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Public Policy and the Law Relation to Collective Bargaining in the Public Service

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I APPROACH the subject of this paper by cautioning that the monolithic implication of the title is deceptive. It is questionable whether there is a public policy relating to collective bargaining in the public service, because a settled community attitude, implicit in any statement of public policy, is totally lacking. If public policy could be discovered, however, its substance would be a mosaic of many policies scattered among numerous governmental jurisdictions, both state and federal. Any attempt to define the law applicable to public employee collective bargaining encounters not only this expected problem of diversity but also an almost hopeless task of crystallizing a statement of the law prevailing in any given jurisdiction. This crystallization is not easily achieved because the law—or laws—affecting the rights and liabilities of public employees with regard to collective bargaining and the forms and implications of such bargaining are now undergoing substantial metamorphosis.

These changes are taking place not only in the legislative and judicial forums but also in the popular forum, where the operation of a law may show little resemblance to the letter of the law. This has been particularly evident in the operation of state laws prohibiting strikes among public employees. Notwithstanding such prohibitions, strikes have been occurring with increasing frequency and, from the standpoint of the employees and unions involved, with increasing success, although it is unlikely that any of these strikes would be termed successful from the standpoint of the immediate welfare or convenience of the public. From such experiences, both the public and the public officials concerned should have learned that however desirable it may be to prohibit strikes in the public sector, merely passing a law outlawing such strikes may not be the best way to prevent them. In fact, the very existence of laws prohibiting such strikes, and particularly laws providing no adequate substitute, often serves to stimulate rather than deter strike activity among public employees.

Note the experience in New York. In 1947 the Condon-Wadlin Act was passed. It emphasized harsh penalties for public employees who engaged in a strike. Notwithstanding those penalties, numerous strikes—most notably the New York City transit strike of 1966—did occur. That

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1 Federal and state laws are discussed in the text accompanying notes 30-48 infra.
2 For a general discussion of the rash of strikes in the public sector, see Time, March 1, 1968, at 34.
twelve-day strike cost New Yorkers an estimated one billion dollars, mainly in lost wages and retail sales. An injunction against the strike and the imprisonment of its leaders for contempt proved futile. In 1967 Condon-Wadlin was replaced by the Taylor Act. This new law guaranteed public employees the right to organize and to engage in collective negotiations, established a system of mediation and fact-finding to aid in settling public employee labor disputes, and provided severe penalties against unions responsible for public employee strikes. However, the Taylor Act’s fate was easy to predict. As one commentator put it:

[T]he president of the New York teachers’ union could be sent to prison for ordering a violation of the no strike order. If he is not, this will make a dead letter of the law upon the first instance of its being tested. But if he is sent to prison, he will become a martyr, and greatly enhance the cause of the public employee, making him willing to strike again, even in violation of the law.

This prediction became fact when 49,000 New York teachers struck in September 1967. Their strike lasted almost three weeks, their union was fined $150,000, and their local union president, Albert Shanker, served fifteen days in jail. This bold strike achieved a significant breakthrough in public sector labor relations by demonstrating to schoolteachers all over the nation that collective bargaining, backed by a willingness to strike, could achieve for them what lofty ideals and tax-conscious school boards ordinarily could not deliver. Thus, the no-strike provisions of the Taylor Act were relegated, like the corresponding provisions of Condon-Wadlin and like “prohibition” under the Volstead Act, to the assemblage of laws which have been more honored in their breach than in their observance.

6 Id. § 202.
7 Id. § 205.
8 Id. §§ 210-11.
11 Raskin, How To Avoid Strikes by Garbagemen, Nurses, Teachers, Subwaymen, Welfare Workers, Etc., New York Times Magazine, Feb. 25, 1968, at 34. As this Article goes to press, the New York City schoolteachers—53,000 of them out of 57,000—are once again on strike under the leadership of Albert Shanker, who commented “that the strike would be ‘bigger and more effective’ than any before . . . . [W]e must get complete protection for the teachers before we go back,” N.Y. Times, Sept. 13, 1968, at 53, col. 3 (city ed.). With regard to the consequences of the strike, he stated, “I did not enjoy the fifteen days I spent in jail for last year’s strike and I’m sure I won’t enjoy it next time . . . .” N.Y. Times, Sept. 10, 1968, at 1, col. 8 (city ed.).
13 The delegates to the Representative Assembly of the Association of Classroom Teachers in 1968 heard the retiring ACT President predict “greater militancy than we have seen even in 1967—responsible militancy . . . classroom teachers and militant professional associations ready to fight for those conditions that provide high-quality education for children.” NEA Reporter, July 19, 1968, at 3, col. 1. The ACT delegates passed a resolution recognizing the right of teachers to withdraw services in cases “(a) where conditions make it impossible for teachers to provide quality education, (b) where alternate means to rectify such conditions have been conscientiously explored, and (c) where solutions have been proposed but not consummated.” The resolution further called on local and state associations to work to obtain repeal of state laws prohibiting withdrawal of services. NEA Reporter, July 19, 1968, at 3, col. 2.
14 National Prohibition Act of 1919, ch. 85, § 1, 41 Stat. 305.
15 For a more optimistic appraisal of the no-strike provisions of the Taylor Act, see Raskin, supra note 11, at 34.
Other New York city employees also took notice. The president of State, County and Municipal Employees Union, District 37, which represented 50,000 employees of the City of New York, announced that "[i]f Al Shanker goes to jail, the pressure is on others, too. It becomes a dare, like a threat to knock the chip off my shoulder."16 Indeed, the threat of jail failed to forestall a nine-day strike by New York City's sanitation employees, a strike which created a political stench that permeated far beyond that metropolis.17

The New York experiences were dramatic but not unique. In 1966 there were 142 strikes by public employees throughout the United States. In 1967 the figure climbed to more than 250,18 all of which were technically illegal. In the state of Florida, for instance, where schoolteachers may not lawfully strike19 and where, unlike New York, there has never been a strong labor union tradition, several thousand teachers under the leadership of their "professional association"20 recently joined in a statewide "mass resignation." The public, however, called this action a strike.21 And in the state of Tennessee the issuance of an injunction22 did not deter the sanitation employees of Memphis from following the example of their New York brethren with a prolonged and bitter strike.23

This breakdown of state laws24 which forbid strikes by public employees presents a weighty social problem. Although the states, through their police power, have the legal authority to legislate against work stoppages that endanger the health, safety, and welfare of the public,25 our present concern is more with enforceability than with authority. An unenforce-

