

TEACHER STRIKES: A PROPOSED SOLUTION

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The alarming frequency of public school teacher strikes suggests that applicable collective bargaining statutes need significant changes. Based on the premise that public employees, including teachers, should not have the right to strike against the government-employer, these statutes employ various procedures to provide a substitute for the proscribed strike.¹ Unfortunately, these laws have not been effective. The number of public employee strikes,² and teacher strikes in particular,³ continues to increase. With the start of each new school year, strikes by public school teachers occur in defiance of

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1. Most state public employee labor relations laws focus on the strike proscription. Consequently, the statutes provide mediation, fact-finding, arbitration or combinations thereof to serve as strike substitutes. See notes 27, 61 and 62 and accompanying text *infra*.

2. Among state and local government employees, there were 142 strikes in 1964 involving 105,000 workers and 455,000 man-days idle; in 1968 there were 254 strikes among 202,000 workers with 2,550,000 man-days idle; in 1970 there were 409 strikes among 177,600 workers with 1,375,000 man-days idle. In 1975 there were 478 strikes among 318,500 workers and involving 2,204,400 man-days idle; in 1976 there were 378 strikes among 130,700 workers with 1,690,700 man-days idle. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, ANALYSIS OF WORK STOPPAGES, 1976, 77 (1978); BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, HANDBOOK OF LABOR STATISTICS 320-21 (1971) and 310 (1976).

3. Of the 378 government work stoppages in 1976, 138 (approximately 36.5%) involved teachers. The next largest occupational group of public sector strikers was blue-collar and manual workers; this group struck 60 times in 1976 and comprised only 15.9% of the total public sector strikes during that year. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, ANALYSIS OF WORK STOPPAGES, 1976, 77 (1978).

the statutory proscription.⁴ Defects in the public employee labor relations laws appear to be the major source of the numerous illegal public school teacher strikes.

The problems with the current body of laws governing public employee labor relations evidence a need for a new legislative approach: teachers must be granted a qualified right to strike. Collective bargaining between teachers and school boards should be simple and direct. The public interest—the welfare of school children and the tranquil and efficient delivery of public services—demands that teachers legitimately possess the bargaining leverage of a strike. The circuitous route of existing legislative patterns only delays the inevitable strikes and increases the friction between the parties. Without the legal right to strike, teacher-school board negotiations will suffer continued frustrations and the public, as well, will suffer as a result.

Teachers are the most militant group in the public sector, as evidenced by their striking to achieve their collective bargaining demands.⁵ Although the sources of teacher militancy are varied,⁶ empirical studies usually attribute this phenomenon to the increasingly younger and more highly educated persons who teach full-time.⁷ Further, the peculiar consequences of strikes in the public

4. For example, teachers struck in three major southern Illinois communities prior to the commencement of classes in the fall of 1978. See St. Louis Post-Dispatch, Aug. 2, 1978, at 1A, col. 1.

5. See note 3 and accompanying text *supra*.

6. Certainly the increased militancy among teachers is part of the trend of increased unionization of public and white-collar employees. Although traditionally difficult to organize, white-collar unions have recently grown in number. For a discussion of this trend and its peculiar problems, see Anderson, *Strikes and Impasse Resolution in Public Employment*, 67 MICH. L. REV. 943, 954 (1969) [hereinafter cited as Anderson]; Moskow & McLennan, *Teacher Strikes and Dispute Settlement Policy*, 14 N.Y. L.F. 281, 281-84 (1968) [hereinafter cited as Moskow & McLennan]; Wildman, *Collective Action by Public School Teachers*, 18 INDUS. & LAB. REL. REV. 3, 8 (1964). This militancy and unionization may also be "a reflection of a more general tendency in our society to form groups in order to augment the force of individual demands by concerted action." Kheel, *Strikes and Public Employment*, 67 MICH. L. REV. 931, 931 (1969) [hereinafter cited as Kheel].

7. For a review of the major empirical studies concerning the various sources of teacher militancy as well as an interesting and innovative study of the problem, see Fox & Wince, *The Structure and Determinants of Occupational Militancy Among Public School Teachers*, 30 INDUS. & LAB. REL. REV. 47 (1976). See generally R. SMITH, H. EDWARDS & R. CLARK, *LABOR RELATIONS LAW IN THE PUBLIC SECTOR: CASES AND MATERIALS* (1974); Zack, *Why Public Employees Strike*, 23 ARB. J. 69 (1968) [hereinafter cited as Zack]; Note, *A Critical Approach to the Traditional Prohibition of Teacher Strikes in Connecticut: Is the Qualified Right to Strike a Viable Alternative?*, 2

school system enhance its attractiveness as a collective bargaining tool for the employees: "Striking teachers, unlike other employees, lose no work days as a result of the strike. Schools almost always remain in session the full 180 days, and teachers are subject to only the inconvenience resulting from the extension of the school year."⁸ Thus, of all public employees, teachers merit special attention since they strike more frequently and suffer less loss than other public employees. Additionally, teachers illustrate an emerging trend of both unionization and utilization of the strike weapon by many heretofore unorganized white collar workers.⁹

I. STRIKES: HISTORY OF CURRENT LEGISLATION

The growth of public sector collective bargaining spans a relatively short segment of recent American history.¹⁰ Prior to 1946, a noted absence of such legislation¹¹ forced courts to rely upon the common law which gave teachers and other public employees the right to join a union, but prohibited them from striking.¹² The period from 1946

CONN. L. REV. 171, 173 and 173 n.13 (1969) [hereinafter cited as *Teacher Strikes in Connecticut*]; Comment, *The Scope of Bargaining in Public Education Under the Pennsylvania Public Employee Relations Act*, 14 DUQ. L. REV. 427, 442 n.62 (1976) [hereinafter cited as *Bargaining in Public Education*].

8. Note, *Impasse Resolution Mechanisms and Teacher Strikes*, 7 U. MICH. J. L. REF. 575, 579 (1974) [hereinafter cited as *Impasse Resolution*]. See also Alderfer, *Follow-Up on the Pennsylvania Public School Strikes*, 25 LAB. L. J. 161 (1974).

9. See note 6 and accompanying text *supra*, Wollett, *The Coming Revolution in Public School Management*, 67 MICH. L. REV. 1017 (1969).

10. See Kerman, *Strikes and Work Stoppages in the Public Sector*, 43 N.Y.S. B. J. 24, 24-26 (1971) [hereinafter cited as Kerman]; Note, *An Analysis of the Comprehensive Approach to the Public-Employee Strike Problem*, 44 MISS. L.J. 766, 766-70 (1973) [hereinafter cited as *Comprehensive Approach*].

11. The relatively small number of statutes and ordinances concerning public employee collective bargaining and strikes enacted in the wake of the 1919 Boston police strike provide the only exceptions to this general observation. Kerman, *supra* note 10, at 24.

12. Before 1946, courts relied upon the common law which provided that public employees could join unions even though the public employer was not obligated to bargain with these unions. Additionally, the government could restrict the type of union created. *Id.* See also *United Fed'n of Postal Workers v. Blount*, 325 F. Supp. 879, 882 (D.D.C.), *aff'd*, 404 U.S. 802 (1971) ("At common law no employee, whether public or private, had a constitutional right to strike in concert with his fellow workers;" such concerted action resulted in common law prosecution of strikes as conspiracies); *Board of Educ. v. Redding*, 32 Ill.2d 567, 571, 207 N.E.2d 427, 430 (1965) ("there is no inherent right in municipal employees to strike against their governmental employer"); *Jefferson County Teachers Ass'n. v. Board of Educ.*, 463 S.W.2d 627, 628

to 1959 witnessed a rapid growth in the rate of government employment¹³ and public employee union organization.¹⁴ In response to subsequent turmoil in both private and public sector labor relations,¹⁵ state legislatures enacted strident laws which prohibited public employee strikes and exacted heavy penalties for recalcitrant public sector unions.¹⁶

The 1960's heralded a new approach for dealing with public sector strikes. Congress introduced a statutory right to bargain collectively and alternative means for impasse resolution.¹⁷ A majority of states

(Ct. App. Ky. 1970) ("Under the common law it is recognized that public employees do not have the right to strike or to engage in concerted work stoppages"); *Rockwell v. Board of Educ. of Crestwood*, 57 Mich. App. 636, 642, 226 N.W.2d 596, 598 (1975), *rev'd on other grounds*, 393 Mich. 616, 227 N.W.2d 736 (1975), *cert. granted* 427 U.S. 901 (1976) ("it is well settled that there is neither a common law nor a constitutional right of public employees to strike"); *Head v. Special School Dist.*, 288 Minn. 496, 507, 182 N.W.2d 887, 894 ("it is clearly established at common law that a strike by public employees for any purpose is illegal").

13. In 1947 there were 3,789,000 employees in state and local government, comprising 6.2% of the nation's work force; by 1950 there were 4,285,000 public employees comprising 6.7% of the total work force; in 1955 the 5,054,000 government workers comprised 7.4% of the work force; in 1962 there were 6,849,000 public sector workers comprising 9.3% of the work force. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, HANDBOOK OF LABOR STATISTICS 1977, 96, 21 (1977). The growth in the number of teachers has been the most significant area of increase among public employees. On the state and local level, all employment increased 117.0% between 1957 and 1976. During this same period, teacher employment increased 156.4%. *Job, More Public Services Spur Growth in Government Employment*, 101(9) MONTHLY LAB. REV. 3, 3-7 (1978).

