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Industrial Collective Bargaining in the Public Sector: Because It's There?

Stephen S. Boynton*

The test of a first rate intelligence is the ability to hold two opposed ideas in the mind at the same time, and still retain the ability to function.

F. Scott Fitzgerald
The Crack-up, February 1936

In the past decade there has been an extremely vocal debate on whether the concept of industrial collective bargaining is appropriate in the public employment sector. Although many variations of collective negotiations occur in public employment today, it has been asserted that collective bargaining as known in the private sector should be the only method of dealing with public employee labor relations and that any other procedure should be replaced. The inevitable climax of this debate was the introduction of legislation in the United States Congress to impose federal jurisdiction for collective bargaining rights on all state and local subdivisions, public and quasi-public corporations, housing authorities and public agencies.¹

The assumption of federal jurisdiction relies on the commerce clause² and the

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1. H.R. 17282, 91st Cong., 2d Sess. (1970); H.R. 1225, H.R. 4503, H.R. 5762, H.R. 5844, H.R. 7684, H.R. 7981, 92d Cong., 1st Sess. (1971); cf. H.R. 12532, 91st Cong., 1st Sess. (1969) which places all public employees under the Nat'l Labor Rel. Act, 29 U.S.C. § 152; H.R. 9324, 92d Cong., 1st Sess. (1971) and S. 1951, 91st Cong., 2d Sess. (1970) dealing exclusively with education. It was announced on Jan. 20, 1972 that hearings would commence on Mar. 1, 1972 before the Special Subcommittee on Labor of the Committee on Education and Labor of the House of Representatives on H.R. 7684, H.R. 9324, and H.R. 12532. Statement of Rep. Frank Thompson (D-N.J.) 118 CONG. REC. H 162 (daily ed. Jan. 20, 1972). [The provisions of all the House bills concerning the general subject are identical, so all citations to sections will equally apply to all bills.]

2. U.S. CONST. art. I, § 8.

first and fourteenth amendments to the Constitution.³ The only public employees excluded are "officials appointed or elected pursuant to a statute to a policymaking position" ⁴ The bill allows employees to form, join, or assist a labor organization and to bargain collectively. Further, the bill authorizes employees to refrain from all union activities, except to the extent that a collective bargaining agreement contains a union security provision such as a union shop.⁵ Union dues are checked off by the employer to any organization designated by the employee, but where there is an exclusive representative, dues must be checked off to that organization only.⁶ The exclusive representative includes only those unions which are recognized prior to the enactment of the Act or which later become certified.⁷ Certification comes from a five-member National Public Employee Relations Commission appointed by the President.⁸ A union petition for an election (excluding supervisors) must be supported by 30 percent of the employees, and other unions can participate only if they can show authorization from 10 percent of the bargain-unit. Only one election may be conducted in any 12-month period. The Commission would determine the unit in which the election and collective bargaining would take place.⁹ Any individual, employer, or union may file a complaint on an alleged unfair labor practice and is entitled to a hearing before a hearing examiner, whose decision is final, unless the Commission determines that there are sufficient reasons to review the case.¹⁰ Written agreements, enforceable in federal district court, are authorized for arbitration of disputes concerning the interpretation of the agreement.¹¹ Provisions for mediation and fact-finding are provided; and if both parties agree to submit disputed issues to final and binding arbitration, the arbitration shall take precedence over all fact-finding procedures.¹² In application, the Act

shall supersede all previous statutes concerning this subject matter and shall preempt all contrary local ordinances, Executive orders, legislation, rules, or regulations adopted by any State or any of its political subdivisions or agents such as a personnel board or civil service commission.¹³

3. H.R. 1225, 92d Cong., 1st Sess. § 1 (1971).

4. *Id.* § 2(3).

5. *Id.* § 3.

6. *Id.* § 4.

7. *Id.* § 2(6).

8. *Id.* § 9.

9. *Id.* § 6.

10. *Id.* § 7.

11. *Id.* § 8.

12. *Id.* § 10.

13. *Id.* § 13.

In short, this bill would become the only path by which any non-federal public employee in any jurisdiction could seek changes in the labor relations area.

