically labelled 'transactions'" were more properly understood as *political* decisions. The study found:

The central distinguishing feature of the governmental process is . . . its monopoly of the lawful means of physical violence, its possession of power—not just on a parcel of private property, but everywhere in the political jurisdiction. This quality, in and of itself, sets the political economy apart, and endows it with a purpose quite separate from that of the private sector. Taxes and public expenditures represent not just "costs" and "products" but "votes" and "influence." Political stability as much as economic prosperity is involved in the goals of a political economy.

R. WOOD & V. ALMENDINGER, 1400 GOVERNMENTS, *THE POLITICAL ECONOMY OF THE NEW YORK METROPOLITAN REGION* 18 (1967).

52. J. DUNLOP, *WAGE DETERMINATION UNDER TRADE UNIONS* 117 (1967).

53. Hildebrand, *The Public Sector*, in *FRONTIERS OF COLLECTIVE BARGAINING* 125, 153 (1967).

profile will be warped upward on comparative tests.”⁵⁴ While the complete avoidance of these inequities and inefficiencies is impossible, it seems to me that the inequities created by strike pressures in the public sector are greater than those which would result from the recommendations or decisions of fact finders or arbitrators. I say this because third-party intervenors are uniquely capable of identifying and balancing the respective equities of the disputants.

The Illinois Supreme Court recently advanced another possible distinction between private and public sector unionism: the notion that private parties have no right to interfere with a governmental function.⁵⁵

The underlying basis for the policy against strikes by public employees is the sound and demanding notion that governmental functions may not be impeded or obstructed, as well as the concept that the profit motive, inherent in the principle of free enterprise, is absent in the governmental function.⁵⁶

Related to the notion that there is no right to interfere with a governmental function is the concept of loyalty; both of these concepts, in turn, are based on the well-worn idea that public employees strikes constitute an intolerable interference with the sovereignty of the state. The Florida Supreme Court recently cited with favor President Franklin D. Roosevelt's famous pronouncement on public employee strikes: “‘Such action, looking toward the paralysis of Government by those who have sworn to support it, is unthinkable and intolerable.’”⁵⁷ The Florida court agreed that public employee strikes cannot be sanctioned without permitting “‘the breakdown of governmental functions’” and the “‘first step toward anarchy.’”⁵⁸ I do not accept the view, however, that any and every public employee strike is a first step toward anarchy. For such reasoning will result in the destructive confrontation described by Robben W. Fleming, President of the University of Michigan and a noted labor expert:

In my judgment the danger that any strike against the government will undermine our democracy is counterbalanced by the equally dangerous contempt for the law which results from the prohibition of all strikes and leads to its frequent violation. If this prohibition continues, either it will lead to this contempt for the law, or there will be great public pressure for it to be applied against strike in the private sector as well.⁵⁹

54. *Id.* at 153.

55. *Board of Educ. v. Redding*, 32 Ill. 2d 567, 207 N.E.2d 427 (1965).

56. 32 Ill. at 571-72, 207 N.E.2d at 430.

57. *Teachers v. Board of Public Instruction*, 69 L.R.R.M. 2466, 2468 (1968).

58. 69 L.R.R.M. at 2469.

59. Fleming, *Introduction*, in *FRONTIERS OF COLLECTIVE BARGAINING* 1, 11-12 (1967).

Still, some courts are likely to focus on the special duty that public employees are thought to owe to their government employers, particularly after two recent United States Supreme Court decisions⁶⁰ which focus upon the civil liberties of public servants. During the course of two different investigations, a policeman and a sanitation worker were asked to waive their constitutional right against self-incrimination as a condition to retaining their government employment. The Court held unanimously in both cases that the employees were improperly dismissed because retention of public employment could not be made conditional upon a waiver of constitutional rights protected by the fifth and the fourteenth amendments. However, Justice Fortas, who wrote the majority opinions, limited the holdings to an actual waiver of constitutionally protected rights; he stated in dictum that absent the demand for waiver, a municipality could insist that an employee testify in matters relating to his official duties as a condition to retaining employment. Justice Fortas wrote, in part:

Unlike the lawyer, [the policeman] is directly, immediately, and entirely responsible to the city or State which is his employer. He owes his *entire loyalty* to it. He has no other "client" or principal. He is a trustee of the public interest, bearing the burden of great and total responsibility to his public employer.⁶¹

It remains to be seen whether the broad language of these two civil liberties cases will ultimately be applied to public sector collective action. It seems doubtful that the test of "loyalty" used by Justice Fortas in reference to policemen will be applied with equal force to the majority of governmental employees, particularly those such as park attendants or meter maids whose services are neither critical nor traditionally or necessarily unique to government.

In a sense, all of the previous discussion has been prefatory. I have attempted, as have others in this Symposium, to present the theoretical and practical arguments that are bedrock in any discussion of collective bargaining for government employees. The remainder of this Article will be devoted to an examination of the various schemes that have been designed to cope with the situations in which collective bargaining in the public sector fails to yield a negotiated settlement.

IV. IMPASSE RESOLUTION IN PUBLIC EMPLOYMENT

A. *The Foreign Experience*

In order to place our recent experience with trade union militancy in public employment into perspective, it is helpful to consider

60. *Gardner v. Broderick*, 392 U.S. 273 (1968); *Uniformed Sanitation Men Assoc., Inc. v. Commissioner of Sanitation*, 390 U.S. 230 (1968).

61. *Gardner v. Broderick*, 392 U.S. at 277-78 (emphasis added).

the more peaceful relations of governments and employees in other countries where collective bargaining has long been accepted in public employment. The foreign experience is a particularly relevant consideration since it is often used as a justification for extending the right to strike to the public sector.

1. *The Canadian Public Service*

As Professor Harry Arthurs points out in this Symposium,⁶² the Canadian federal experience, although not a panacea, is extremely hopeful in many respects. Under the new federal Act,⁶³ employee organizations in the Canadian Public Service are free to choose in advance whether they prefer the right to strike or compulsory arbitration as a means of dispute resolution. However, the public employer may exclude certain industries from the strike-rights provisions or demand that certain employees within a unit give up the right to strike on the ground that the service affects the public safety and security.⁶⁴ The President of the Canadian Treasury Board recently stated:

Experience so far suggests that in a unit governed by the option for binding arbitration, the pressures to find a mutually satisfactory settlement are just as strong as they are in one where the conciliation strike route has been chosen. There is certainly nothing to support the oft-expressed view that effective bargaining is impossible when arbitration lies at the end of the road.⁶⁵

Even more significant, not one dispute has been submitted to arbitration since the Act became effective toward the end of October last year.⁶⁶

2. *British Experience*

Some commentators take the position that British public employees have the same immunities for concerted action during the course of a labor dispute that private sector employees have⁶⁷ under the Trade Disputes Act of 1906.⁶⁸ Although it is true that the Trade Disputes and Trade Unions Act of 1946⁶⁹ repealed the criminal sanctions imposed by the Trade Disputes and Trade Unions Act of

62. See Arthurs, *supra* note 23, at 990.

63. Public Service Staff Relations Act, c. 72, §§ 36, 59, [1966-67] Can. Stat.

64. Public Service Staff Relations Act, c. 72, § 101(1)(c), [1966-67] Can. Stat.

65. Address by C. N. Drury, Joint Conference on Collective Bargaining in Federal Public Service, at Niagara Falls, Nov. 20, 1968, reproduced in GERR No. 282, G-1, at G-4.

66. GERR No. 282, at G-4.

67. It may also be argued that Canadian public employees have traditionally enjoyed the right to strike even in the absence of specific legislative authorization. See Arthurs, *supra* note 23, at 987.

68. 6 Edw. 7, c.47.