14. See note 14 and accompanying text *supra*. Union membership among government employees grew from 5.1% in 1956 to 5.9% in 1960. In 1964 this group increased to 8.1% and in 1970, 11.2% of government employees belonged to unions. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, HANDBOOK OF LABOR STATISTICS 1971, 327-30 (1971).

15. In 1956 there were 27 public employee work stoppages, involving 3,460 workers and 11,100 man-days idle; there were 36 work stoppages in 1960 among 28,600 workers, with 58,400 man-days idle. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, HANDBOOK OF LABOR STATISTICS 1971 at 318-21 (1971). See generally Kerman, *supra* note 10; *Comprehensive Approach*, *supra* note 10, at 767-68; *Bargaining in Public Education*, *supra* note 7, at 429-31. See also note 3 and accompanying text *supra*.

16. See, e.g., MO. STAT. ANN. § 105.530 (Vernon 1976).

17. The federal approach is found in Exec. Order No. 10,988, 3 C.F.R. 521 (1959-1963 Compilation), which recognized federal employees' right to bargain collectively. The Order signifies a dramatic development in public sector labor law. "It recognized the principle that federal employees will be less inclined to strike if they are given a voice in determining their wages and conditions of employment and thus have viable alternatives to the strike for resolution of their grievances." *Comprehensive Approach*,

then enacted dispute-settlement legislation¹⁸ patterned after the federal approach. These no-strike laws withstood frequent constitutional challenges. Specifically, state courts upheld these laws when alleged to violate First Amendment guarantees of freedom of assembly and freedom of speech.¹⁹ Courts also upheld these statutes when they were claimed to violate the Thirteenth Amendment proscription of involuntary servitude²⁰ and the Fourteenth Amendment mandate of equal protection of the laws.²¹ Although constitutionally valid,

supra note 11, at 769. Additionally, penalties for activities equivalent to any of the itemized unfair labor practices enforced the strike proscription.

18. Statutes employing the dispute-resolution approach prohibit public employee strikes, but provide an alternative method for resolving bargaining impasses. *See, e.g.*, DEL. CODE ANN. tit. 19 § 1310 (1974) (parties may submit impasses in public employee negotiations to arbitration); NEB. REV. STAT. § 79-1293 (1971) (if teacher disputes continue after the parties "meet and confer," parties submit the problem to non-binding fact-finding). In addition, see *Comprehensive Approach*, *supra* note 11, at 768-71 for an overview of responses to this turmoil by Alaska, California, Connecticut, Delaware, Michigan, Nebraska, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin.

19. *See, e.g.*, Board of Educ. v. Kankakee Fed'n. of Teachers, 46 Ill. 2d 439, 444-5, 264 N.E.2d 18, 21 (1970), *cert. denied*, 404 U.S. 865 (1971) (First Amendment considerations do not control when an unlawful strike is in progress); Board of Educ. v. Redding, 32 Ill. 2d 567, 574, 207 N.E.2d 427, 431 (1965) ("[I]t is more than clear that a state may, without abridging the right of free speech, restrain picketing where such curtailment is necessary to protect the public interest and property rights and where the picketing is for a purpose unlawful under state laws or policies."); Jefferson County Teachers Ass'n. v. Board of Educ., 463 S.W.2d 627, 630 (Ky. App. 1970) ("the rights of free speech and public assembly do not license violation of law"); School Dist. for Holland v. Holland Educ. Ass'n., 380 Mich. 314, 321, 157 N.W.2d 206, 208 (1968) ("within limitations, . . . the sovereignty may deny to its employees the right to strike"). *See also* City of Pawtucket v. Pawtucket Teachers Alliance, 87 R.I. 364, 141 A.2d 624 (1958) (no-strike laws valid under Rhode Island constitutional guarantees of free speech and freedom of assembly).

20. *See, e.g.*, Pinellas County Classroom Teachers' Ass'n. v. Board of Pub. Instruction, 214 So. 2d 34, 37 (Fla. 1968) ("We are not here confronted by an arbitrary mandate to compel performance of personal service against the will of the employee. These people were simply told that they had contracted with the government and that . . . [t]hey could not . . . strike against the government and retain the benefits of their contract positions."); School Dist. for Holland v. Holland Educ. Ass'n., 380 Mich. 314, 321, 157 N.W.2d 206, 208 (1968) (the sovereign may legitimately prohibit the right to strike).

21. *See, e.g.*, Norwalk Teachers Ass'n. v. Board of Educ., 138 Conn. 269, 276, 83 A.2d 482, 485 (1951) (Public employees are not denied equal treatment by the strike proscription: "They occupy a status entirely different from those who carry on a private enterprise. They serve the public welfare and not a private purpose"); Jefferson County Teachers Ass'n. v. Board of Educ., 463 S.W.2d 627, 630 (Ky. 1971) (There is no denial of equal protection of the law by prohibiting the right to strike only in the

these statutory solutions proved ineffective: "the public-sector strike problem only worsened. The number of work stoppages from 1962, the year of the enactment of the first dispute settlement program, to 1970, increased from 28 to 412."²² In the early 1970's, several states sought to improve the dispute-settlement approach through enactment of comprehensive programs designed to finally resolve the recurring strike problem.²³ Nonetheless, teacher strikes continually occur.²⁴

Both the role of the courts and the current economic climate contribute to the continued inefficacy of the various statutory approaches to public sector collective bargaining.

The courts play a major role in enforcing public employee collective bargaining statutes; courts also contribute to the frequency of illegal teacher strikes. When teachers violate the law by striking,²⁵

public sector because there is a "reasonable basis" in the public-private sector distinction.); *Head v. Special School Dist.*, 288 Minn. 496, 509, 182 N.W.2d 887, 893, *cert. denied*, 404 U.S. 886 (1970) (the danger to public safety and welfare justify the public sector strike proscription); *Rankin v. Shanker*, 23 N.Y.2d 111, 242 N.E.2d 802, 807, 295 N.Y.S.2d 625, 530 (1968) (a legitimate distinction between public and private employment is constitutionally permissible).

22. *Comprehensive Approach*, *supra* note 11, at 770. Generally, the problems with these dispute-resolution approaches to public sector labor relations stem from the fact that the programs were enacted hastily, without the aid of labor experts and were administered haphazardly. These programs did not deal with the problem which caused the strikes, *i.e.*, the disparity between public and private employees' wages and benefits. Furthermore, the procedures provided by this legislation were ineffective. *Id.*

23. The comprehensive approach entails successive recourse to mediation, fact-finding, and arbitration to resolve impasses. Independent agencies or commissions usually administer these programs. In the majority of states, these three steps are conclusive. *See, e.g.*, ME. REV. STAT. ANN. tit. 26, § 979-D (1964 & Supp. 1978); N.Y. CIV. SERV. LAW § 209 (McKinney 1973 & Supp. 1978-1979); WIS. STAT. ANN. 111.70 (West 1974). *Cf.* VT. STAT. ANN. tit. 3, § 925 (Supp. 1978) (the single package "last best offer" of the parties through approval by the General Assembly although the Assembly is not prevented from modifying the agreement). In some jurisdictions, however, a strike may follow these three steps. *See, e.g.*, HAW. REV. STAT. §§ 89-11, 89-12 (Supp. 1975); ORE. REV. STAT. § 243.726 (1977).

24. *See* notes 3 and 4 and accompanying text *supra*.

25. Courts frequently find it difficult to determine when a teacher strike has occurred. *See, e.g.*, *Board of Educ. v. New Jersey Educ. Ass'n.*, 53 N.J. 29, 247 A.2d 867 (1968) (blacklisting of a school district by the National Education Association held to be a strike). *See also* *School Dist. for Holland v. Holland Educ. Ass'n.*, 380 Mich. 314, 327, 157 N.W.2d 206, 211 (1968) (Souris, J., concurring) (because contracts had not been signed, teachers were not employees within the contemplation of the relevant statute, and no strike occurred).

enforcement of the statutes' mandate is usually left to the courts.²⁶ Because statutory sanctions tend to exacerbate a delicate situation and are "after-the-fact" in nature, they are generally ineffective.²⁷ Usually, then, the courts must remedy the situation and enforce the statutory proscription. Courts most often react to public school teacher strikes by issuing the anti-strike injunction requested by the school board.²⁸ However, the frequent violation of these court orders produces problems. Teachers often ignore the injunctions and courts

26. "Most states which prohibit public employee strikes do not provide for automatic sanctions where strikes occur in derogation of such prohibitions." Note, *Striking a Balance in Bargaining with Public School Teachers*, 56 IOWA L. REV. 598, 601 (1971) [hereinafter cited as *Striking a Balance*].

27. For an excellent discussion of the problems with the punitive approach to illegal teacher strikes, see Comment, *Collective Bargaining for Public Employees and the Prevention of Strikes in the Public Sector*, 68 MICH. L. REV. 260, 269-70 (1969) [hereinafter cited as *Prevention of Strikes*]. See also City and County of San Francisco v. Cooper, 13 Cal. 3d 898, 534 P.2d 403, 415, 120 Cal. Rptr. 707, 719 (1975) ("experience has all too frequently demonstrated, however, that such harsh, automatic sanctions do not prevent strikes but instead are counterproductive, exacerbating employer-employee friction and prolonging work stoppages").