16 Missouri Teamster, Feb. 16, 1968, at 4, col. 5.
17 N.Y. Times, Feb. 13, 1968, at 1, col. 6 (city ed.). In appraising the no-strike provision of the Taylor Act, it should be noted that some commentators feel that it was not adequately tested in the teachers' and sanitation workers' strikes because the teachers' dispute was in its critical phase before the law became effective, and the sanitation dispute was in the purview of New York City's new Office of Collective Bargaining. N.Y. Times, May 5, 1968, at 82, col. 1 (city ed.).
18 TIME, March 1, 1968, at 34.
19 FLA. STAT. ANN. § 839.21 (1965).
20 The Florida Education Association is the National Education Association affiliate in Florida.
22 Tennessee has no statute prohibiting strikes by public employees. In the Memphis strike of sanitation workers beginning in February, 1968, Mayor Loen obtained an extension of a state court's injunction issued in 1966 against strikes by the American Federation of State, County and Municipal Employees. N.Y. Times, Feb. 26, 1968, at 27, col. 1 (city ed.).
23 It was the Memphis sanitationmen's strike which brought the Rev. Dr. Martin Luther King, Jr., to Memphis, where he was assassinated on April 4, 1968. N.Y. Times, April 5, 1968, at 44, col. 1 (city ed.). His death was a harsh price to pay for the agreement of April 16, 1968, ending the two-month strike and insuring union recognition to the sanitationmen. N.Y. Times, April 17, 1968, at 1, col. 2 (city ed.).
24 Laws forbidding public employee strikes are increasingly failing to command voluntary compliance, and compulsory enforcement is proving politically unfeasible. However, this observation is not applicable to federal employment. See note 36 infra, and discussion in part II infra. There may also be a difference, though only in degree and timing, among various states depending upon the strength and militancy of their respective labor union traditions.
25 For a discussion of the scope of a state's police power, see Jacobson v. Massachusetts, 197 U.S. 11, 25 (1901). In City of Detroit v. Street Employees Div. 26, 312 Mich. 237, 51 N.W.2d 228, appeal dismissed, 144 U.S. 805 (1952), the Supreme Court of Michigan upheld the constitutionality of a statute forbidding public employees from striking. Cf. Dorsey v. Kansas, 272 U.S. 306, 311 (1926), in which Mr. Justice Brandeis wrote that "Neither the common law, nor the 14th Amendment, confers the absolute right to strike."
able law is a bad law." The argument that the law should be obeyed may be correct in the abstract. But tested pragmatically, if the rule of law is to work, the law itself must be workable. When laws are inherently unenforceable they serve only to repudiate the basic legal system, and public respect for law and order is undermined. The problem, therefore, is to devise workable statutes which safeguard both the welfare of the public and the welfare of the public employee.

To this end, this commentary will (1) explore why existing state laws against strikes by public employees are generally ineffective; (2) attempt to define what public policy in this area ought to be; and (3) attempt to outline the essentials of a statutory scheme which might implement that policy.

I. UNIONIZATION OF PUBLIC EMPLOYEES AND THE INSTITUTION OF COLLECTIVE BARGAINING

Why have the laws prohibiting strikes by public employees so often failed? Why did New York's seemingly comprehensive Taylor Act, designed to guarantee the benefits of collective bargaining to public employees while also protecting the public from strikes, break down?

According to mediator Theodore W. Kheel, an on-the-scene observer, "the [Taylor] law appears to invite unions to threaten to violate the law . . . By prohibiting strikes of public employees, the law eliminates collective bargaining, which implies the right of the buyer or seller to refuse to buy or sell by a strike or a lockout." The right of a union to strike, and to a lesser extent, the right of an employer to lock out, are generally considered essential to collective bargaining in the private sector. But are they also essential in the public sector? This is the basic question which must be faced in attempting to devise a system of collective bargaining for public employees.

Before such an attempt is made, however, the present situation should be disected and the divergent parts bared to realistic scrutiny. In particular, existing state laws should be examined in the light of the extent of public employee unionism, the factors stimulating the growth of unions in the public sector, and the example of collective bargaining in the private sector.

20 From a sociological standpoint, an unenforceable law may not even be a law, if a law is defined as:

[A] rule of human conduct that the bulk of the members of a given political community recognize as binding upon all its members—this recognition being induced by certain factors such as a general obedience to the rule, the organization of sanctions for its enforcement and of procedures for its interpretation and application, and a general conviction of the rightness of the rule (or of the end it is apparently designed to promote), especially when this conviction is reinforced by the knowledge that others believe it right or at least act in accordance with it.


21 N.Y. Times, Jan. 7, 1968, § 1, at 1, cols. 2, 3.


Framework of Existing Law. Although the organization of public employees into unions is not new, collective bargaining in the public sector is of recent origin. At the state level, Wisconsin, in 1959, was first to formalize the process. In the federal service unions until recently generally relied upon lobbying and political influence as the only means of achieving their economic goals. This pattern of union activity was changed to some extent by President Kennedy’s issuance of Executive Order No. 10988 in 1962. That order granted federal employees the right to form, join, and assist any employee organization, to refrain from engaging in such activity, and provided for various forms of union recognition. It also provided for limited collective negotiations as to working conditions, standards for promotion, grievance procedures, and as to other matters which did not conflict with merit system principles or infringe upon an agency’s mission, budget, organization and assignment of personnel, or the technology under which its work is performed. Federal employees are prohibited from striking by explicit statutory provisions. Executive Order No. 10988 naturally spurred the growth of unionism among federal employees. Additionally, in conjunction with Wisconsin’s pioneering statute of 1959, the Order set the stage for a spurt of state legislation establishing specialized forms of collective bargaining for unions representing public employees at the state and local level.

Several states, within the last few years, have passed detailed statutes which (1) protect the right of public employees to engage in or to refrain from engaging in union activity, (2) provide for recognition of unions in public employee bargaining units and for collective bargaining by these

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Footnotes:

30 Federal employees have had local union representation since 1863; the National Association of Letter Carriers was organized in 1889. Note, Labor Relations in the Public Service, 75 Harv. L. Rev. 391, 392 (1961). And see R. Doherty, Mailman, U.S.A. 31 (1960).
32 For years public employees, both state and federal, have engaged in political lobbying to obtain concessions from their public employers. For example, this method has been used successfully by the firefighters in Texas to exact detailed legislation covering working conditions for both firemen and policemen. Tex. Rev. Civ. Stat. Ann. art. 1269m (1961).
34 Id. § 1(a), at 151.
37 See Stieber, Collective Bargaining in the Public Sector, in CHALLENGES TO COLLECTIVE BARGAINING 65, 68 (L. Ulman ed. 1967). Such state legislation has an impact on union growth. For example, under New York’s Taylor Act, N.Y. Civ. Serv. Law §§ 200-12 (McKinney Supp. 1967), 600,000 of a total of 900,000 state and local public employees are now represented by unions. According to Dr. Robert D. Helsby, Chairman of the New York Public Employment Relations Board, 260,000 public employees have exercised their rights of union representation since the law went into effect. N.Y. Times, May 5, 1968, at 82, col. 1 (city ed.).
unions, aided by various forms of mediation and fact finding but without the right to strike, and (3) establish administrative machinery to enforce and administer these provisions. In still other states similar provisions have been extended to selected public employee groups. Several additional states guarantee public employees a statutory right to belong or not to belong to a labor union. However, most states have no statutes expressly governing the right of public employees to belong to labor unions or to engage in collective bargaining.

The Texas Act is a study in inconsistencies. It, like New York's Condon-Wadlin Act and several similar statutes in other states, was passed in 1947, the year Taft-Hartley and many of the state "right-to-work" laws were enacted. The Act prohibits a public body from entering into a collective bargaining contract or from recognizing a labor organization as bargaining agent for any group of public employees. But the same Act guarantees (1) that public employment shall not be denied "by reason of membership or nonmembership in a labor organization," and (2) that public employees shall have the right "to present grievances concerning their wages, hours of work, or conditions of work" through a union representative (so long as it does not claim the right to strike). A recent

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44 Id. § 2.
45 Id. § 4.
46 Id. § 6. Strikes and organized work stoppages of public employees are expressly prohibited. Id. § 3.
Texas statute compounded the inconsistency by permitting governmental employers to check-off union dues for their employees, but recognition of, or collective bargaining with, the union-recipient of the dues is still legally unavailable.