69. 9 & 10 Geo. 6, c.52.

1927⁷⁰ against striking public employees, many statutory and common-law restrictions remain on public employee strikes in Great Britain. Generally, civil servants in the United Kingdom do not work under a contract of service. As a matter of common law, they are servants of the Queen and hold their appointments "at the will and pleasure of the Crown."⁷¹ With the exception of one major postal strike in 1964, there have been only token strikes and work-to-rule campaigns in the British civil service. In those few cases, little disciplinary action was taken, but it is widely assumed by civil servants "that if they struck the Government might retaliate by withdrawing or reducing pensions."⁷² Moreover, civil service trade unions do not believe in the use of the strike weapon. The ability of these unions to sustain a strike would be severely limited in any event by their small union treasuries, and British civil servants are not generally willing to pay higher dues. But, the most significant deterrent against public employee strikes was the clear threat of reprisals against striking workers that accompanied the repeal in 1946 of the broad criminal sanctions of the 1927 Act. When the Attorney General moved for the second reading of the 1946 Trade Disputes and Trade Unions bill, he stated in part:

The 1927 Act did not forbid civil servants (directly) to strike, and nothing that we propose to do now will make it any more legal than it is today for civil servants to take strike action . . . Government, like any government as employer, would feel itself perfectly free to take any disciplinary action that any strike situation that might develop demanded.⁷³

Today, various criminal sanctions and governmental rights of seizure limit public employee strikes in England. Under section 4 of the Conspiracy and Protection of Property Act of 1875,⁷⁴ an employee in a gas or water (and since 1919, electricity) works commits a crime if he "wilfully and maliciously breaks a contract of service . . . knowing or having reasonable cause to believe that the probable consequence of his so doing, either alone or in combination with others will be to deprive the inhabitants of that city, borough, town, place or part wholly or to a great extent of their supply."⁷⁵ In addition, the government has broad powers to break strikes under

70. 17 & 18 Geo. 5, c.22.

71. F. SCHMIDT & M. SOMERHAUSEN, *NEGOTIATING RIGHTS IN THE PUBLIC SERVICE AND THE RIGHT TO STRIKE IN THE PUBLIC SERVICE* 94 (1966).

72. *Id.* at 95.

73. *Id.* at 94.

74. 38 & 39 Vict., c.86.

75. 38 & 39 Vict., c.86, § 4.

the Emergency Powers Act of 1920.⁷⁶ Professor K. W. Wedderburn notes that British post office workers may be subject to criminal prosecution during the course of a trade dispute under the Post Office Act of 1953.⁷⁷ The statute is broad enough to cover any slow-down or stoppage.⁷⁸ In addition, section 3 of the Police Act of 1919⁷⁹ established a "house union" and made it a crime to do "any act calculated to cause disaffection . . . or to induce any member of the Police Force to withhold his service or to commit breaches of discipline [Such act shall make the actor] liable to imprisonment for two years or fine of fifty pounds."⁸⁰ Finally, there is considerable doubt that the immunities granted to trade unions in civil actions by the Trade Disputes Act of 1906 bind the Crown at all, "since the Crown is not expressly named therein and there would appear to be no necessary implication that the Crown is bound."⁸¹

Thus, the fairly peaceful record in the United Kingdom in public employment cannot be attributed to a lack of civil, criminal, and disciplinary weapons available to public prosecutors and government agencies. Rather, it would seem that labor peace in public employment may be the result of the availability of compulsory arbitration. For example, the police, utility workers, and workers in nationalized industries may refer disputes to industry and national Whitley Councils—tripartite dispute settlement boards. Most national civil servants, including white collar workers, also have the benefit of Whitley Councils. Moreover, employees may resort to the Civil Service Pay Research Unit, a national fact-finding board that determines "analogues" for each class of "nonindustrial" civil servant. The determinations of the Unit become the basis for negotiations in Whitley Councils, and arbitration is ultimately available in the event of disagreement.⁸² However, the existence of strong penalty provisions should not be discounted.