28. *Striking a Balance*, *supra* note 26, at 601. See, e.g., Board of Educ. v. Redding, 32 Ill. 2d 567, 576, 207 N.E.2d 427, 430 (1965) (court reversed lower court denial of injunction against striking school custodial employees); Board of Educ. v. New Jersey Educ. Ass'n., 53 N.J. 29, 38, 247 A.2d 867, 878 (1968) (court upheld ruling restraining teacher resignation and acts which would prevent other teachers from accepting jobs); *In re Burhrer*, 50 N.J. 501, 522, 236 A.2d 592, 603-04 (1967) (court imposed jail sentences and fines for contempt of court convictions resulting from teachers' violations of strike injunction); School Comm. v. Westerly Teachers Ass'n., 111 R.I. 96, 104, 299 A.2d 441, 446 (1973) (court refused to issue an automatic restraining order upon showing of teacher strike and instead ordered a hearing on this motion: "Ex parte relief in instances such as teacher-school committee disputes can make the judiciary an unwitting third party at the bargaining table and a potential coercive force in the collective bargaining processes"); Danville Bd. of School Directors v. Fifield, 132 Vt. 271, 276, 315 A.2d 473, 474 (1974) (because the school board failed to arbitrate with teachers according to agreement and filed suit for an injunction against the arbitration instead, court denied the injunction and required board to submit to arbitration). Some courts have dealt with temporary injunctions rather than permanent injunctions. See, e.g., Board of Jr. College Dist. v. Cook County College Teacher Union, 126 Ill. App. 2d 418, 435, 262 N.E.2d 125, 129-30 (1st Dist. 1970) (court rejected school board motion that temporary injunction be lifted and upheld contempt citation for violation of the temporary injunction); School Dist. for Holland v. Holland Educ. Ass'n., 380 Mich. 314, 327, 157 N.W.2d 206, 208 (court dissolved temporary injunction and remanded for a hearing on, inter alia, whether an injunction should issue). For a general discussion of the injunction and the civil and criminal contempt citations, see Halligan, *Enjoining Public Employees' Strikes: Dealing with Recalcitrant Defendants*, 19 DE PAUL L. REV. 298 (1969).

must issue contempt citations.²⁹

Commentators usually cite the lack of effective statutory sanctions and the ambivalence of courts in issuing injunctions as the source of these contempt orders.³⁰ Further, the imposition of fines, jail terms, and probation as means to enforce the contempt citation can be counterproductive. More specifically, a "martyr" problem frequently arises: jailing a union leader may increase the union's militancy and create embarrassment when continued negotiations necessitate his release.³¹ Such enforcement measures applied to teachers often produce sympathy strikes, amnesty strikes, and disguised strikes³² which could negatively affect the quality of education.³³ Clearly, the numerous counterproductive effects of judicial sanctions effectively rebut the suggestion that courts ought to apply more stringent sanctions to illegal strikers.

Although the judicial system has been the primary vehicle for enforcing the strike proscription, the courts have also been the conduits for the recent trend in the erosion of the legal sanctions against strikes. In an increasing number of jurisdictions, a school board's assertion that the impending or existing strike will harm the public health, safety, and welfare no longer guarantees the issuance of an injunction.³⁴ Instead, courts demand that requests for an injunction

29. See, e.g., *School Comm. of New Bedford v. Dlouhy*, 360 Mass. 109, 115-16, 271 N.E.2d 655, 657-68 (1971) (imposing a fine, this court assessed the total expense to the city from the strike at \$100,000 based upon wages paid to the strike-breakers, costs of operating buses and utilities, and costs incurred when the lost days were scheduled later); *In re Jersey City Educ. Ass'n.*, 115 N.J. Super. 42, 57, 278 A.2d 206, 214 (court emphasized deterrent effect of contempt penalties imposed).

30. See *Impasse Resolution*, *supra*, note 8, at 578-79.

31. See *Comprehensive Approach*, *supra* note 10, at 773-74.

32. *Id.* at 774.

33. *Id.* Relatively little has been written about the effects of strikes on students and most of the comments have been merely rhetorical. See Radke, *Real Significance of Collective Bargaining for Teachers*, 15 LAB. L.J. 795, 797 (1964); Seitz, *Rights of School Teachers to Engage in Labor Organizational Activities*, 44 MARQ. L. REV. 36, 42 (1960).

34. The seminal case in this area is *School Dist. for Holland v. Holland Educ. Ass'n.*, 380 Mich. 314, 326, N.W.2d 206, 210 (1968), in which the court held that a showing of a public employee strike does not, ipso facto, justify an injunction since "it is basically contrary to public policy in this state to issue injunctions, in labor disputes absent a showing of violence, irreparable injury or breach of the peace." See also *Timberlane Regional School Dist. v. Timberlane Region Educ. Ass'n.*, 114 N.H. 245, 251, 317 A.2d 555, 559 (1974) (factors determining the issuance of an injunction include "whether recognized methods of settlement have failed, whether negotiations have been conducted in good faith, and whether the public health, safety, and welfare

demonstrate specific and serious harm from the impending or actual strike.³⁵ Many courts also apply traditional equity doctrines when issuing injunctions and require the school board to come to the court with "clean hands."³⁶ A California court recently took a further step in the erosion of legal sanctions against strikes when it upheld the validity of a teacher-school board contract, although the contract was the product of an illegal, and allegedly coercive, teacher strike.³⁷

Certainly the current economic climate has had an impact upon the teacher negotiations and the frequency of teacher strikes.³⁸ Inflation and the glutted labor market for teachers has taken its toll on limited school board appropriations, teacher demands, and the friction attending negotiations. It appears unlikely that these factors will be mitigated in the immediate future. In fact, despite the continual upgrading of public employee labor relations laws,³⁹ the future eco-

will be substantially harmed if the strike is allowed to continue."); *School Comm. v. Westerly Teachers' Ass'n.*, 111 R.I. 96, 103, 299 A.2d 441, 445 (1973) (the court asserted that "the mere failure of a public school system to begin its school year on the appointed day cannot be classified as a catastrophic event. . . . There is flexibility in the calendaring of the school year that . . . may also negate the necessity of the immediate injunction which could conceivably subject some individuals to the court's plenary power of contempt."). *Cf. In re Berry*, 68 Cal. App. 2d 137, 436 P.2d 273, 65 Cal. Rptr. 273 (1968) (injunction declared invalid as overbroad where order prohibited picketing as well as striking); *Lamphere Schools v. Lamphere Fed'n. of Teachers*, 1977 Lab. Cas. CCH Par. 55.055 (quashed suit against striking teachers which sought damages under common law tort remedies).

35. *See, e.g., School Dist. for Holland v. Holland Educ. Ass'n.*, 380 Mich. 314, 326, 157 N.W.2d 206, 210 (1968) ("it is basically contrary to public policy in this state to issue injunctions in labor disputes absent a showing of violence, irreparable injury or breach of the peace"); *School Comm. v. Westerly Teachers Ass'n.*, 96 R.I. 111, 104-05, 299 A.2d 441, 446 (1973) (court refused to issue a restraining order merely because the school board alleged a teacher work stoppage; instead the court required a full hearing on this issue).

36. *See Rockwell v. Board of Educ. of School Dist. of Crestwood*, 393 Mich. 616, 227 N.W.2d 736 (1975) (court held that striking teachers may not necessarily receive statutory sanctions if reviewing agency determines that the strike was provoked by unfair labor practices of the school board); *School Dist. for Holland v. Holland Educ. Ass'n.*, 380 Mich. 314, 327, 157 N.W.2d 206, 211 (1968) (in remanding to determine whether an injunction should issue, the court directed a finding of whether "the plaintiff school district has refused to bargain in good faith").

37. *City and County of San Francisco v. Cooper*, 13 Cal. 3d 898, 534 P.2d 403, 120 Cal. Rptr. 707 (1975).

38. *See Nordlund, A Critique of Teacher Negotiations in 1974-1975*, 26 LAB. L.J. 119, 119-24 (1975).

39. Several jurisdictions now permit a qualified right to strike. The Alaska statute, for example, qualifies the right to strike by a classification of employees: 1) When mediation fails to resolve an impasse involving police, firefighters and jail,

nomie climate portends continued illegal strike activity, particularly among teachers.⁴⁰ Thus, further statutory changes are imperative.

II. STRIKES: PUBLIC SECTOR VS. PRIVATE SECTOR

In the private sector, strikes constitute a necessary element in the collective bargaining process.⁴¹ Both the strike threat and the strike itself operate to equalize the bargaining positions of the parties.⁴² The strike weapon supplies the leverage necessary to enable the less powerful union to demand and receive concessions at the bargaining table from the more powerful management: it is *the* factor in employer-union relations which forces the employer to bargain seriously with the union.⁴³ However, the strike is not merely a tactic employed by unions to force compromises from management. "The beauty of the strike is that while a potent weapon, it also inflicts damage on the

prison and hospital employees, arbitration is the sole recourse; 2) A strike may follow unsuccessful mediation for public utility, snow removal, sanitation and educational (including teachers) employees. However, considerations of public health, safety and welfare and the employees' compliance with statutory requisites may limit the duration of the strike; 3) All other public workers may strike on an employee vote. ALAS. STAT. § 23.40.200 (1972). Other jurisdictions permit public employee strikes after exhaustion of other impasse resolution devices. *See, e.g.*, HAW. REV. STAT. § 89-11, 89-12 (Supp. 1975); ORE. REV. STAT. § 243.726 (1977) (strikes permitted after failure of mediation, fact-finding and arbitration); PA. STAT. ANN. tit. 43, § 1101.1003 (1978) (strikes permitted after breakdown of mediation procedures. *See also* MINN. STAT. ANN. § 179.64 (Supp. 1978) (non-essential employee strikes permitted when employer fails to request binding arbitration or fails to comply with a binding arbitration order).