Although one might seriously debate the proposition that the history of collective bargaining in the private sector has not brought "any sign of the apocalypse,"¹⁴ the time has come to seriously question whether it is realistic to grant public employees the right to bargain collectively and, correspondingly, afford them the right to strike. Certainly, it is not surprising that the president of the largest public employee union in the country has stated that "[w]ithout the right to strike, there can be no true collective bargaining for public employees."¹⁵ Now that the debate has reached Congress, attention should be focused not only on the *appropriateness* of such collective bargaining in the public sector but also on the *need* for such a concept, particularly one imposed by federal action. The issue has obviously become more acute with the increasing militancy in the public sector. This is graphically illustrated by a comparison of the strike of a few public employees at the Washington Naval Yard in August of 1835¹⁶ with the walk-out of 200,000 mail carriers and clerks in March of 1970.¹⁷ Recent trends bring the issue into focus:

WORK STOPPAGES, 1958-1968¹⁸
STATE AND LOCAL GOVERNMENT

Year	Number of Stoppages	Number of Workers Involved	Man-Days Idle
1958	15	1,720	7,510
1959	26	2,240	11,500
1960	36	28,600	58,400
1961	28	6,610	15,300
1962	28	31,100	79,100
1963	29	4,840	15,400
1964	41	22,700	70,800
1965	42	11,900	146,000
1966	142	105,000	455,000
1967	181	132,000	1,250,000
1968	254	201,800	2,545,200

14. Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107, 1109 (1969).

15. Jerry Wurf, President, American Federation of State, County, and Municipal Employees, AFL-CIO, AFL-CIO NEWS, March 19, 1966. AFSCME has also developed a model state collective bargaining bill for the public sector and non-profit institution employees. See 383 BNA GOV'T EMPLOYEES REL. REP. [hereinafter cited as G.E.R.R.] B-3 to B-4 (1971). For a discussion on the background and growth of this union see Ross, *Those Newly Militant Government Workers*, FORTUNE, Aug. 1968, at 104; Culhane, *Washington Pressures/Public Employees' Union Stresses Federal Action to Get More State, Local Clout*, National Journal, Oct. 16, 1971, at 2082.

16. D. ZISKIND, ONE THOUSAND STRIKES OF GOVERNMENT EMPLOYEES 7 (1940).

17. See CONG. Q., March 27, 1970, at 841; N.Y. Times, Mar. 23, 1970, at 1, col. 8.

18. 92 MONTHLY LAB. REV. 29, 30 (1969).

The figures emphasize two material points. First, the incidence of public employee strikes is a national issue. In 1967 and 1968, 40 states had at least one of these strikes.¹⁹ Secondly, every one of the strikes was illegal. Consequently, the basic challenge of any public employee legislation is to prevent disruption detrimental to the public interest and still provide millions of public employees with the economic benefits found in the private sector. Either state and local jurisdictions must provide orderly procedures to deal with the causes of public employee unrest or Congress may have the unfortunate task of providing a possibly more extreme solution.

The trend today in public employment is not unlike the economic, political, and social development in a private labor movement that has tremendously influenced our society. The growth in the number of public employees is singularly significant. There are over 12 million persons employed in the public sector—twice the number employed 20 years ago.²⁰ The importance and impact of this labor force on our political and economic structure must be recognized, and its problems realistically resolved. Professor Harold Davey has commented that the decade of the 1970's will be referred to "in the year 2000 as 'the decade of the public sector,' taking its place along with the 1880's and the 1930's as one of the three most significant periods in the labor relations history of the nation."²¹

The purpose of this article is to analyze the issue realistically and to determine what will result from this legislative effort for public employees.