3. *The Swedish Experience*

A valid comparison of Swedish labor relations with our own requires an appreciation of the very different role that the national union confederations in Sweden play in formulating government

76. 10 & 11 Geo. 5, c.55.

77. 1 & 2 Eliz. 2, c.36.

78. 1 & 2 Eliz. 2, c.36, §§ 58-59.

79. 9 & 10 Geo. 5, c.45.

80. 9 & 10 Geo. 5, c.45, § 3.

81. REPORT OF THE ROYAL COMMISSION ON TRADE UNIONS AND EMPLOYERS' ASSOCIATIONS 1965-1968, at 236 (1968).

82. *Id.* at 34.

policy and in controlling member unions. In Sweden, a Civil Service Committee, designed to prevent labor disputes in the state service where a strike could be harmful to the community, consists of four members appointed by the state and four members appointed by the primary labor organizations. Either party to a dispute may submit an issue to the committee; although its judgment is not binding, "because of the authority which the committee enjoys and the high level it represents, its pronouncements exert a strong pressure in practice."⁸³ In the final instance, the government can intervene in a dispute by introducing compulsory legislation.

In the case of municipal workers, the Federation of Municipal Authorities and the municipal employee organizations have agreed upon similar procedures since January 1966. In addition, a local government can invoke the services of a joint labor-management committee in a labor dispute that affects services of vital importance to the community. In practice, because of the pervading power of the national labor movement, a strike must be approved on a national level before the movement will allow the use of coercive force in the public or private sector. No such procedures or traditions exist in the United States.

B. *Structured Dispute Resolution in the United States*

As pointed out above,⁸⁴ collective bargaining has been singularly effective in public employment in this country even without the right to strike. The record of dispute resolution in New York City, New York State, Michigan, Wisconsin, Connecticut, Massachusetts, and other jurisdictions which have adopted collective bargaining laws is impressive. There is evidence that the process of fact-finding with recommendations, used in all the jurisdictions cited, has not had the deadening effect on collective bargaining which some observers expected. (As used herein, the term "fact-finding" includes impartial recommendations, advisory arbitration awards, and fact finders' reports and recommendations.) Instead, it has proved to be an effective means of resolving public employee disputes without strikes. In New York City, the Office of Collective Bargaining coordinates the labor relations activities of municipal agencies and such other public employers who, with the mayor's approval, elect to use its procedures.⁸⁵ The Office is charged with the responsibility of implementing a three-part procedure of impasse resolution consisting of

83. F. SCHMIDT & M. SOMERHAUSEN, *supra* note 71, at 109.

84. See notes 19-44 *supra* and accompanying text.

85. N.Y. CITY ADMIN. CODE ch. 54, Local Law 53 § 1173-3.0(g), reproduced in GERR No. 205, at E-3.

mediation, fact-finding, and, ultimately, public recommendations for settlement.

It would be a mistake to ascribe the success of public sector collective bargaining to the single procedure of fact-finding with recommendations. The majority of contract disputes are settled by the direct bargaining of the parties. Moreover, inherent in the concept of advisory recommendations—at least in New York City—is the possibility that a given dispute might be referred to mediation or to binding arbitration. Indeed, the disputing parties may call upon the same panel that conducts mediation to arbitrate a particular issue; on other occasions a public board may ask the mediation panel to make advisory recommendations as to issues that the parties will not refer to arbitration. The panel may actually engage in all three processes under the general heading of fact-finding. For example, in the one year during which the New York City Office of Collective Bargaining has been in operation, the twenty-three impasse cases closed by the Office were disposed of as follows:⁸⁶ thirteen cases were settled by report and recommendations of a panel, accepted by the parties; three cases were settled when the parties reached agreement before the panel operated; one case was diverted to arbitration as a grievance under contract; three cases were diverted to, and settled by, mediation; two cases were diverted to the Board of Collective Bargaining for binding determinations;⁸⁷ and one case was not within the jurisdiction of the Office. In only two cases during 1968 did one party initially reject a fact finder's report and recommendations. In both cases, the union rejected the findings, but in neither case did a strike result; moreover, the unions involved subsequently reconsidered their position and accepted the recommendations.⁸⁸ The record of closed impasse cases during 1968 is significant because it shows the