40. *See generally* Nordlund, *A Critique of Teacher Negotiations in 1974-1975*, 26 LAB. L.J. 119 (1975).

41. Basically, there are three types of strikes: 1) recognition strikes to acquire both the status of bargaining unit for a group of employees and the power to collectively bargain for them; 2) jurisdictional strikes which occur between unions with respect to work assignments; and 3) strikes during the term of the agreement which generally concern wages and conditions of employment. Clark, *Public Employee Strikes: Some Proposed Solutions*, 23 LAB. L.J. 111, 113-15 (1972) [hereinafter cited as Clark].

42. *See generally* Anderson, *supra* note 6; Bernstein, *Alternatives to the Strike in Public Labor Relations*, 85 HARV. L. REV. 459, 463-64 (1971) [hereinafter cited as Bernstein]; Bilik, *Toward Public Sector Equality: Extending the Strike Privilege*, 21 LAB. L.J. 338, 344 (1970) [hereinafter cited as Bilik]; Clark, *supra* note 41; Moskow & McLennan, *supra* note 6, at 286; Wellington & Winter, *Structuring Collective Bargaining in Public Employment*, 79 YALE L.J. 805, 822 (1970) [hereinafter cited as Wellington & Winter]; Zack, Note, *Binding Arbitration*, 10 NEW ENGLAND L. REV. 157, 165 (1974) [hereinafter cited as *Binding Arbitration*].

43. Bernstein, *supra* note 42, at 462.

wielder, so that even the threat of its use induces in both sides the degree of reasonableness essential to realistic bargaining."⁴⁴ Consequently, unions rarely use their right to strike.⁴⁵ The strike threat, rather than the strike itself, is actually the more common and efficacious bargaining tactic.⁴⁶

The justification for the strike proscription in the public sector⁴⁷ rests primarily on alleged differences in employer-employee relations in the public and private sectors.⁴⁸ Historically, the proscription was based on the premise that the sovereignty of the public sector would not tolerate strikes.⁴⁹ Commentators also argue that the profit motive,

44. *Id.* at 463.

45. *Id.*

46. *Id.* See also *Binding Arbitration*, *supra* note 42.

47. It is important to note that with respect to the existence of any right to strike, public employees are coequal with private sector employees: "[i]n the absence of a statute, they too do not possess the right to strike." *United Fed'n. of Postal Workers v. Blount*, 325 F. Supp. 879, 882 (D.D.C.), *aff'd*, 404 U.S. 802 (1971).

48. The most common public/private sector distinction alleges that the economic impact of a private sector strike translates into political pressure in the public sector. See, e.g., *Clark*, *supra* note 41, at 115-16 ("The purpose of a private sector strike is to bring economic pressure on the employer . . . the purpose of a strike in the public sector is to bring political pressure on the public employer"); *Zack*, *supra* note 7, at 76 ("Traditional economic power which underlies private industry collective bargaining cannot be exercised by public employees because there is none of the economic coercion accompanying threats of strike or lockout"); *Binding Arbitration*, *supra* note 42, at 157 ("the effect of the [public sector] strike is to deny the public the performance of given service . . . to bring pressure to bear on the public employer").

49. Since strikes in the public sector would sanction control of a government function for private profit, they would be anarchic and would effectively deny the authority of elected officials. *Pinellas County Classroom Teachers Ass'n. v. Board of Public Inst.*, 214 So.2d 34 (Fla. 1968). See also *Bernstein*, *supra* note 42. A corollary to this policy argument is the assertion that public employees have a special duty to promote the efficient operation of the government. See *Norwalk Teachers' Ass'n. v. Board of Educ. of City of Norwalk*, 138 Conn. 269, 83 A.2d 482 (1951) (public employees as government agents have a "special duty" and their status is inherently different from private workers); *Pinellas County Classroom Teachers Ass'n. v. Board of Public Inst.*, 214 So.2d 34 (Fla. 1968) (the absence of a right to strike is an incident of public employment); *Board of Educ. v. Redding*, 32 Ill. 2d 567, 207 N.E.2d 427 (1965) (as government agents, public employees have a duty not to act in any way which would harm the efficiency of other public employees); *School Comm. v. Westerly Teachers Ass'n.*, 96 R.I. 111, 299 A.2d 441 (1973) (teachers are government agents charged with aiding the government in its constitutional duty to educate its youth). *Cf.* *School Dist. for City of Holland v. Holland Educ. Ass'n.*, 380 Mich. 314, 157 N.W. 2d 206 (1968) (the sovereign possesses the authority to limit the ability of its employees to strike); *In re Bueher*, 50 N.J. 501, 236 A.2d 592 (1967) (teachers, as public servants, must set an example for other citizens by complying with the strike injunction); *City of Pawtucket v. Pawtucket Teachers' Alliance*, 87 R.I. 364, 141 A.2d 624 (1958) (pub-

necessary in the private sector for a strike to exert pressure on the employer, is absent in the public sector.⁵⁰ Further, a significant number of courts and commentators maintain that public services are essential and that a strike by public employees could cripple the cities.⁵¹ Finally, many argue that public sector strikes distort the "normal political process."⁵²

The expansion of government into areas which traditionally were

lic employment involves the surrender of some personal rights and liberties, including the right to strike).

50. A private sector strike threatens the economic welfare of management which cannot withstand a prolonged strike and maintain a profitable business. However, public sector services are subject to an inelastic demand. Because services cannot be substituted, a strike cannot put economic pressure on the government. Furthermore, a private employer has the option of closing down operations entirely in response to a strike whereas the government cannot go out of business. See Moskow & McLennan, *supra* note 6, at 286; Wellington & Winter, *supra* note 42, at 677.

51. See Board of Educ. v. Redding, 32 Ill. 2d 567, 207 N.E.2d 427 (1965) (teachers' strikes cannot obstruct delivery of government services); Pinellas County Classroom Teachers Ass'n. v. Board of Public Instr., 214 So.2d 34 (Fla. 1968) (teacher strikes are prohibited to prevent the breakdown of an essential aspect of government); Board of Educ. of Newark v. Newark Teachers Union Local 481, 114 N.J. Super. 306, 276 A.2d 175 (1971) (public interest demands freedom from interruption of the education of youth); Board of Educ. of Union Beach v. New Jersey Educ. Ass'n., 53 N.J. 29, 247 A.2d 867 (1968) (teachers do not have the right to make government agencies unable to function by virtue of a strike); School Comm. v. Westerly Teachers Ass'n., 96 R.I. 111, 299 A.2d 441 (1973) (the need to prevent government paralysis justifies the teacher strike prohibition); City of Pawtucket v. Pawtucket Teachers' Alliance, 87 R.I. 364, 372, 141 A.2d 624, 629 (1958) (the functions of government in a democracy cannot be impeded or obstructed by strikes). Denial of government services would also harm the public health, safety and welfare and would punish the innocent public. Norwalk Teachers' Ass'n. v. Board of Educ., 138 Conn. 269, 83 A.2d 482 (1951) (allowing strikes would permit teachers to contravene the public welfare); Head v. Special School Dist. No. 1, 288 Minn. 496, 182 N.W.2d 887, cert. denied, 404 U.S. 886 (1970) (the rationale of the no-strike law is to prevent danger to public safety and welfare from teachers' strikes). See generally *Binding Arbitration*, *supra* note 42.

52. This theory stresses that striking employees could command an increased proportion of the budget without a public directive as to the appropriateness of that particular allocation of resources. For a detailed discussion of the role of public sector strikes as distorting the political process, see Wellington & Winter, *supra* note 42, at 677. The asserted disruption of the political process by public employee strikes is based upon several distinctions between the public and private sectors: 1) decisions are made by top officials in the private sector and diffused among many public agencies; 2) public conditions of employment are pre-mandated by law whereas they are developed by joint effort in the private sector; 3) taxes finance the costs of public sector strike settlement while private settlement costs are passed on to the consumer; and 4) the negotiating public employer is generally without control of available funds while private management negotiators directly control the funds for their employees. *Binding Arbitration*, *supra* note 42, at 160-63.

solely within the ambit of the private sector reveals a major weakness in the basis of these arguments. Conditions in modern society no longer justify the historical private/public sector distinction.⁵³ Indeed, numerous lawsuits have sought to challenge this distinction. For example, although modern courts continue to assert the sovereignty argument, this theory seems to be mere question-begging and conclusory upon closer examination.⁵⁴ The essential services and profit motive arguments are also subject to criticism as being based upon a non-existent economic model of perfect competition.⁵⁵ Finally, the public's concern over additional tax increases supplies a natural limit to the demands of public sector unions, so that it is unlikely that public sector strikes would distort the political process.⁵⁶ In fact, it is questionable whether a "normal political process" actually exists.⁵⁷

Arguments that public sector strikes operate differently from those in the private sector are repeated strenuously and often. The recent strikes by numerous public workers which momentarily crippled

53. See Edwards, *The Developing Labor-Relations Law in the Public Sector*, 10 DUQ. L. REV. 357, 359-61 (1972) [hereinafter cited as Edwards].