The No-strike Concept and Collective Bargaining

In the private sector the strike is now considered fundamental and is legislatively recognized as a national labor policy in both the Norris-La Guardia Act²² and the National Labor Relations Act.²³ The use of the strike in the public sector, however, has long been viewed as intolerable on the grounds that work stoppages against the sovereign are illegal and that the services of government

19. ADVISORY COMM'N ON INTERGOVERNMENTAL REL., LABOR-MANAGEMENT POLICIES FOR STATE AND LOCAL GOVERNMENT 234-35 (1969).

20. U.S. DEP'T OF LABOR, U.S. BUREAU OF LABOR STATISTICS, HANDBOOK OF LABOR STATISTICS 1968, at 80, table 41 (1968).

21. Davey, *Resolving of Unrest in the Public Sector*, 20 LAB. L.J. 529 (1969). An editorial in *The Journal of Commerce*, discussing the proposed legislation in terms of the labor relations history of the National Labor Relations Act, commented: "When one considers the history of industrial labor relations in this country [Act], and as interpreted by the National Labor Relations Board, one is apt to pause at this point. And those in Congress who are supporting the National Public Employee Relations Bill would do well to pause, too." *The Journal of Commerce*, Mar. 19, 1971, at 4, col. 2.

22. 29 U.S.C. §§ 101-15 (1970).

23. 29 U.S.C. § 151 (1970).

must not be interrupted.²⁴ This concept is embodied in the case law, statutes, and opinions from the attorney general in 43 states.²⁵ The federal government statutorily prohibits strikes by federal employees.²⁶ Four states, however, have enacted legislation giving public employees the right to strike absent emergency situations;²⁷ several other states are studying the issue.²⁸

However, as the nation has witnessed in the recent past, the fact that a strike may be prohibited is not controlling. There is some question, therefore, whether such a prohibition is relevant.²⁹ Indeed, legal counsel to the unions involved in the Charleston, South Carolina hospital employees' dispute in 1969³⁰ stated:

24. The statements on this point by the various national leaders in this century are noteworthy: "There is no right to strike against the public safety by anybody, anywhere, any time." Telegram from then Governor Calvin Coolidge to Samuel Gompers, President, American Federation of Labor on the occasion of the Boston police strike, September 16, 1919 cited in A. LINK, *AMERICAN EPOCH* 236 (2d ed. 1963); ". . . [A] strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of [g]overnment until their demands are satisfied. Such action, looking toward the paralysis of [g]overnment by those who have sworn to support it, is unthinkable and intolerable." Letter from Franklin D. Roosevelt to L.C. Steward, President, Nat'l Fed'n of Fed. Employees, Aug. 16, 1937, noting the organization's bylaw against strikes. 1937 *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 325 (1941); "Society cannot tolerate strikes that endanger the very survival of society. I don't think we ought to have strikes in public service industry." Walter Reuther, 56 *NAT'L CIVIC REV.* 392, 394 (1967); "A strike of public employees is not tolerable, but simply saying that is not a substitute for thought and action." Address by former Secretary of Labor, George P. Shultz, before Assembly of Governmental Employees, in Detroit, Michigan, Oct. 17, 1969.

25. U.S. DEP'T OF LABOR, *SUMMARY OF STATE POLICY REGULATIONS FOR PUBLIC SECTOR LABOR RELATIONS: STATUTES, ATTORNEY GENERALS' OPINIONS AND SELECTED COURT DECISIONS* (Nov. 1971).

26. 5 U.S.C. § 7311 (3) (1970).

27. Hawaii Act 171, L. 1970; PA. STAT. ANN. tit. 43, § 217.1 (Supp. 1971); MONT. REV. CODE ANN. tit. 41, § 2209 (Supp. 1970); 21 VT. STAT. ANN. § 1704 (Supp. 1971). See also Schmidman, *Nurses and Pennsylvania's New Public Employee Bargaining Law*, 22 *LAB. L.J.* 725 (1971); Smith, *State and Local Advisory Reports on Public Employment Labor Legislation: A Comparative Analysis*, 67 *MICH. L. REV.* 891 (1969).

When Gov. Raymond P. Shafer reluctantly signed the Pennsylvania bill he urged "all employees and their bargaining agents to use this new labor tool wisely and in the best interest of all citizens . . . so that differences can be resolved at the negotiation table, not on the street and picket lines while school children, hospital patients and others in need of public service suffer." *Washington Post*, July 26, 1970, at A-10, col. 4.

28. E.g., The Labor Law Committee of the Ohio State Bar Association in 1969 recommended the repeal of the Ferguson Act which bans public employee strikes. *OHIO REV. CODE ANN.* §§ 4117.01 to -.05 (1965). The proposed substitute would permit a strike if the public employer and the labor organization were unable to reach an agreement after 45 days following the recommendation from the fact-finding board, and the strike could continue until such time as a collective bargaining agreement was reached. 42 *OHIO BAR* 563, 576 (1969).