The minimum rights extended by the Texas statute—the right of public employees to belong to unions and to present grievances—are essentially the rights of free speech, assembly, and petition which should be protected by the United States Constitution regardless of statute. If so, the right of a Texas public employee to belong to a labor organization would be basically the same as that of a Memphis garbage collector in the state of Tennessee, where such an explicit statutory right does not exist. Although a direct test of such rights may never be presented, several recent Supreme Court decisions imply that they are guaranteed by the first and fourteenth amendments.

In *NAACP v. Alabama* the Supreme Court, noting the "close nexus between the freedoms of speech and assembly," struck down a state statute which required disclosure of an organization's membership. The Court emphasized that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . ." In *Shelton v. Tucker*, a case involving an Arkansas statute that required school teachers to disclose every organization to which they had belonged or regularly contributed, the Court declared that "to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." The court, therefore, held the statute invalid under the fourteenth amendment, though recognizing that the state's legitimate objective of protecting itself from incompetent teachers could be achieved by more specific means which would not broadly stifle fundamental personal liberties.

In *Keyishian v. Board of Regents* the Court declared that "the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." This view was reconfirmed in *Pickering v. Board of Education*, decided at the close of the last term of Court. The latter case involved the dismissal of an Illinois schoolteacher because he had written and published

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50 Id. at 460.
52 364 U.S. at 485-86.
54 Pickering v. Board of Educ., 88 S. Ct. 1731 (1968). And see Watts v. Seward School Bd., 88 S. Ct. 1731 (1968), a per curiam opinion vacating and remanding for further consideration in light of *Pickering*. The facts in *Watts* involved a form of concerted activity—solicitation among teachers to effect the ouster of a school superintendent and circulation of a letter containing allegedly false charges—for which the sponsoring teachers were fired.
a letter critical of the school board. The dismissal occurred after the board had determined, following a full hearing, that the letter contained several false statements which unjustifiably impugned the "motives, honesty, integrity, truthfulness, responsibility and competence" of the school administrators and board members and damaged their professional reputations. Accepting the fact that some of the statements were untrue, the Supreme Court reversed the state court's affirmation of the dismissal, holding "that in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." The Court thus applied the libel standard first announced in New York Times v. Sullivan, based upon the "public interest in having free and unhindered debate on matters of public importance." The Court's statement of the problem in Pickering suggests the test which would be applicable to the rights of public employees to belong to labor unions and to present grievances relating to their employment: "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

I would conclude from these cases that public employees have a constitutional right to organize into labor unions and that they may petition their employer through these unions on matters concerning conditions of their employment. This conclusion provides the legal frame of reference for the search for policy and law, outlined later, relating to collective bargaining in the public service.

Growth and Stimulus of Public Employee Unions. A less theoretical frame of reference is the fact that public employees are organizing themselves— in unprecedented numbers—into unions regardless of the presence or absence of statute. Garbage collectors, teachers, transit workers, and other public employees by the hundreds of thousands have begun to organize, either by joining labor unions or by converting their existing "associations" into more militant organizations that take on many characteristics of traditional labor unions. Unions representing employees in the public sector are the fastest growing unions in the nation—the two largest have quadrupled in size in the last dozen years—and there is every indication that the growth trend will continue.

55 88 S. Ct. at 1738.
57 88 S. Ct. at 1737.
58 Id. at 1734-35.
59 For example, the National Education Association is becoming more militant and willing to use the strike as a means of improving conditions. At its 1968 convention "[t]he 7,103 delegates frequently expressed their approval of teacher militancy—in their applause for reports of action in Florida in the past year, in their approval of building up the DuShane Fund for Teacher Rights directly from the Association budget, and in their vote to approve teacher strikes as a last-resort mechanism in educational struggles." NEA Reporter, July 19, 1968, at 1, col. 3.
60 Stieber, Collective Bargaining in the Public Sector, in CHALLENGES TO COLLECTIVE BARGAINING 65 (L. Ulman ed. 1967).
61 Membership in the American Federation of State, County and Municipal Employees increased from 82,737 in 1951 to an estimated membership of 350,000 in 1967. During the same period,
Once organized, these employees are bound to seek an outlet for effective participation in the process which determines their compensation and working conditions. Whether the public likes it or not, the demands of these burgeoning unions will be for some form of collective bargaining. Now that significant numbers of public employees have tasted the fruits of such bargaining, its popularity can only increase.

The question of whether collective bargaining should be used by government employees is now moot. The vital question, therefore, is how shall collective bargaining be used? If thoughtful and workable legislation is not devised, some form of collective bargaining will probably develop anyway, but it will be in response to ad hoc displays of raw strike power and the politics of expediency.

Lest there be any doubt about the mootness of the former question, we need only to examine the factors which are stimulating the popularity of militant unionism in the public sector. At state and local levels, public employees generally earn considerably less than employees performing comparable work in private employment. As the ranks of government employees increase—the number is now about twelve million and expected to reach fifteen million within the next seven years—public employees and their unions will seek a larger slice of the economic pie. It is only natural that these unions will turn to means which have been effective in the past, albeit in the private sector, to achieve these economic goals. Hence, collective bargaining (i.e., bargaining demands backed by strike or threat of strike) will be their choice of weapon. Assuming that such a choice would eventually yield wages comparable to those prevailing in the private sector, would the process also seriously harm the public? Is it possible to avoid extortionate settlements and paralyzing work stoppages affecting vital public services under a system of public employee collective bargaining? In large measure, the answer will depend upon the system.

The Example of Collective Bargaining in the Private Sector. While much can be learned from the example of industrial relations in the private sector, even private sector collective bargaining has had its conspicuous failures. Although collective bargaining has provided stability in most industries, the system often has broken down in disputes where vital public services were at stake. The major disputes machinery of both the Taft-Hartley Act and the Railway Labor Act has not always been adequate to
cope with the big strike, particularly in such key industries as air and rail transportation and in the maritime services.\(^7\) Notwithstanding an obvious need to modify private collective bargaining to accommodate it to changing economic conditions—occasioned by advancements in technology, concentration of bargaining by multi-employer and multi-union groups, and the impact of regulated monopoly industry on our complex and interdependent way of life—collective bargaining will probably continue to be the chief regulator of private sector industrial relations for the foreseeable future. Whatever the shortcomings of collective bargaining, the alternatives are considered less appealing.\(^8\)

We should be acutely aware of the shortcomings of collective bargaining when we attempt to adapt this system for use in the public sector; however, we also should recognize the very solid achievements of the institution. As John T. Dunlop asserted:

\[\text{Our collective bargaining system must be classified as one of the more successful distinctive American institutions along with the family farm, our higher educational system and constitutional government of checks and balances. The industrial working class has been assimilated into the mainstream of the community, and has altered to a degree the values and direction of the community without disruptive conflict or alienation and with a stimulus to economic efficiency. This is no mean achievement in an industrial society.}\(^9\)