54. The courts often rely on flowery language aimed at the readers' emotions rather than relying on logic. For example, the court in *School Comm. v. Westerly Teachers Ass'n.*, 111 R.I. 96, 100, 299 A.2d 441, 443-44 (1973) declared:

The state has a compelling interest that one of its most precious assets—its youth—have the opportunity to drink at the font of knowledge so that they may be nurtured and develop into the responsible citizens of tomorrow. No one has the right to turn off the fountain's spigot and keep it in a closed position.

See *Norwalk Teachers' Ass'n. v. Board of Education of City of Norwalk*, 138 Conn. 269, 273, 83 A.2d 482, 484 (1951) (the court set the stage for its conclusions against the teacher strike by asserting that "Under our system, the government is established by and run for all of the people, not for the benefit of any person or group"); *Pinella's County Classroom Teachers Ass'n. v. Board of Public Instruction*, 214 S.2d 34, 36 (Fla. 1968) (the court describes a teacher strike as producing "the breakdown" of this aspect of government); *Board of Educ. v. Redding*, 32 Ill. 2d 567, 573, 207 N.E.2d 427, 432 (1965) (the court described the teachers' strike as "impeding and obstructing" this service).

55. See, e.g., Edwards, *supra* note 53, at 362.

56. See Burton & Krider, *The Role and Consequences of Strikes by Public Employees*, 79 YALE L.J. 418, 424-32 (1970); Edwards, *supra* note 53, at 363.

57. Burton, *Can Public Employees be Given the Right to Strike?* 21 LAB. L.J. 472 (1970). This study also notes various means—other than the strike—by which unions gain influence. Similar to the strike, these tactics generally operate outside the "normal political process." These tactics include dissemination of information, direct action short of strikes, legal action, independent political actions, conjunctive political action, patronage, and third-party intervention (mediation or fact-finding).

New York City⁵⁸ illustrates the oft-repeated arguments that public services are essential and that the sovereignty will not tolerate strikes. However, the effects of the 1977 coal miners strike underscore the fallacy of the public/private sector distinction: the havoc produced by strikes is similar whether triggered by a private or public sector union.⁵⁹

III. STRIKE: CURRENT LEGISLATION

Public employees and commentators continually challenge the necessity and value of the strike proscription. In addition, the incidence of illegal teacher strikes continues to be high and the largely ineffective legal sanctions against these strikes rapidly erode. Nevertheless, the strike proscription continues to be an essential element in most state public employee labor relations laws.⁶⁰ These laws provide various types and combinations of impasse resolution techniques designed to operate as strike substitutes. The techniques usually contained in these statutes include mediation, fact-finding, arbitration or a combination of these tailored to the needs of each jurisdiction. Regardless of jurisdictional variations, however, the general purpose behind all public employee impasse resolution mechanisms is to provide an adequate substitute for the strike and to ensure equal bargaining power between the parties.⁶¹

58. See, e.g., Howlett, *The Right to Strike in the Public Sector*, 53 CHI. B. REC. 108, 110 (1971) [hereinafter cited as Howlett].

59. See *A Coal Emergency*, NEWSWEEK, Feb. 27, 1978, at 18. See generally *School Comm. v. Westerly Teachers Ass'n.*, 111 R.I. 96, 110, 299 A.2d 441, 448 (Roberts, C.J., dissenting) ("The fact is that in many instances strikes by private employees pose the far more serious threat to the public interest than would many of those engaged in by public employees."); Howlett, *supra* note 58, at 110 ("[a] strike by either jolts the public in the same manner.").

60. The strike is prohibited in all but five states. See note 39 *supra* and accompanying text. Further, some states do not even grant teachers the right of collective bargaining, let alone the right to strike. For example, in Missouri, a bill which would have permitted public employee collective bargaining was recently defeated in the legislature. This legislation was proposed while St. Louis, Missouri public school teachers were on strike. The President of the Missouri Federation of Teachers noted that this strike "provided both an excuse for rejecting the bargaining bill and a perfect example of why it is needed." *St. Louis Globe-Democrat*, Feb. 19, 1979, at 16A, col. 2.

61. Hildebrand, *The Resolution of Impasses*, in THE ARBITRATOR, THE NLRB AND THE COURTS 289-92 (D. Jones ed. 1967); Note, *California Assembly Advisory Council's Recommendations on Impasse Resolution Procedures and Public Employee*

A. *Mediation*

Mediation is the most popular statutory form of impasse resolution.⁶² It is a simple process which involves the intervention of a third party in negotiation sessions, to aid settlement of the dispute.⁶³ Frequently employed in teacher-school board disputes,⁶⁴ mediation is strikingly similar to the collective bargaining process itself. In fact, commentators often describe the technique as a mere aid to negotiations rather than as a separate mechanism employed when negotiations fail.⁶⁵ Since mediation encourages a voluntary settlement between the disputants through the use of a neutral third party,⁶⁶ the mediator plays a crucial role because his or her skill becomes the determinative factor in the success of this mechanism.⁶⁷

Statistics suggest that mediation is highly effective in resolving teacher negotiations.⁶⁸ Yet, frequently in teacher-school board disputes, mediation appears to be either an additional ground for dispute⁶⁹ or merely a mandatory stepping-stone on the path toward a strike.⁷⁰ Because the efficacy of mediation in the public sector depends upon the parties' recognition of an attractive dispute-resolution

Strikes, 11 SAN DIEGO L. REV. 473, 486 (1973) [hereinafter cited as *Public Employee Strikes*].

62. *Public Employee Strikes*, *supra* note 61 at 885.

63. Clark, *supra* note 41, at 117-18.

64. See, e.g., *Public Employee Strikes*, *supra* note 61, at 485. See generally notes 69-70 and accompanying text *infra*.

65. See Clark, *supra* note 41, at 118; Report and Recommendations of the Twentieth Century Fund Task Force on Labor Disputes in Public Employment, *Pickets at City Hall*, 21-24 (1970) [hereinafter cited as *Pickets at City Hall*]; Simkin, *Mediation and the Dynamics of Collective Bargaining*, in R. SMITH, H. EDWARDS & R. CLARK, *LABOR RELATIONS LAW IN THE PUBLIC SECTOR: CASES AND MATERIALS* (1974) [hereinafter cited as Simkin]; Zack, *Improving Mediation and Fact-Finding in the Public Sector*, 21 LAB. L.J. 259, 263-64 (1970) [hereinafter cited as *Improving Mediation*].

66. Clark, *supra* note 41, at 117-18.

67. *Id.*

68. See Krinsky, *Avoiding Public Employee Strikes—Lessons from Recent Strike Activity*, 21 LAB. L.J. 464, 465 n.6 [hereinafter cited as Krinsky].

69. For example, in *Timberlane Regional School District v. Timberlane Regional Educ. Ass'n.*, 114 N.H. 245, 317 A.2d 555 (1974), the teachers requested a federal mediation service mediator for when negotiations reached an impasse. However, this offer itself produced an impasse: the parties were unable to select a mutually agreeable mediator and finally resumed direct negotiations. When negotiations again broke down, the teachers struck. This strike was expressly conditioned upon commencement of mediation.

70. In the recent strike by Tucson, Arizona teachers, the flitting use of mediation

mechanism, this technique has not been very successful in teacher-school board negotiations. Instead of seriously attempting to resolve the dispute at the mediation stage, these parties tend to endure the mediation process in order to qualify for fact-finding.⁷¹

B. *Fact-Finding*

Unfortunately, the prospect of fact-finding often tolls the death knell for mediation.⁷² The appointment of a fact-finder to preside at an informal hearing where each party presents its version of the dispute begins the process.⁷³ The value of fact-finding lies in its presentation of "carefully framed issues, closely related to the prior bargaining of the parties."⁷⁴ At the conclusion of the hearing, the fact-finder prepares a report which the parties are free to accept or reject.

A frequently-debated issue with respect to this mechanism focuses on whether the fact-finder should initially issue the report only to the negotiating parties or to the public as well.⁷⁵ If the fact-finder issues the report to the parties only, they would have an opportunity to alter some of its terms and to reach an agreement based upon the report as well as tailored to their needs. Also, the parties could reject the recommendations. If the fact-finder issues the report publicly from the outset, however, public pressure may compel its acceptance. Alternatively, the threat of public pressure may provide sufficient impetus for the parties to reach a negotiated settlement independently of the fact-finding process.

In constructing the report, the fact-finder's criteria include standards of equity and the acceptability of the recommendations. In ad-

appeared to be only a momentary diversion in reaching the eventual strike. *See, e.g.*, St. Louis Post-Dispatch, Oct. 2, 1978, at 8A, col. 1.

71. *Improving Mediation*, *supra* note 65, at 270.

72. *See generally* Doering, *Impasse Issues in Teacher Disputes Submitted to Fact-Finding in New York*, 27 *ARB. J.* 1, 12-16 (1972) [hereinafter cited as Doering] for a description of state variations in fact-finding procedures. *See also* *Pickets at City Hall*, *supra* note 65; Simkin, *supra* note 65.