29. U.S. Civil Serv. Comm'r Robert E. Hampton stated in 1970 that the "Commission soon will review the law prohibiting strikes by federal employees to determine whether the provisions are relevant to the times in light of the postal and air traffic controllers strikes. . . ." Address by Robert E. Hampton, Nat'l Ass'n of Internal Revenue Employees, Buffalo, New York, Sept. 4, 1970.

30. See Wechsler, *They Walked Into the Sun*, *N.Y. Post*, July 24, 1969, at 37, col. 3.

It is not inconceivable that by the end of this decade almost all public employees will *enjoy* the right to strike except where the public health and welfare would be endangered.³¹

Since penalties, in many instances, have not been enforced, many persons favor the strike as a viable method of gaining employment concessions. As Senator Robert P. Griffin has aptly stated: “[w]hen government cannot, or will not, invoke the penalties it threatens, strikes are not only encouraged but respect for the government is undermined.”³²

The real question is whether collective bargaining will deter the strike concept or, if in fact collective bargaining can be successfully employed without use of strikes. It has been advocated that there is no difference between the public and the private employee, and therefore the strike tool in bargaining should be available. A former counsel to the National Education Association took the position in 1964 that “strikes are impermissible in any governmental bargaining system.”³³ Four years later he stated that:

Experience has taught me that I was wrong. It is no longer clear to me why the legality of a strike by bus drivers, for instance, should depend on whether their employer is a municipal corporation or a privately owned company.³⁴

Others have taken the position that the right to strike is the *sine qua non* of the public employment bargaining process.³⁵ In 1966, the American Federation of State, County and Municipal Employees [AFSCME] International Executive Board adopted the following position: “AFSCME insists upon the right of public employees . . . to strike. To forestall this right is to handicap the free

31. Eisner & Sipser, *The Charleston Hospital Dispute: Organizing Public Employees and the Right to Strike*, 45 ST. JOHN'S L. REV. 254, 270 (1970) (emphasis added).

32. Address by Senator Robert P. Griffin (R-Mich.), Nat'l Conf. of State Legislative Leaders, Honolulu, Hawaii, Dec. 5, 1968.

33. Wollett, *The Public Employee at the Bargaining Table: Promise or Illusion?*, 15 LAB. L.J. 8, 12 (1964).

34. Wollett, *The Taylor Law and the Strike Ban*, in PUBLIC EMPLOYEE ORGANIZATION AND BARGAINING 29, 35 (1968).

Although the identical analogy is used by Professors Wellington and Winter, they conclude that it “is only half of the issue. . . .” Wellington & Winter, *supra* note 14, at 1123-24.

35. “The most effective technique to produce acceptable terms to resolve disputes is voluntary agreement of the parties, and the best system we have for producing agreements between groups is collective bargaining—even though it involves conflict and the possibility of a work disruption. There is no alternative.” Kheel, *Strikes and Public Employment*, 67 MICH. L. REV. 931, 942 (1969). See also Burton & Krider, *The Role and Consequences of Strikes by Public Employees*, 79 YALE L.J. 418 (1970); Donahue, *What Do Unions Want?*, in THE CRISIS IN PUBLIC EMPLOYEE RELATIONS IN THE DECADE OF THE SEVENTIES 35, 37 (1970); Eisner & Sipser, *supra* note 31, at 271. Comment, *Public Employees—The Right to Organize, Bargain, and Strike*, 19 CATHOLIC U.L. REV. 361, 370-71 (1970).

collective bargaining process."³⁶ Others, including this author, are not convinced.