This system is alluring to public employees for the same reasons which make it attractive to private employees. Aside from hoping to achieve economic benefits through collective strength, employees also expect that the negotiation process, as well as the organizational activity which takes place within a union, will provide an opportunity to participate in matters affecting their own welfare.\(^10\)

The fruits of collective bargaining are the contracts and grievance procedures to which the parties agree. These contracts and procedures generally have a high degree of acceptability because the practices represent the work product of individual effort and compromise. The parties sit across the bargaining table, more or less as equals, and formally agree on rules of conduct and substantive conditions.\(^11\) Their agreements thus carry a moral as well as a legal obligation,\(^12\) and are inclined to be more acceptable than


\(^{68}\) The alternative most commonly advanced is compulsory arbitration, which is opposed by both management and labor. This opposition was demonstrated on August 9, 1966, when the American Bar Association's Section of Labor Relations Law voted down a resolution urging compulsory arbitration as the terminal dispute settlement procedure in the railroad, airline, and maritime industries. BNA, *Labor Relations Yearbook—1966*, at 91, 92 (1967).


\(^{70}\) See id. at 171-72.

\(^{71}\) The president of the American Federation of State, County and Municipal Employees, AFL-CIO, has referred to collective bargaining as "a process that transforms pleading to negotiations. It is a process that permits employees dignity as they participate in the formulation of their terms and conditions of employment. . . . Collective bargaining is a process that occurs among equals." *Wall Street J.*, Sept. 15, 1967, at 18, col. 1.

\(^{72}\) As a legal obligation, a collective bargaining contract may be enforced in court under § 301(a) of the Labor-Management Relations Act (Taft-Hartley Act), 29 U.S.C. § 185(a)
determinations promulgated by a third party, whether that party be a board of compulsory arbitration or a legislative body. Also, when employees and employers fashion their own procedures and conditions, they tend to tailor-make the practices to meet special needs and remedy specific problems. Given the proper incentives, they can usually do this better than anyone else because of their intimate knowledge of their own operations.

There is a personal as well as a collective aspect to collective bargaining. It is self-evident that the collective economic package which the system yields to the American worker is generally very attractive. But the more significant contribution to the American way of life may be the almost invisible personal aspect of the system. Members of the general public who derive their knowledge of the subject solely from newspaper accounts of strikes and wage settlements may be unaware of what collective bargaining actually means to the union worker. In a society where self-employment has practically disappeared and where most workers are employed by large corporations, collective bargaining provides a form of economic due process which would otherwise be unavailable, unless provided by governmental regulations far more pervasive than those which now exist. Most labor relations laws are designed to protect and regulate the institution of collective bargaining. Except as to minimum requirements for wages and overtime, and protection against various forms of discrimination, the law leaves it to the parties to determine for themselves, through bargaining, applicable rates of pay and other conditions of employment, including such items as seniority, job security, and grievance procedures. These latter items are the basic ingredients in the prevailing system of industrial due process. Rules which the parties adopt to govern job tenure, and procedures


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<td>1967</td>
<td>5,181</td>
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* In thousands


The Supreme Court in NLRB v. Insurance Agents Int'l Union, 361 U.S. 477, 488 (1960), summed up the proper approach for the National Labor Relations Board in a system "where the Government does not attempt to control the results of negotiations," stating that:

It is apparent from the legislative history of the whole Act that the policy of Congress is to impose a mutual duty upon the parties to confer in good faith with a desire to reach agreement, in the belief that such an approach from both sides of the table promotes the over-all design of achieving industrial peace. . . . But apart from this essential standard of conduct, Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences.
which they establish for settling disputes, including arbitration, give the worker a legal right to fair treatment and the means to enforce that right. As a member of the bargaining unit, which is his immediate industrial community, the employee helps determine the substantive terms of the collective agreement. By these collective, but nevertheless personal, actions the industrial working class is thus "assimilated in the mainstream of the community."  

Deploring the passing of the American frontier, Walter Prescott Webb observed that: "The modern individual . . . finds himself cut off from the frontier where work could always be found and barred by the machine which is doing more and more of the work left to be done in civilization. It is a situation in which he feels quite useless, baffled, and defeated." In Webb's view, the individual was becoming relatively less important, losing his identity in a growing corporate life. Yet this was not an expression of hopeless pessimism, for Webb identified the underlying question as "whether we can manage what we have so eagerly taken?" He discerned in the question a challenge and an opportunity: "Our challenge consists in finding out what modifications should be made, and our opportunity will come in making them."  

I am not suggesting that collective bargaining has become a substitute for the frontier—even in part. I do suggest, however, that in seeking responses to Webb's underlying question we may discover that for most working people the need for self-expression and for participation in the determination of their own economic destiny is, to a considerable extent, satisfied by collective bargaining. While labor unions can be impersonal—even tyrannical—most unions at least provide an opportunity for the employee to share, with his fellow employees, in a degree of control over the conditions of his employment. Whether he avails himself of this opportunity is another matter. To the extent that this opportunity is not available, society's corrective efforts ought to be concentrated on insuring the essentially democratic nature of the union itself, a subject which is beyond the scope of this paper. But, for purposes of our present inquiry, the message which we cannot avoid is that the personal aspect of collective bargaining, which tends to satisfy the individual worker's craving for economic self-determination, is as valid for employees of government as for employees of General Motors.

Is this also true of the collective aspect of collective bargaining? It is the collective aspect which forces the employer into agreement with the union.  

81 Id. at 418.
82 Id.
83 This was an objective of the Landrum-Griffin Act (Labor Management Reporting and Disclosure Act of 1959), 29 U.S.C. §§ 401-511 (1964).
The collective action of a strike, whether real or potential, is the power that the union brings to the bargaining table. Although a union may afford its officers and members occasions for the exercise of both leadership and persuasiveness, the union's ultimate success in the bargaining process depends upon the power of the employees, acting in concert, to withhold their services. In the private sector this is counter-balanced by the employer's power to resist union demands and to lock-out under certain conditions, thereby creating an approximate equilibrium which usually makes collective bargaining work. Collective bargaining is not to be equated with enlightened persuasion. "The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values. The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system . . . ." Remove the weapons from either side, and collective bargaining—at least as we now know it—vanishes.

Is the strike weapon then essential to collective bargaining? Even if we limit our question to strikes of public employees, we will find no simple answer. Public employment and public management differ markedly from their counterparts in private industry. It should, therefore, not be surprising that the function of the strike is not the same in the two sectors, and that collective bargaining, whatever shape it ultimately assumes in the public sector, must differ substantially from collective bargaining in the private sector.