73. Anderson, *supra* note 6, at 967.

74. *See* Gould, *Public Employment: Mediation, Fact-Finding and Arbitration*, 55 *A.B.A.J.* 835, 837-39 (1969); Krinsky, *supra* note 68, at 468-69.

75. These and other considerations are discussed in B. POGREBIN, *New Trends in Public Employee Organizing and Bargaining* (1976); Doering, *supra* note 72; *Public Employee Strikes*, *supra* note 61, at 485 n.54.

dition, the fact-finder may incorporate specific statutory criteria.⁷⁶ Basically, the weight given to these criteria turns on the fact-finder's perception of his or her role. The fact-finder must decide whether to construct proposals which would produce a settlement or to act as a neutral intervenor who publishes the facts of the dispute and proposes equitable solutions.⁷⁷ In practice, the parties' attitude and public reaction to the particular bargaining situation define the fact-finder's role.

Statistics indicate the utility of fact-finding in resolving public sector labor disputes;⁷⁸ the success rate is particularly evident in teacher-school board negotiations.⁷⁹ For example, a study of the Wisconsin experience with fact-finding in teacher disputes⁸⁰ concluded that the low rate of teacher strikes and the high rate of party acceptance of the fact-finder's award demonstrated that this impasse resolution mechanism was highly regarded by both parties. However, later evaluations in Wisconsin revealed a reversal in this trend: the number of fact-finding petitions decreased and the frequency of strikes increased. Although teachers were the principal initiators of fact-finding, they were not hesitant to strike when the recommendations were not favorable. The Wisconsin study attributed this declining success rate to inherent weaknesses of the fact-finding process. As a dispute-resolution technique, fact-finding lacks finality and consequently disputants view it as merely an additional step in the bargaining process.⁸¹

76. See, e.g., VT. STAT. ANN. tit. 3, § 925(f) (1978), which directs the fact-finding panel to consider the following factors in making its recommendation: (1) prevailing wages and employee benefits for comparable work; (2) work schedules "as they relate to the employee's needs and the general public's requirement for continual service," and (3) "general working conditions as they compare with" prevailing safety standards and conditions.

77. See Doering, *supra* note 72; McKelvey, *Fact-Finding in Public Employment Disputes: Promise or Illusion?*, 22 INDUS. & LAB. REL. REV. 528 (1969) [hereinafter cited as McKelvey].

78. See Anderson, *supra* note 6, at 967-68; Krinsky, *supra* note 68, at 465 n.6.

79. See Gatewood, *Fact-Finding in Teacher Disputes: The Wisconsin Experience*, 97 (10) MONTHLY LAB. REV. 47 (1974); McKelvey, *supra* note 77. But see Dispute Settlement in the Public Sector: The State-of-the-Art, Report submitted to the U.S. Dep't of Labor, Div. of Public Employee Lab. Rel. (1971), which presents data suggesting that fact-finding continues to be efficacious in the private sector.

80. Gatewood, *Fact-Finding in Teacher Disputes: The Wisconsin Experience*, 97 (10) MONTHLY LAB. REV. 47 (1974).

81. A party may simply decide to strike regardless of the success of fact-finding. For example, in *In re Jersey City Educ. Assn.*, 115 N.J. Super. 42, 278 A.2d 206

Theoretically, fact-finding has several characteristics which could be highly advantageous in resolving bargaining impasses for teachers, and the public sector in general. Compared to mediation, fact-finding mandates a slightly greater degree of finality and aids negotiations by eliminating any factual disputes. Further, public publication of the report exerts pressure on the parties to settle.⁸² This trait appears to be particularly relevant to teacher-school board disputes where public accountability weighs heavily with both parties. Although rejection of the recommendation may preclude an agreement, mutual selection of the fact-finder and restriction of the initial publication of the report to the parties can substantially eliminate this problem.⁸³

Another suggestion to increase the efficacy of fact-finding as a strike substitute is to require binding recommendations. Strikes frequently follow the rejection of fact-finder's recommendations: many of these strikes would be prevented if the recommendations were made binding unless the impasse was resolved at that stage in the negotiations.⁸⁴ Indeed, Nevada⁸⁵ and Vermont⁸⁶ have implemented this approach. However, several commentators criticize this approach as effectively equivalent to binding arbitration,⁸⁷ although it is presented in the guise of the less controversial approach of fact-finding.

(1971), the parties successively employed mediation and fact-finding when negotiations reached an impasse. In the early stages of fact-finding, the teachers met and voted to strike.

82. Anderson, *supra* note 6, at 967-68; Bok & Dunlop, *Survey of Impasse Procedures and their Rationale*, in R. SMITH, H. EDWARDS & R. CLARK, *LABOR RELATIONS LAW IN THE PUBLIC SECTOR: CASES AND MATERIALS* (1974).

83. Krinsky, *supra* note 68, at 468-69.

84. *Id.* at 470.

85. This approach has been moderately successful. See Grodin, *Arbitration of Public Sector Labor Disputes: The Nevada Experiment*, 28 *INDUS. & LAB. REL. REV.* 89 (1974) [hereinafter cited as Grodin].

86. VT. STAT. ANN. tit. 3, § 925(i).

87. Fact-finding and arbitration are clearly distinguishable procedures. In fact-finding, a continuous possibility of voluntary settlement exists and the measure of success is the acceptability of the recommendations. By contrast, the equity of the claims determines the success of arbitration. Nonetheless, the two procedures often overlap with respect to the type of investigation, the scope of the parties' stipulation, and some of the criteria used. Anderson, *supra* note 6, at 966.

C. Arbitration

In contrast to mediation and fact-finding, arbitration⁸⁸ involves a hearing before a specially selected board. At this hearing, each party summarizes its position on the issues, presents supporting evidence, and submits briefs to the arbitrator. The arbitrator then produces an award supported by a written opinion. Depending on the operative statute, the arbitrator's award may or may not bind the parties. If the award binds the parties, arbitration settles the collective bargaining dispute.⁸⁹ In addition to the issue of whether the arbitrator's award will be binding, state statutes vary as to which group of public employees may invoke the procedure, the timing of the award, the composition of the panel, and the terms and limitations of the award.⁹⁰

Considered to be an effective strike substitute in the public sector,⁹¹ "arbitration zeroes in on the causes of the impasse, seeking to dissolve it before it ripens into a strike. Because most public work stoppages involve quarrels over contract provisions during negotiations, . . . arbitration is a suitable means of preventing public sector work stoppages."⁹² Although arbitration is relatively new to the public

88. For a concise description of what actually occurs during arbitration, see Gershenfield, *Compulsory Arbitration is Ready when You Are*, 23 LAB. L.J. 153, 156-58 (1972); Gould, *The Arbitration Process in the U.S.*, 28 ARB. J. 111, 114-15 (1973); *Comprehensive Approach*, *supra* note 10. There are two basic kinds of arbitration—interest arbitration and grievance arbitration. Interest arbitration concerns impasses in producing a collective bargaining agreement and is the subject of this Note. Grievance arbitration is primarily a means to resolve disputes arising from the collectively bargained-for agreement. See Gould, *Substitutes for the Strike Weapon: The Arbitration Process in the U.S.*, 28 ARB. J. 111, 112-13 (1973).

89. When the arbitrator's decision does not bind the parties, this procedure fails to resolve the impasse. Arbitration then becomes another step to be taken before a union exhausts all available alternatives and may strike. A teacher strike following the school board's rejection of the arbitrator's decision in *School Comm. v. Westerly Teachers Ass'n.*, 111 R.I. 96, 299 A.2d 441 (1973), illustrates this problem with non-binding arbitration.

90. For a thorough examination of the variations among state statutes, see McAvoy, *Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector*, 72 COLUM. L. REV. 1192 (1972) [hereinafter cited as McAvoy].

91. See Anderson, *Compulsory Arbitration in Public Sector Dispute Settlement*, in R. SMITH, H. EDWARDS & R. CLARK, *LABOR RELATIONS LAW IN THE PUBLIC SECTOR: CASES AND MATERIALS* (1974); Horton, *Arbitration, Arbitrators and the Public Interest*, 28 INDUS. & LAB. REL. REV. 497 (1975) [hereinafter cited as Horton]; Wellington & Winter, *The Unions and the Cities*, in R. SMITH, H. EDWARDS & R. CLARK, *LABOR RELATIONS LAW IN THE PUBLIC SECTOR: CASES AND MATERIALS* (1974).

92. *Comprehensive Approach*, *supra* note 10, at 780 (1973).

sector, the use of this mechanism has increased substantially.⁹³ In fact, a trend toward more frequent use of arbitration (particularly compulsory arbitration) in the public sector has appeared.⁹⁴ Proponents of the continued expansion of this technique in the public sector cite its deterrent effect on strikes as its major attribute.⁹⁵ As a result of arbitration's efficacy as a strike substitute and its accommodation of the political and economic needs of the public sector, the increased use of this impasse resolution technique is likely to continue.⁹⁶

Arbitration in the public sector usually takes the form of "last final offer arbitration," by "issue" rather than by "total package."⁹⁷ As its name implies, last final offer arbitration requires each side to submit its final offer—either in toto or by each distinct issue—to the arbitrator who then chooses the most reasonable proposition.⁹⁸ Commentators have suggested that last final offer arbitration is particularly well-suited to meet the demands of teacher-school board negotiations, which include "the teachers' individuality, their inexperience in collective bargaining, their militancy and adamance, and the many policy considerations, such as class size, which retard the progress of negotiations each year."⁹⁹

Despite the fact that last final offer arbitration addresses some of

93. See Boyd, *Arbitration vs. Bargaining*, St. Louis Post-Dispatch, Sept. 3, 1978, § 1-1 of (News Analysis) at 1, col. 1. This article describes the increased use of arbitration in both public and private sector labor disputes. The author focuses on changes in union and management attitude toward this device and analyzes the theories behind the pros and cons of arbitration.