86. New York City Office of Collective Bargaining, First Annual Report (to be published in May 1969).

87. *Id.* In one of these two cases, the scope of bargaining and the scope of an impasse panel's possible recommendations was settled; in the other case, the *Borg-Warner* limitations on bargaining to impasse were held to apply to negotiations within the jurisdiction of the Office's procedures.

88. Similar patterns of successful prior mediation and reference to arbitration have been observed in other jurisdictions. The combined data compiled by Edward Krinsky of the Research Staff of the University of Wisconsin Department of Labor Relations for the states of Wisconsin, New York, Connecticut, Michigan, and Massachusetts show that between sixty and eighty per cent of mediation cases were resolved without resort to fact-finding; approximately fifty per cent of the cases in which fact-finding was initiated were settled prior to the issuance of recommendations. Krinsky also found that in the great majority of completed fact-finding cases, work stoppages have been avoided and the recommendations accepted. Data supplied by E. Krinsky from an unpublished and incomplete Doctoral Thesis on Fact-Finding in Public Employment, February 1969 (University of Wisconsin).

interrelationship of the various procedures available and the flexibility of the permanent machinery which has been established.⁸⁹

The nature of the fact-finding process itself perhaps explains the variety and flexibility of impasse resolution procedures which have been observed in jurisdictions such as New York City. The fact finder typically collects evidence in a quasijudicial hearing in order to examine critically the merits of a given dispute. With this information in hand, he may make a report to a political authority, recommend a settlement to the parties, or make a public recommendation designed to bring the pressure of public opinion to bear on an intransigent party. Fact-finding has been described as a "logical extension of collective bargaining because it continuously keeps open the possibility of voluntary settlement."⁹⁰ It is this possibility of voluntary settlement throughout the process that distinguishes fact-finding from compulsory arbitration.⁹¹ Theodore Kheel noted another important distinction between arbitration and fact-finding in his report to the speaker of the New York State Assembly.⁹² Mr. Kheel correctly pointed out that even practitioners of both processes often confuse arbitration and fact-finding. Fact-finding success, he insisted, is measured by "the acceptability of recommendations," whereas arbitration measures the "equity of the claims."⁹³

Arbitration and fact-finding may, however, converge at a number of points: the nature of the investigation, the scope of the parties' submissions or stipulations, the language of written decisions, and even the unstated criteria are often the same or similar. This may be the result of what Kheel calls practitioner's confusion. It may also reflect the

89. It should be noted that under the Taylor Law, as revised on March 4, 1969, by S. 5008 and A. 6704 (effective April 1, 1969), final resolution of disputes is committed to the appropriate legislative body. Specifically, the amended version of the statute provides that

the legislative body or a duly authorized committee thereof shall forthwith conduct a hearing [if a fact finders' report and recommendations is not accepted] at which the parties shall be required to explain their positions with respect to the report of the fact-finding board; and (iv) thereafter, the legislative body shall take such action as it deems to be in the public interest, including the interest of the public employees involved.
Law of March 4, 1969, § 209(3)(e), GERR No. 288, at F-1, F-5, *amending* N.Y. CIV. SER. LAW § 209(3)(e) (McKinney Supp. 1968).

90. Hildebrand, *The Neutral in Public Employment Disputes*, in PROCEEDINGS OF THE 20TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 287, 292 (1967).