In private industry, where the employer competes for profits, the economic pressures at work in a strike or in the threat of a strike are unlike those created by similar activity directed against the governmental employer. The government is not in business to make a profit; its business is to provide a service to the public. Furthermore, the lines of authority in government employment are frequently unclear. Rarely will a governmental representative at the bargaining table have full authority to grant wage increases. Across-the-board wage increases for government workers usually require appropriations from the taxing authority, whether it be a state legislature, a city council, a school board, or other taxing unit. Sometimes there will be a combination of legislative bodies sharing the money-raising function, as when state and local funds are combined to finance a local school system. An additional factor is the diffusion of political activity among elected and appointed officials. In the typical governmental structure elected officials must be alert to the whims and wishes of the voters, a

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85 NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477 (1960). The Court also quoted the following, more idealistic passage from Cox, The Duty To Bargain in Good Faith, 71 HARV. L. REV. 1401, 1409 (1958), to describe the dual existence of the statutory command to bargain in good faith and the availability of economic devices: "Initially it may be only fear of the economic consequences of disagreement that turns the parties to facts, reason, a sense of responsibility, a responsiveness to government and public opinion, and moral principle; but in time these forces generate their own compulsions, and negotiating a contract approaches the ideal of informed persuasion." Id. at 483-90.

group which includes both taxpayers and union members. On the other hand, appointed officials may have the normal managerial desire for efficiency and economy yet lack the stimuli of profit and loss statements and competitive cost accounting to spur development of streamlined methods and late-model technology.

This enumeration of some of the essential differences between public and private sector employment omits the matter of sovereignty. It should not be significant that the employer is the "sovereign," notwithstanding conventional wisdom which teaches that bargaining with and striking against government are per se illegal because they challenge the exclusive authority of the sovereign to legislate terms and conditions of employment for government servants. This theory is akin to the doctrine of sovereign immunity, which had its roots in the ancient and discredited maxim that "The King can do no wrong." It is a wonder that sovereign immunity ever became established in a democracy; but it is not sacrosanct. It has been whittled away and chipped at by statutes and cases, so that private citizens may now sue their government in many areas of law and conduct. Similar accommodation can surely be effected in the matter of sovereignty over the employment relation. The real question is not whether collective bargaining and strikes by public employees can be legalized, but the more pragmatic one of whether collective bargaining can be adapted or modified to meet the special needs of the public sector.

Similarities between some governmental functions, especially the so-called proprietary functions, and comparable private operations are deceptive. From the standpoint of both the employee and the consumer there is no practical difference between a regulated privately-owned public utility, such as a transit company, and a governmental enterprise performing the same function. This is illustrated by the history of public transit in San Antonio and Dallas. In both cities, unionized private transit companies recently were taken over by public authorities, whereupon the collective bargaining rights of the employees instantly vanished. Since Texas law prohibited recognition of the employees' unions, the resulting problems—which included a brief strike by the Dallas employees—boiled down to a lack of communication. There were no means through which the parties

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89 E.g., Federal Tort Claims Act, 28 U.S.C. §§ 2671-80 (1964). For a brief review of the "steady encroachment upon the originally unbroken domain of sovereign immunity," see Dalehite v. United States, 346 U.S. 15, 25 n.10 (1953), and the dissent of Justice Jackson in which he noted: "Surely a statute [Federal Tort Claims Act] so long debated was meant to embrace more than traffic accidents. If not, the ancient and discredited doctrine that 'The King can do no wrong' has not been uprooted; it has merely been amended to read, 'The King can do only little wrong.'" Id. at 60.  
91 The concept of sovereignty was no impediment to Canada, which recently enacted legislation legalizing strikes among certain federal employees. Public Service Staff Relations Act, 1967, CAN. REV. STAT. c. 72, § 101, at 757 (1967).  
92 See notes 41-48 supra, and accompanying text.  
could talk to each other—they lacked a system of effective communication, which may be the essence of collective bargaining. The bus operator probably did not understand why his bargaining rights should be different because his employer happened to be a city rather than a private company. And from the standpoint of the public, the immediate impact of a transit strike was not altered by the change in ownership.

While the Dallas-San Antonio situation points up a need for communication (i.e., some form of collective bargaining) the means of communication need not be exactly the same form of collective bargaining that existed when the transit systems were operated under private ownership. For notwithstanding the similarities between the private and public sectors, strikes by public employees have distinguishing features. The sheer display of public employee strike power, quiescent or active, is capable of doing much more than close the gap between wages in the public and private sectors. Unlike the private sector, in the public sector there are no adequate forces to counterbalance strike action. Thus, if organized public employees were to become powerful enough, they could use the strike weapon as a blackjack to demand more and more, regardless of the equities of their case. If unlimited use of the strike were available to public employees, their collective bargaining achievements would depend more upon the community’s dependence on their services than upon any rational economic yardstick. Employee self-restraint and public opinion would hardly be adequate to prevent extortionate settlements in many cases. But certain strikes could be tolerated. While a community could not endure a prolonged strike of policemen, firemen, or hospital employees, a strike of public librarians or of gardeners in the public parks would probably have little impact on community life. At least for these groups, to cite only the extreme examples, if collective bargaining is to be successful it cannot be dependent solely on the right to strike.

**Supposition.** The opinion which I draw from the above discussion is that most of the existing laws prohibiting strikes will be unsuccessful unless they offer an adequate substitute for the strike. Public employees will continue to organize, and when organized they will demand improvements in their employment status and back their demands with the ability to strike. Public employees, including teachers and other white collar groups, have discovered that which the private sector labor movement and the civil rights movement discovered earlier—society helps those who help themselves. Yet there are some strikes which, by their duration or by the nature of the services affected, the public cannot tolerate. A substitute for these strikes must be found.

We should be wary, however, in our search for a fair and adequate substitute for the strike. Since we should try to preserve the do-it-yourself aspect of collective bargaining, we must avoid throwing out the baby with the bath. We may be unable to devise a system which will guarantee that there will never be any strikes of public employees; it is doubtful if any

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94 See note 62 supra.
such system could be achieved short of a police state. We should, however, develop a collective bargaining system especially adapted to the needs of public employment, recognizing that some strikes of public employees might serve a long-range purpose and not be detrimental to the public welfare. But primarily we should concentrate on devising substitutes for strikes and lockouts that will implement rather than destroy collective bargaining.

Since the form which collective bargaining takes in the private sector cannot and should not be duplicated in the public sector, we have an opportunity for innovation and experimentation. The dearth of public collective bargaining enabling statutes and the lack of any real tradition of collective bargaining among government employees may prove to be advantages. The undeveloped quality of this phenomenon could stimulate truly creative approaches. And from a political standpoint, the very absence of strong vested interests at this early stage of public employee unionization affords an opportunity for fashioning new solutions—solutions which might also be transferrable to disputes in the private sector where public welfare is jeopardized by prolonged strikes in certain vital industries.

II. DEFINING PUBLIC POLICY

In attempting to define what public policy ought to be, it is inevitable that we begin with certain arbitrary assumptions. I believe these assumptions to be valid, however, for they are consistent with the policy toward organized labor which prevails generally in the American economy. Moreover, they are based on a concept of fairness which should be an essential element in a democratic institution. These assumptions will be the yardstick by which we shall measure proposed legislation designed to regulate employment relations for public employees.

First. Compensation and conditions of employment for public employees should be comparable to that prevailing in private employment for work which requires similar qualifications (i.e., similar skill, ability, and training) and which is performed under similar conditions.

Second. In general, strikes in the public sector should be avoided. In particular, strikes of governmental employees which endanger the health, safety, or welfare of the public should be prohibited.