94. *Id.*

95. Proponents of the use of arbitration in public sector disputes include the leaders of the American Federation of State, County and Municipal Employees (AFSCME). The leadership of AFSCME supports the use of arbitration in contract disputes for public employees working in emergency-care situations. *Id.*

96. For such predictions, see Horton, *supra* note 91, at 497-98; Boyd, *Arbitration vs. Bargaining*, St. Louis Post-Dispatch, Sept. 3, 1978, § 1-1 of (News Analysis) at 1, col. 1.

97. Last final offer arbitration by issue permits the arbitrator to choose the most reasonable of each of the separate issues which comprise the final award. This method is more flexible than total package last final offer arbitration where the award may contain some unreasonable issues. Clark, *supra* note 29, at 119; Garber, *Compulsory Arbitration in the Public Sector: A Proposed Alternative*, 26 ARB. J. 226, 232 (1971) [hereinafter cited as Garber]; *Impasse Resolution*, *supra* note 8, at 592-93.

98. Clark, *supra* note 41, at 119; Garber, *supra* note 97, at 232; *Impasse Resolution*, *supra* note 8, at 592-93.

99. *Impasse Resolution*, *supra* note 8, at 592-93.

the factors peculiar to teacher-school board impasses, this technique has generally been challenged on the same grounds as arbitration. Since arbitration transfers much of the decision-making authority from the parties to the neutral arbitrator, arbitration is often challenged and struck down as an unconstitutional delegation of legislative policy and budgetary determinations.¹⁰⁰ However, the inclusion of statutory criteria¹⁰¹ for the arbitrator and the increased acceptance of arbitration among modern courts¹⁰² may sap the strength of this

100. "[T]he employer-employee relationship in government is a legislative matter which may not be delegated. Such contracts if permitted to stand would result in taking away from a municipality its legislative power to control its employees and vest its control in an unrelated and uncontrolled private organization (a union)." *Fellows v. LaTronica*, 151 Colo. 300, 305, 377 P.2d 547, 550 (1962). See also *Board of Educ. v. Rockford Educ. Ass'n.*, 3 Ill. App. 3d 1090, 1093, 280 N.E.2d 286, 287 (2d Dist. 1972) ("a board of education does not require legislative authority to enter into a collective bargaining agreement. . . . However, a board may not, through a collective bargaining agreement or otherwise, delegate to another party those matters of discretion which are vested in the board by statute"); *St. Paul Professional Employees Ass'n. v. City of St. Paul*, 303 Minn. 106, 109, 226 N.W.2d 311, 313 (1975) (because defendant city refused to proceed to arbitration pursuant to state statutory provisions and union request, court found that city committed an unfair labor practice and affirmed the order requiring statutory compliance); *State ex rel. Everett Fire Fighters Local v. Johnson*, 46 Wash. 2d 114, 121, 278 P.2d 662, 666 (1955) (court held that arbitration would be an "abdication" of official responsibility since "the council would be stepping out of the picture entirely and the arbitration board would be performing a function which, by law, is the responsibility of the council."). See generally *McAvoy*, *supra* note 90.

101. *Dearborn Firefighters Union Local 412 v. City of Dearborn*, 42 Mich. App. 51, 56, 201 N.W.2d 650, 652 (1972) (in upholding the constitutionality of the Michigan public sector labor relations statute, the court ruled that the statutory standards were sufficient to limit the arbitrator's authority); *City of Warwick v. Warwick Regular Firemen's Ass'n.*, 106 R.I. 109, 117-18, 256 A.2d 206, 211 (1969), in which the court upheld the arbitrator's standards in the Rhode Island Firefighters' Arbitration Act as sufficiently specific to sustain the statute's constitutionality. The standard involved a comparison of wage, hours, and employment conditions with several local trades and with firefighters of comparable cities. Additionally, the arbitration must balance the public welfare against job hazards and requisite training.

102. For example, the court in *Danville Bd. of School Directors v. Fifield*, 132 Vt. 271, 275, 315 A.2d 473, 475 (1974), stated that "[a]rbitration as a way of settling claims against municipalities has long been recognized by this court." The court then proceeded to note "the trend on both judicial and legislative action to employ arbitration as an inexpensive and reasonably amicable method of conflict resolution." *Id.* See *State ex rel. Firefighters v. City of Laramie*, 437 P.2d 295, 304 (Wyo. 1968) (court upheld Wyoming statute which required arbitration of firefighter labor disputes); *Local 1226 Rhinelander City Employees v. City of Rhinelander*, 35 Wis. 2d 209, 215, 151 N.W.2d 30, 33-34 (1967) (court upheld arbitration clause in collective bargaining agreement for city water department).

argument.

In addition to the delegation arguments, parties also pose challenges to arbitration based upon general Due Process principles.¹⁰³ Still others criticize arbitration as discouraging responsible and serious collective bargaining.¹⁰⁴ However, commentators and statistical indicators¹⁰⁵ seriously challenge each of these arguments because arbitration is effective in resolving public sector labor disputes. Although disputants may regard arbitration as a less desirable means of resolving public sector (and particularly teacher) labor disputes than mediation or fact-finding, its use is increasing.¹⁰⁶

Public sector labor relations statutes usually include arbitration as the final step in a series of procedures which parties may invoke to resolve disputes without resort to the strike. Most state statutes implement the "arsenal of weapons" approach to public sector dispute resolution which includes mediation, fact-finding, and arbitration.¹⁰⁷ However, the continually high incidence of public sector strikes has subjected this approach to criticism as ineffective. One commentator identifies "poor timing, inadequate staffing, haphazard application, and the absence of a comprehensive and integrated approach to the settlement of labor disputes"¹⁰⁸ as the source of the inadequacy of these statutory programs.

D. *The Comprehensive Approach*

A small number of jurisdictions have already incorporated a proposed improvement to the current approach into their statutes.¹⁰⁹ This proposal calls for the implementation of a comprehensive program which would include the typical impasse resolution devices, sanctions to ensure their proper use, and a separate agency to administer the program. Such an approach offers several advantages. The-

103. See generally McAvoy, *supra* note 90.

104. See, e.g., Garber, *supra* note 97; McAvoy, *supra* note 90; *Prevention of Strikes*, *supra* note 27.

105. See, e.g., Gould, *Public Employment: Mediation, Fact-Finding and Arbitration*, 55 A.B.A.J. 835 (1969); Grodin, *supra* note 85.

106. See Boyd, *Arbitration vs. Bargaining*, St. Louis Post-Dispatch, Sept. 3, 1978, § 1-1 of (News Analysis) at 1, col. 1.

107. See generally *Prevention of Strikes*, *supra* note 49; *Comprehensive Approach*, *supra* note 10.

108. *Prevention of Strikes*, *supra* note 27, at 289.

109. See *Comprehensive Approach*, *supra* note 10, at 786.

oretically, this program would address itself to the problems of public sector labor relations in general as well as to the problems of each particular jurisdiction. Since it would enforce a unified and comprehensive labor policy at each step in the collective bargaining process, the program would also promote effective resolution of those disputes. There are several problems with this proposal, however. Each state legislature must resolve questions of funding, determine how extensive the act will be, and convince the public of the desirability of an additional layer of bureaucracy prior to successful implementation of a comprehensive program.

The integrated, watchdog nature of the comprehensive approach to public sector labor relations represents an attempt to resolve disputes without resort to strikes. Nevertheless, it is questionable whether this approach can successfully achieve its goal. The comprehensive approach relies on the same techniques of mediation, fact-finding, and arbitration which have already proven to be inadequate strike remedies. It is not clear how or why the addition of a comprehensive enforcement agency will remedy the defects of the usual impasse resolution devices and produce equitable collective bargaining agreements without the right to strike. This approach fails to resolve the basic flaw in the methods currently employed: the absence of the strike weapon as a bargaining tool in mediation, fact-finding, and arbitration shifts the weight of the bargaining positions to favor the employer. The comprehensive approach merely changes the available methods of settling disputes but does not attack the source of the problem.

IV. THE RIGHT TO STRIKE

Fundamental to collective bargaining, the right to strike is as vital to public sector unions as it is to unions in the private sector. In particular, public school teachers need the leverage of the right to strike to effectively bargain with the school boards. A credible strike threat equalizes the parties' bargaining positions so that collective bargaining, as the bilateral determination of an agreement, can operate effectively. Without the right to strike to back up their demands, teachers and other public employees will continue to be at a disadvantage in negotiations.¹¹⁰ In fact, in the public sector, "the denial of the right to strike has the effect of heavily weighing the collectively

110. In addition, agreements reached during an illegal strike often are not binding if later challenged by the school board. However, the California Supreme Court re-

bargaining process in favor of the government.”¹¹¹ Under no-strike laws, “public employees are merely able to make suggestions and recommendations which the employer will be free to reject without fear of reprisal.”¹¹² Denying public employees the right to strike nullifies the right to bargain collectively.