91. A recently proposed Taylor Law amendment that would make fact-finding binding would, according to its proponents, "achieve the benefits of arbitration but avoid the rigid patterns which compulsory arbitration invariably imposes. In addition it should tend to motivate both parties to more effective and realistic good faith negotiation and earlier achievement of agreement." *Hearings on the Taylor Law Before the Joint Legislative Comm. on Indus. and Labor Conditions* (unpublished, Dec. 1968) (statement of R. Rowley), reproduced in GERR No. 277, at B-1.

92. Kheel, Report, *supra* note 27, at 14.

93. *Id.* at 33.

fact that practitioners tend to shape a new process like fact-finding; if they are professional arbitrators, it may be difficult for them to abandon their firm commitment to equitable notions. Indeed, it may not be desirable for them to do so as long as they firmly believe that the fact-finding process works because the parties respond to equitable recommendations. It is clear that an arbitrator is in one respect a fact finder: "arbitration is in itself unique because it normally concentrates in the arbitrator the primary function of fact-finding, which is performed by the trial court, and the secondary function of review, which is confided in the intermediary and final appellate court system."⁹⁴ It is also common that fact finders are constrained by the parties' submission agreement from making an independent investigation to uncover relevant facts and must rely upon briefs and evidence submitted during the hearing.

Fact-finding should be seen as an occasional extension of bargaining or as an adjunct to bargaining—a process that is valuable because it presents carefully framed terms of agreement that are closely related to the prior bargaining of the parties. These terms of agreement are likely to be "acceptable" because they are couched in the realm of the reasonable—if not equitable—expectations of the parties. Recommendations will be all the more acceptable if the fact finder identifies the issues in full view of the public and the union's rank and file. If one disputing party's miscalculation as to reasonable expectations of the other party is a common cause of strikes—and at least one noted economist thinks that it is⁹⁵—then a process that appraises the parties of what is realistically possible within a particular bargaining history and in a particular labor market is a process premised on persuasion and voluntary agreement rather than adjudication.

The substitution of fact-finding with recommendations for the strike weapon is not advanced as a panacea for dispute resolution; there are no such easy answers. I simply feel that fact-finding is preferable to legalizing public employee strikes because of the flexibility and equity it affords in dispute resolution. Recent experience shows that the majority of public employee disputes are settled short of recommendations by mediators, that the great majority of recommendations have been accepted, and that the problems posed by rejection of recommendations are not peculiar to the process of fact-finding.

94. Tobriner, *An Appellate Judge's View of the Labor Arbitration Process: Due Process and the Arbitration Process*, in PROCEEDINGS OF THE 20TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 37, 38 (1967).

95. L. REYNOLDS, *LABOR ECONOMICS AND LABOR RELATIONS* 280-82 (3d ed. 1959).

Thus, if fact-finding with recommendations is properly utilized, collective bargaining in the public sector can be effective without the right to strike.

Of course, the courts must also be an essential part of any process that looks toward voluntary settlement of labor disputes in public employment. The nature of labor relations in the public as well as in the private sector calls for mature consideration of the equities on both sides of a labor dispute. What we need is an adaptation of the "clean hands" doctrine of the Norris-LaGuardia anti-injunction statute;⁹⁶ under that provision, restraining orders in labor disputes were conditioned upon the conduct of the parties. The Michigan Supreme Court essentially adopted this approach in a case involving the Holland Education Association.⁹⁷ There, the court in effect recognized a limited right to strike even though the Michigan Public Employment Relations Act prohibited strikes in the public sector. The Michigan court, having considered the conduct of the employer during bargaining, found that there was no basis for an automatic injunction against a teacher walkout. New York's Taylor Law similarly recognizes the possibility that a strike may have been caused by acts of extreme provocation on the part of the public employer; this would tend to diminish the responsibility of a labor organization for a resultant strike.⁹⁸ Nevertheless, in the Huntington, Long Island, teachers' case, the PERB trial examiner found that the school board's rejection of a fact finder's recommendations for the

96. 29 U.S.C. §§ 104, 107 (1964).