Third. Consistent with the wishes of the employees expressed in appropriate employee units, and subject to the limitations imposed by the public welfare, wages and conditions of employment for public employees ought to be established by a bilateral bargaining process between the employer and the employees' organizational representative—a form of collective bargaining adapted to the peculiar needs of governmental employment. To the extent that this adaptation diminishes the right to strike, the available alternatives should encourage the parties to reach their own agreements with minimum reliance upon settlements imposed by third party intervention.
Fourth. In most instances, third party intervention should be limited to mediation and voluntary arbitration. But if the parties have been unable to agree upon a voluntary settlement and if the public health, welfare, or safety is endangered by a strike, submission of the dispute to quasi-judicial arbitration should be required. The function of such arbitration should be limited to ascertaining and applying the wages and conditions of employment prevailing for comparable work in the same labor market area in the private sector.

Fifth. The determination of when and whether the public health, welfare, or safety is being endangered by a threatened or existing strike of public employees should be a judicial function. The decision should be made by a court of equity having the usual equitable powers of injunction and contempt.

Although I have characterized the above assumptions as arbitrary, strong reasons support this definition of proposed public policy.

As to the first assumption, it may seem a truism that public employees ought to work under salaries and conditions similar to those prevailing in the private sector. But most employees of state and local governmental units do not. Implementation of this premise would cost many communities a great deal of money, and higher taxes are never popular. Nevertheless, a system premised on substandard compensation for governmental employees is indefensible, and every effort ought to be made to bring public wage scales in line with those of the private sector. Any community which fails to make this effort should expect discontent among its public servants. The federal government is already dedicated to the standard of wage comparability. At least as a moral commitment, Congress has declared that "[f]ederal pay rates be comparable with private enterprise pay rates for the same levels of work." For "general schedule" employees, this principle must be implemented from time to time by direct congressional action. But many federal employees, most notably blue collar "Wage Board" employees, are excluded from coverage of the general schedule. Their wages are "fixed and adjusted from time to time as nearly as is consistent with public interest in accordance with prevailing rates."

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62 The salaries paid to school teachers are an example. The training and ability of teachers ordinarily command much greater compensation when sold in the private labor market. See note supra.


64 5 U.S.C. § 1502(c)(7) (1964) excludes from coverage of the General Schedule and the Civil Service classification system "employees in recognized trades or crafts, or other skilled mechanical crafts, or in unskilled, semiskilled, or skilled manual-labor occupations, and other employees including foremen and supervisors in positions having trade, craft, or laboring experience and knowledge as the paramount requirement . . ." and also certain Bureau of Engraving employees.

65 5 U.S.C. § 5341(a) (1964). Although this general provision for prevailing rates does not apply to such bodies as the Tennessee Valley Authority, the Atomic Energy Commission, and the Panama Canal Company, for most such agencies the wage rates for trades, crafts and labor employees are also fixed and adjusted in accordance with prevailing standards. Federal Personnel Manual System Letter No. 532-2, U.S. Civil Service Comm'n, Dec. 1, 1967, at 4.

The federal commitment to the prevailing wage concept is further illustrated by the long-standing practice of requiring private contractors to pay prevailing wage rates (and fringe benefits since 1964) on federal projects and on federally assisted projects. Davis-Bacon Act of 1931, 46 Stat. 1494, as amended, 40 U.S.C. §§ 276a to 276a-7 (1964). "[T]he minimum wages to be paid various classes of laborers and mechanics shall be based upon the wages that will be deter-
For example, the Tennessee Valley Authority enabling Act provides that laborers and mechanics employed by TVA shall be paid not less than the rates that prevail in the vicinity for similar work. The fact that federal pay scales generally compare favorably with those of private employment has undoubtedly been an element contributing to the absence of strikes in the federal service. Adoption of the principle of equal pay for equal work for non-federal public employees would certainly eliminate one major cause of strikes.

The prevailing wage concept which is here proposed contains one detail which differs from the usual concept. The private sector area of comparison should be the labor market area rather than an arbitrary political or geographical unit. This provides a more realistic standard of comparison. Depending on the types of jobs in question, a labor market area might even encompass a multi-state region. For example, the labor market area for schoolteachers in one of the New England states would include, at the very least, all of the New England states and perhaps several other northeastern states. On the other hand, the labor market area for unskilled labor in a given city or county might be confined to the immediate geographical vicinity.

The second assumption as to public policy is supported by the recent history of strikes among public employees. Although efforts should be made to avoid such strikes, an absolute prohibition on all strike activity is likely to be self-defeating for reasons previously discussed. However, our urban society cannot tolerate a total or extended work stoppage of employees engaged in certain vital services. Therefore, strikes, by their duration or by the nature of the services affected, which pose a danger to the health, safety, or welfare of the public must be prohibited. The extent of the prohibition, however, should depend on the time and circumstances of the particular labor dispute, not upon an a priori legislative classification that some services are vital and are therefore nonstrikable, while others are not. It is unfeasible—if not totally impossible—to devise such a classification. Does a strike of schoolteachers endanger the welfare of the public? Might not the answer depend on the timing and extent of the strike? And what of a partial strike of firemen limited to routine non-emergency work but with retention of personnel for full coverage of fires and other...
emergencies? A strike of transit workers in one city might be only an inconvenience because of the availability of alternative transportation, whereas in another city a transit strike might paralyze the economic life of the community and be more of a catastrophe than an inconvenience. And is there not an essential difference between a strike of sanitation men occurring in the frozen winter months, and a strike of the same workers in the hot summer months? And does not the duration of such a strike also make a difference? No legislature should attempt to define with particularity which strikes should be prohibited and which should be legal. Aside from the political considerations which would invariably influence the enactment of such provisions, such an approach should not be attempted because no legislature can foresee, and thus adequately describe, all of the contingencies which would render some strikes lawful and others unlawful. As stated in the fifth assumption, the task of deciding whether a strike of public employees endangers the health, welfare, or safety of the public ought to be left to the courts for decision on an ad hoc basis.

The third assumption endorses collective bargaining as the favored method of determining wages and conditions of public employment. The advantages of such a bilateral process have already been discussed. As we observed, the form which such bargaining must take in the public sector must be adapted to the peculiar needs of that sector. This is so not only because government employment and government management differ in certain significant respects from their counterparts in the private sector, but also because diminution of the right to strike in public employment will in itself change the nature of the bargaining process. If the voluntary and flexible nature of the process is to be maintained, it is essential that the available alternatives to strikes and lockouts furnish the parties with sufficient incentive to reach, without compulsion, an accord which will be compatible with the public interest.

The fourth assumption recognizes that there will be disputes which the parties themselves cannot or will not settle without third party intervention. When such disputes involve critical services, curtailment of which would endanger the community, settlement ought not to depend on the coercive effect which a strike or lockout might have on the community. But in most instances third party intervention need not mean third party determination. Experience has demonstrated the value of mediation as a catalyst in producing bilateral settlement of labor disputes.\(^1\) Considering the nature of public employment and the need to exhaust every reasonable effort to achieve voluntary adjustment, mediation should be required in every labor dispute where the governmental unit and the public employee representative are unable to achieve a peaceful settlement.\(^2\) But in those situations where mediation has failed and where the parties have refused voluntary arbitration, and if the public health, welfare, or safety

\(^{1}\) See Aaron, Emergency Dispute Settlement, in Southwestern Legal Foundation, Labor Law Developments—1967, at 185 (1967).