Without the right to strike, the likelihood of impasses in negotiations increases. The basic power positions of the parties determines the incidence of strikes during collective bargaining sessions.¹¹³ Some commentators argue that the right to strike deters the occurrence of strikes by equalizing the parties’ bargaining positions; when the parties are equal, recognition of union demands does not necessitate a strike.

When the union is secure and legally protected in its right to strike, the employer—aware of his own power to influence the strike decision—can be expected to exercise great sensitivity toward the bargaining process. “[N]o-strike laws, on the other hand, tend to make the employer dull to the danger signals, thus enhancing the likelihood of a bargaining breakdown.”¹¹⁴

Similarly, in teacher-school board negotiations, the absence of a right to strike distorts the bargaining process. Because of an inherent bargaining advantage, the school boards do not always consider teachers’ demands seriously. Consequently, school boards presume that they can prevent recognition of teacher demands by invoking the no-strike law.

Teachers, however, possess an advantage over other public employees when they illegally assume the right to strike: teachers incur no economic hardship because state statutes require them to satisfy a minimum number of work days. At the end of an illegal strike, school districts extend the school year into the summer. As a result, the public—not the teachers—is most susceptible to the disruptive effects of the strike. Thus, unlike other public employees, teachers are especially likely to assert a right to strike. This peculiar feature of

cently upheld a contract negotiated under strike conditions. *City and County of San Francisco v. Cooper*, 13 Cal. 3d 898, 534 P.2d 403, 120 Cal. Rptr. 707 (1975).

111. *Timberlane Regional School Dist. v. Timberlane Regional Educ. Ass’n.*, 114 N.H. 245, 249, 317 A.2d 555, 557 (1974).

112. *Moskow & McLennan*, *supra* note 6, at 287.

113. *See Bers*, *The Right to Strike in the Public Sector*, 21 LAB. L.J. 482, 482-83 (1970).

114. *Bilik*, *supra* note 42, at 347.

teacher strikes emphasizes the need for a legitimate strike right to equalize bargaining positions before the parties reach an impasse. The effective and circuitous routes of the various impasse resolution techniques cannot prevent strikes and promote negotiated agreements as effectively as the simple device of granting teachers a right to strike.

A. *A Qualified Right to Strike*

A statutory qualified right to strike exists in five states for certain classes of public employees including teachers.¹¹⁵ Numerous commentators have also proposed a right to strike for public employees.¹¹⁶ Most of the right to strike advocates recommend a qualified right to strike rather than an absolute option. These proposals present various formulas. The most common suggestion employs a functional approach to the public employee strike right in which the availability of the right to strike for public employee groups depends upon the function of the particular workers. This proposal usually involves differentiation based on "essential" and "non-essential" employees.¹¹⁷ The obvious problem with such an approach is the difficulty of distinguishing essential from non-essential government services.¹¹⁸ When examined from the viewpoint of the working parent relying on the caretaking function of schools, uninterrupted delivery of education could be deemed essential. It is questionable whether such a standard provides a fair method for determining wages and labor conditions.¹¹⁹ In fact, "this distinction puts a premium upon an employee group's capacity to injure the public."¹²⁰ Most importantly, it would be politically impossible to implement this standard.¹²¹

A second criteria for permitting a qualified right to strike employs

115. See note 39 and accompanying text *supra*.

116. Bilik, *supra* note 42, at 116. See, e.g., Kheel, *supra* note 6, at 941; Zack, *supra* note 7, at 82.

117. See *Teacher Strikes in Connecticut*, *supra* note 7, at 184-85; *Prevention of Strikes*, *supra* note 27, at 271.

118. Anderson, *supra* note 6, at 951; Moskow & McLennan, *supra* note 6, at 293.

119. Anderson, *supra* note 6, at 951.

120. *Id.* at 952.

121. Several commentators emphasize this problem. See, e.g., Anderson, *supra* note 6, at 952; Moskow & McLennan, *supra* note 7, at 293.

a governmental-proprietary distinction.¹²² This proposal would deny the right to strike to those public employees in jobs which serve a purely governmental function, while permitting strikes for those workers employed in purely proprietary services. The ambiguity inherent in such a standard is evident from the school system which is both privately and publicly operated. In addition, similar to the problems with the essential/non-essential standard, both the equity of this standard and the feasibility of implementing it are open to serious question.

Another standard for allowing a limited right to strike involves the notion of the public welfare.¹²³ This proposal would permit public sector strikes unless or until the government-employer demonstrates that the strike threatens the public health, safety, or welfare.¹²⁴ This approach would define "public welfare" as property loss, the threat of violence, physical injury to the public, and threat to the life and health of the public.¹²⁵ When implemented, this standard would permit an extended teacher strike. Yet, as with the other proposals, the vagueness of this standard appears to undermine its efficacy.

B. *A Proposal*

Relatively few commentators have urged an absolute right to strike for public sector employees¹²⁶ despite the fact that the quest for true collective bargaining and general principles of equity would seem to mandate such an approach. The absolute strike right does not seem to be a politically feasible solution. Instead, a limited right to strike seems to be the best alternative.

122. This distinction is discussed in *Teacher Strikes in Connecticut*, *supra* note 7, at 181-82.

123. Several commentators have presented this proposal. See, e.g., Kerman, *supra* note 10, at 42-43; Kheel, *supra* note 6, at 940-41; *Striking a Balance*, *supra* note 26.

124. This standard is incorporated into the Pennsylvania public employee labor relations statute. Pursuant to this law, after exhausting negotiation and mediation procedures, teachers may strike "unless or until such a strike creates a clear and present danger or threat to the health, safety or welfare of the public." PA. STAT. ANN. tit. 43, § 1101.1003 (1970) (Purdon).

125. See Kerman, *supra* note 10, at 42-43.

126. Two noted commentators propose an absolute right to strike. See Anderson, *supra* note 7, at 951-52 (a qualified strike right creates more problems than it solves); Bilik, *supra* note 30, at 356 ("the unrestricted right to strike is a more reliable deterrent to irresponsible action than is the restrictive statute . . . internal restraints are more compelling").

The most persuasive approach to the development of a limited public sector right to strike involves the utilization of the "non-stoppage" and "graduated" strike.¹²⁷

In a non-stoppage strike, operations continue as usual. However, both the union and the employer make payments into a special penalty fund created from contributions based upon a specified percentage of total cash wages. The fund would then be beyond recapture by either party. Thus, while both parties would be under pressure to settle, there would be no disruption of service.¹²⁸ Students could complete their education without interruption and parents could maintain job and vacation schedules without disruption. Pursuant to this proposal, a union would have the option to initiate the mechanism and thereby increase union bargaining power by applying steady and potentially increasing pressure upon the government to settle while giving the government adequate time to adjust to a proposed settlement. This pressure, while effective, would then stop short of public crisis.¹²⁹

A non-stoppage strike would serve the needs of both the teachers and the school board. Teachers would obtain the required bargaining leverage and school boards would be able to maintain delivery of their services. Further, this proposal would eliminate the teachers' bargaining advantage of pressuring the school board by striking without incurring the usual economic harm. In short, the non-stoppage strike would provide a bargaining tactic equivalent to a public sector strike.

In a graduated strike situation, the "employees would stop working during portions of their usual work week and would suffer comparable reductions of wages."¹³⁰ As its name suggests, the work-halt could be increased in stages, when additional pressure is needed. This technique would pressure both parties to settle, but the "decrease in public service would not be as sudden or complete as in the conventional strike."¹³¹ Although this proposal would not be as palatable to the public in the teacher-school board context as would the non-stoppage strike, it still provides a valuable alternative. Parties could use this procedure when the non-stoppage strike fails to

127. This theory is persuasively presented in Bernstein, *supra* note 42, at 470-74.

128. *Id.* at 470.

129. *Id.* at 471-73.

130. *Id.* at 470.

131. *Id.*

produce a settlement or in situations where the history of the particular teacher association and school board indicate a need for a stronger bargaining tool.

Both the non-stoppage and graduated strike proposals would give teacher unions sufficient leverage to ensure effective collective bargaining but would also prevent any debilitating interruption of public services.¹³²

The devices, which could also work in tandem,¹³³ appear to be relatively easy to implement as well as politically acceptable. Further, because these proposals are specifically tailored to some of the peculiarities of public sector labor relations, the non-stoppage and graduated strike proposals promise to operate effectively.

V. CONCLUSION

It is possible to give teachers and other public employees a right to strike—a right which teachers currently exercise in defiance of both legislative mandate and the general integrity of the law—and still protect the public welfare. The teachers' union would have sufficient leverage at the bargaining table to force the government-employer to negotiate, but this pressure would not occur at public expense. Additionally, according public employees the right to strike could substantially reduce the incidence of public school teacher strikes since the strike threat itself should sufficiently pressure the school board to negotiate equitably. Compared to the ineffective and circuitous routes of typical strike substitute statutes, a statutory grant to teachers of the right to strike would be a direct and effective means of avoiding school closings and producing collectively negotiated settlements which embody the needs of both parties. Such a change would prompt negotiations between co-equal parties and would effectuate true collective bargaining.

132. *Id.* at 470-74.

133. *Id.* at 470.

COMMENTS