97. *School Dist. v. Holland Educ. Assn.*, 380 Mich. 314, 157 N.W.2d 206 (1968).

98. At Section 210(3)(e) the Taylor Law clearly states:

In determining whether an employee organization has violated subdivision one of this section ["No public employee or employee organization shall engage in a strike, and no employee organization shall cause, instigate, encourage, or condone a strike."], the board shall consider (i) whether the employee organization called the strike or tried to prevent it, (ii) whether the employee organization made or was making good faith efforts to terminate the strike, and (iii) whether, if so alleged by the employee organization, the public employer or its representatives engaged in such acts of extreme provocation as to detract from the responsibility of the employee organization for the strike.

One commentator has written that the "language of the Act clearly states that these inquiries go to the substantive question of whether Section 210 was violated." Wollett, *The Taylor Law and the Strike Ban*, in *PUBLIC EMPLOYEE ORGANIZATION AND BARGAINING: A REPORT ON THE JOINT CONFERENCE OF THE ASSOCIATION OF LABOR MEDIATION AGENCIES AND THE NATIONAL ASSOCIATION OF STATE LABOR RELATIONS AGENCIES* 29, 33 (1968). But two of the three PERB members insist that the language goes only to mitigation of the penalty and the Taylor Committee in their Interim Report has taken the same position. Since the Act was amended on March 4, 1969, it is now clear that the employer's acts of "extreme provocation" are relevant only to the fixing of penalties. Such acts may not be considered in determining whether employees have in fact engaged in a strike or other prohibited concerted activity. Law of March 4, 1969, § 210(3)(f), GERR No. 288, at F-1, F-7, amending N.Y. CIV. SERV. LAW § 210(3)(f) (McKinney Supp. 1968).

settlement of the dispute did not constitute such an act of extreme provocation as to justify the strike.⁹⁹ The decision brought sharp criticism of the Taylor Law by the National Education Association.¹⁰⁰ Nevertheless, the principle of establishing rules of fair conduct—whether they are called unfair labor practices or some other name—seems to be an appropriate one to append to state laws which ban or otherwise limit the right to strike.

V. CONCLUSION

The public must realize that there can be no absolute guarantee against strikes in a free society; that result is possible only in a police state. If the prevailing no-strike policy is to be maintained, it must be demonstrated that on balance the interest of public employees and the general community will be better served by a process of *political* collective bargaining based upon recommendations or upon voluntary or binding arbitration rather than upon the economic coercion of a strike.

It is my view that collective bargaining and impasse resolution procedures can work and have worked effectively in public employment without the right to strike. Moreover, I would agree with Professor Russell Smith, who recently argued that the current political climate is not receptive to the qualified right to strike for public employees. Professor Smith suggested

that serious thought should be given to Ted Kheel's . . . suggestions, accepted in principle, by the Pennsylvania Committee . . . that the right to strike, except for certain categories of public employees, should be recognized, subject to handling really critical adverse effects on an ad hoc basis as they arise. But the public is probably not ready for this. I guess I continue to subscribe to the view we took in Michigan in our report to Governor Romney which would continue the strike ban and, ultimately, leave the use of the injunction contingent upon relevant inquiry by the court into the circumstances including, obviously, the degree of adverse impact on the public.¹⁰¹

It is my own conclusion, then, that the sounder public policy is to continue the strike ban, but allow the courts and labor boards dis-

99. *In re* Associated Teachers of Huntington, Inc., Case No. D-0003 (Aug. 9, 1968) (Report and Recommendations of Board Member and Hearing Officer George H. Fowler).

100. *Hearings*, *supra* note 91.

101. Unfair Labor Practices in Public Employment, GERR No. 268, at E-1, E-9 (Oct. 28, 1968).

cretion to fashion remedies for violations. Ultimately, the state legislatures or the Congress will make the political judgment as to whether the strike prohibition in public employment is a realistic and equitable public policy or whether it must give way to a limited and qualified right to strike.