\(^{2}\) Compulsory mediation under the Railway Labor Act §§ 3-6, 44 Stat. 580 (1926), as amended, 45 U.S.C. §§ 135-56 (1964), has had the salutary effect of forcing disputing parties to continue bargaining. Thus more settlements are reached and many strikes are avoided.
is being jeopardized by threat or continuation of a strike, some other settlement device must be provided. A device which is consistent with the public policy here assumed is a form of quasi-judicial arbitration in which the board of arbitration serves essentially as a fact-finding body to ascertain comparable wages and conditions in the appropriate labor market area. But unlike the fact-finding or emergency boards provided by many existing statutes, this board would make a binding determination, applying the prevailing wages and conditions to the public jobs in dispute.

This is not a proposal for compulsory arbitration in the conventional sense. A major objection to compulsory arbitration of public employee labor disputes is that legislative bodies are naturally reluctant to delegate to an outside authority the power to determine how and in what amount public money will be spent. Indeed, serious constitutional questions would probably have to be answered if such authority were delegated without fixed standards. The present proposal not only includes fixed standards but also eliminates most of the discretionary or legislative aspects usually associated with compulsory arbitration. The proposed board would make determinations in a manner similar to the federal "wage boards," or to the determinations made by the Secretary of Labor under the TVA Act and under Davis-Bacon procedures for establishing prevailing wages on federally related construction projects. Knowing, at least in a general way, how this board of arbitration would arrive at its decision, each of the disputing parties might not have a counter-incentive to avoid good faith bargaining in the hope or expectation that the Board would render a more satisfactory determination than they could negotiate themselves.

How this board would function in relation to other proposed machinery for settlement of public employee disputes will be discussed after presentation of the entire plan.


105 E.g., The Australian Conciliation and Arbitration Act 1904-50, II Austl. Com. Acts 1036 (1970), provides for compulsory arbitration and permits the Conciliation and Arbitration Commission to include in its award any matter which it thinks necessary or expedient to settle the dispute or to prevent future disputes.

106 See notes 96-97 supra.


109 There is a popular conception that compulsory arbitration destroys the incentive to engage in genuine collective bargaining, and the experience under the War Labor Board is often cited to prove the point. WLB Chairman Edwin E. Witte challenged the popular impression "that collective bargaining virtually ceased, being replaced by governmental determination of labor conditions; that because there was a War Labor Board, the parties made no serious effort to settle their own difficulties; and that as a result minor grievances which should have been settled locally were magnified into serious disputes." He stated that:

As with all other myths which have developed out of our wartime experience, there is some truth in these generally held views regarding collective bargaining during the war. . . . Beyond question, the fact that there was a War Labor Board often led the parties 'to pass the buck' to the Board in disputes which they should have settled themselves. As always happens when new adjustment machinery is created, the existence of the Board probably resulted in its getting many disputes for settlement which would have been settled in some other way or would have remained unsettled without resulting in strikes.

But this is not the entire story. . . . [T]he great majority of the collective
The fifth policy assumption is that it should be the function of the courts to determine when and whether a particular strike—actual or threatened—constitutes a danger to the health, welfare, or safety of the public. The State of Vermont has pioneered in this approach. Its 1967 state labor relations act does not outlaw strikes of public employees as such, nor does it specify penalties for public employees who engage in strikes. Instead, it leaves to the courts the determination, on an ad hoc basis, of when and if a public employee's act of striking endangers the public health, safety, or welfare. Section 32 of that statute declares:

No public employee may strike or recognize a picket line of a labor organization while performing his official duties, if the strike or recognition of a picket line will endanger the health, safety or welfare of the public. The public employer concerned may petition for an injunction or other appropriate relief from the court of chancery within the county wherein such strike or recognition of a picket line in violation of this section is occurring or is about to occur.

This procedure contains the usual advantage of due process, including availability of appellate review, found in the American judicial system. But it has the further advantages of uncertainty and flexibility. Uncertainty can be an advantage when one of the policy objectives is to encourage the parties to settle their own disputes. Flexibility is also an advantage because a court, relatively without fear of political reprisal, can tailor-make its equitable orders to fit the circumstances and can apply appropriate contempt penalties for violation of those orders. And by omitting from the statute specific penalties for striking, the courts and the other branches of government are spared the shameful spectacle which results from a failure to apply statutory penalties. As we have noted, the price of labor peace too often has required law enforcement agencies to look the other way in order to induce striking employees to return to work. Whether the proposed judicial procedures will be more successful than those which were described in the opening section of this paper is a matter which will be considered in conjunction with our appraisal of the entire plan.

III. A Statutory Proposal

A law which embodies the essential elements of the foregoing statement of policy might seem too restrictive to some militant unionists and too permissive to some employers and public officials. But having no electorate to answer to, I shall rush in, proposal in hand, where wise legislators may fear to tread. It is not my intention, however, to spell out the details of a "model" statute. But I am hopeful that my proposal may help stimulate thoughtful and bold consideration of new methods for settling public
employee disputes—methods which will adapt and preserve, consistent with the public interest, the voluntary and democratic qualities of collective bargaining. I suggest that one type of statute which would serve this purpose would be one containing provisions for the following items.

(1) There shall be a statutory declaration of public policy which recognizes that compensation and other conditions of employment for public employees shall be comparable to private sector employment, based upon wages and conditions prevailing in the same labor market area for jobs requiring similar qualifications, i.e., jobs needing similar skill, ability, and training, and performed under similar conditions.\(^{112}\)

(2) Public employees shall have (a) the right to organize into labor organizations, and to form, join or assist labor organizations, (b) the right to engage in lawful concerted activity for the purpose of collective bargaining or other mutual aid or protection, (c) the right to select their representatives according to their own free choice. In general, these rights shall be comparable to the rights guaranteed private sector employees under sections 7 and 8 of the National Labor Relations Act, as amended.\(^{113}\) They shall be enforceable through an employee relations board similar to the National Labor Relations Board. This board shall determine appropriate bargaining units, conduct representation elections, certify exclusive bargaining agents based on majority representation, and find and remedy unfair labor practices when protected rights have been violated.\(^{114}\)

(3) A public employer and a union representing a majority of the employees in an appropriate public employee bargaining unit shall be required to bargain collectively in good faith.\(^{115}\) To bargain collectively shall include meeting at reasonable times and conferring in good faith with respect to wages, hours, and other terms and conditions of employment, and the execution of a written contract, ordinance, or resolution incorporating any agreement reached if requested by either party or required by a board or arbitration pursuant to the statute.

(4) In every dispute concerning the negotiation of new or modified terms and conditions of employment in which the parties, through bilateral negotiations, are unable to reach a settlement, mediation shall be provided.\(^{116}\) The mediator, preferably one who is the mutual choice of the

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\(^{112}\) For example, one of the "similar conditions" which would be considered in comparing police jobs would be the hazardous nature of the work.


\(^{114}\) These provisions are similar to those already found in the newer state public employee relations acts. See note 38 supra. See also Federal Executive Order 10988, notes 33-35 supra. According to Dr. Robert D. Helsby, Chairman of the New York Public Employment Relations Board, "The provision of a formula through which public employees may win recognition without strikes automatically removes the greatest single cause for recent walkouts of teachers and civil service workers in many parts of the nation." N.Y. Times, May 3, 1968, at 82, col. 1 (city ed.).

\(^{115}\) This provision is common to all labor relations statutes which have followed the basic pattern of the Wagner Act. National Labor Relations Act, 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 151-68 (1964). Admittedly, a requirement that wages for public employees be set by collective contract will require some adjustment by all parties. For example, bargaining and contracts periods would have to be correlated with budget and tax determinations and perhaps even bond issues. These adjustments would not be easy, but they are not impossible.

parties, shall use his best efforts, through mediation, to bring about an agreement. Upon exhaustion of mediation, voluntary arbitration shall be proffered and encouraged.\footnote{This requirement is also found in §§ 5 and 7-10 of the Railway Labor Act, 44 Stat. 580, 582-86 (1926), as amended, 45 U.S.C. §§ 155, 157-60 (1964), where it has not had notable success. However, the structure of the Railway Labor Act and established practice offer little incentive for the parties to submit major disputes to voluntary arbitration.}

(5) While pre-mediation negotiations are in progress, and while a dispute is still subject to mediation or voluntary arbitration, both parties shall maintain the status quo—wages and other conditions of employment shall not be altered by the employer and the employees shall not engage in a strike or other concerted work stoppage.\footnote{See Railway Labor Act § 6, 44 Stat. 582 (1926), as amended, 45 U.S.C. § 156 (1964), and Manning v. American Airlines, Inc., 329 F.2d 32, 34 (2d Cir. 1964), holding that "[t]he effect of § 6 is to prolong agreements subject to its provisions regardless of what they say as to termination."}

(6) Following the exhaustion of bargaining and mediation, strikes of public employees would not be absolutely prohibited.\footnote{Strikes occurring prior to exhaustion of these statutory procedures would be unlawful.} The statute shall contain, however, a general provision to the effect that it shall be unlawful for a public employee to engage in a strike or other concerted work stoppage which endangers the health, welfare, or safety of the public. This provision shall be enforceable in the courts by injunction or other appropriate equitable remedy, including contempt proceedings, but the statute itself shall not specify penalties for striking.\footnote{See 4 K. Davis, \textit{Administrative Law Treatise} § 29.01, at 114 (1958).}

(7) In every case in which a court of competent jurisdiction issues an injunction against a strike of public employees, and only in such a case, the parties shall be required to submit their dispute to a board of arbitration for final and binding determination. The members of the arbitration board shall be selected according to procedures which will assure their impartiality. The function of such board shall be to hold hearings and take evidence to determine the wages and conditions in dispute, based upon findings of comparable wages and conditions in the same labor market area in the private sector. Judicial review of the board’s award shall be limited and the substantial evidence rule shall be applicable.\footnote{The proposed statute is intended as a general statement only, and no effort has been made to write detailed legislative provisions. Numerous variations in procedure could be devised, and local conditions might dictate some of these variations. For example, it is not relevant to the central theme of this paper to treat the matter of compulsory unionism for public employees. A union shop provision would certainly be consistent with the policy expressed herein, but a state might choose to outlaw the union shop and still adhere to the basic points contained in this proposal. Likewise no recommendation is made as to whether the boards of arbitration in paragraph 7 of the proposal shall be permanent or ad hoc.}

IV. Conclusion

The foregoing policy assumptions and the accompanying statutory proposal\footnote{\textsuperscript{122} See notes 110, 111 \textit{supra}, and accompanying text.} are not intended as a substitute for voluntary collective bargaining. My object has been to develop a legal framework in which bilateral bargaining can occur in the public sector without serious disruption of the community welfare. If such a plan were to result in substitution of third
party determination for collective bargaining, the plan will have failed. The features which are relied upon to encourage good faith bargaining while minimizing strikes are (1) a statutory declaration of the standard of comparability with private sector employment, (2) protection of the right to organize and provision for union recognition and mandatory collective bargaining when desired by a majority of the employees in an appropriate bargaining unit, (3) establishment of adequate machinery to enforce and administer these provisions, (4) compulsory mediation to aid the parties in reaching their own settlement, (5) encouragement of voluntary arbitration, and (6) the uncertain availability of strikes, judicial intervention, and binding quasi-judicial arbitration when the parties are unable or unwilling to arrive at a settlement. The feature of uncertainty is crucial to the plan. Under the proposal, neither party, acting alone, can invoke arbitration as such. There is no certainty that a court would intervene if the employees should decide to strike—or at least no certainty as to when and how such intervention would occur. Rather than risk a strike and/or judicial intervention, with binding mandatory arbitration available only when the court chooses to enjoin a strike, it is expected that in most instances the parties will either write their own contract or join in a submission to voluntary binding arbitration.

Some strikes are bound to occur. But this should not be too high a price to pay for a relatively free system of collective bargaining. However, the severity and duration of these strikes would be subject to judicial control whenever the public health, welfare, or safety is in danger. It may be anticipated that the courts will establish, on a case-by-case basis, a body of law—perhaps differing substantially from one jurisdiction to another—which would define the elements required for judicial relief in a strike of public employees. The judiciary, building on experience and stare decisis, is better equipped to perform this function than either the legislative or executive branches. A court is less likely to be influenced by political pressures. Furthermore, a court of equity has great flexibility in fashioning remedies. For example, rather than issuing a strike injunction, a court might deliberately withhold such relief for a stipulated period for the purpose of inducing the parties to reach an agreement.

Under the plan, when a court finds the requisite danger to the public and enjoins a strike, the dispute automatically proceeds to arbitration. The uncertainty of judicial intervention and the relative certainty of the comparability standard which the board of arbitration would apply are

123 Fact finding has not been included in the proposal because it would interfere with the prospects for voluntary settlement or submission to arbitration. A board of arbitration, whether acting pursuant to voluntary appointment by the parties or pursuant to statutory mandate following an injunction, ought not to be bound, legally or psychologically, by a prior determination of a fact-finding board. Nor should either party be able to use fact finding as a springboard to a higher settlement.

124 In those instances in which a court would find it necessary to intervene to prevent or stop a serious strike, it is likely that its orders would be obeyed promptly, for public opinion would hardly support employees who are striking to obtain wages or conditions in excess of those prevailing in private employment. But if such a strike were to continue in the face of an injunction, the court would have a wide range of contempt remedies available for enforcement of its orders.
factors which should encourage bargaining and settlement. A decision of the board of arbitration, however, would not be entirely predictable. Many variables would have to be established at the hearing. Determination of the labor market area and the comparability of jobs, based on skill, ability, training, and similarity of conditions of employment, leave much room for bargaining by the parties and a broad range of decision for the board of arbitration. The plan does not envision substituting compulsory arbitration for collective bargaining, though the nature of the bargaining would differ from that available in the private sector.

It is to be hoped that the states will be receptive to open-minded consideration of novel approaches to the new problems which militant public employee unions are now presenting. But collective bargaining, with all of its advantages in the private sector, cannot be successfully transferred to the public sector unless it is carefully modified to meet the dissimilar conditions of public employment. The modifications presented in the foregoing statutory proposal are offered as a possible means of meeting those conditions.
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610