The battles over the right of public unions to organize are all but over on the state level,³⁷ and clearly finished on the federal level.³⁸ The next question is whether Congress has the power to impose collective bargaining on all non-federal employees. As was mentioned earlier, the pending legislation relies on the commerce clause and the first and fourteenth amendments to the Constitution to invoke federal jurisdiction. Arvid Anderson, chairman of the Office of Collective Bargaining in New York City, has suggested that, under *Maryland v. Wirtz*,³⁹ the federal government has broad authority to regulate conditions of employment for state and local schools under the Fair Labor Standards Act⁴⁰ and that the reach of the Taft-Hartley Act⁴¹ might be extended by deleting from it the exemption for state and local subdivisions. Second, many states already have some form of collective bargaining laws.⁴² And finally, it is well established that the mere prohibition of a strike will neither prevent strikes nor collective bargaining from developing.

Recognizing these factors, however, does not necessarily lead to the conclusion that collective bargaining with the right to strike belongs in the public sector. There are fundamental and practical differences between public and private employment which demand distinct labor relations treatment. No amount of rhetoric or perversion of established principles can hide the need for separate labor policy considerations and responses.⁴³

36. *Policy Statement on Public Employee Unions; Rights and Responsibilities, Adopted by Int'l Executive Board of AFSCME, AFL-CIO*, July 26, 1966, in SORRY . . . NO GOVERNMENT TODAY 67-8 (R. Walsh ed. 1969).

37. See *AFSCME v. Woodward*, 406 F.2d 137 (8th Cir. 1969); *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968); cf. *Atkins v. City of Charlotte*, 296 F. Supp. 1068 (W.D.N.C. 1969). See also ADVISORY COMM'N ON INTERGOVERNMENTAL REL., LABOR-MANAGEMENT POLICIES FOR STATE AND LOCAL GOV'T 27 (1969).

38. See Exec. Order No. 10,988, 3 C.F.R. 21 (1962), 5 U.S.C. § 7301 (1970) promulgated by Pres. John F. Kennedy; Exec. Order No. 11,491, 3 C.F.R. 510 (1969), 5 U.S.C. § 7301 (1970). Cf. 29 U.S.C. § 151 (1970). H.R. 1225, 92d Cong., 1st Sess. (1971).

39. 392 U.S. 183 (1968).

40. 29 U.S.C. § 201 (1970).

41. 29 U.S.C. § 141 (1970). Mr. Anderson's position was given in an address at a Symposium on Labor-Management, at the University of Kentucky Labor Education Center, Nov. 14, 1969.

42. Mitchell & Sorenson, *State Labor Legislation Enacted in 1969*, 93 MONTHLY LAB. REV. 48, 51-52 (1970); Report of ABA Committee on State Labor Laws, 310 G.E.R.R. E-1 (1969); U.S. DEP'T OF LABOR, *supra* note 25. At the Fortieth American Assembly (a national non-partisan education institution) held in October, 1971 on collective bargaining in government, the final report recommended that collective bargaining rights "be extended to all levels of government, and to all eligible employees." *Collective Bargaining in American Government*, in FINAL REPORT OF THE FORTIETH AMERICAN ASSEMBLY 5 (1971).

43. If there were no distinction, denial of the right to strike to public employees might not withstand the challenge of the due process and equal protection requirements of the fifth and

The most obvious difference in the employment is the political versus economic discipline. Certainly, the question of wages and benefits is an economic consideration to both types of employees, but the public employer is not faced with the market restraints that face the private employer. It certainly is not a convincing argument to say that the public employer's concern over taxes "may result in a close substitute for market constraints,"⁴⁴ when the economic ingredients of the tax structure and the private industrial profit system are as similar as an anti-ballistic missile and a sling shot. When thousands of transit workers went on a 12-day strike in New York in 1966,⁴⁵ the public pressure for a swift settlement was in no way connected with the cost. The public demanded action. The "cost" factor at that time—whether through increased taxes or decreased services—could not be the controlling factor for the public or, in the face of public demand, for the government.

The Condon-Wadlin Law,⁴⁶ which prohibited such a strike and prescribed penalties, could not be effectively invoked since its enforcement would have denied the workers the very wage increase negotiated.⁴⁷ The enormous pressure placed on the political entities by the public affected by such a strike does not realistically include any economic considerations or results. For example, after a 12-hour strike by firefighters in Newark, New Jersey, state urban aid funds originally authorized for the poor were diverted to salary increases.⁴⁸ This situation clearly illustrates not only an imbalance in the political process, but also a conflict in the development of appropriate governmental priorities.

In *City of New York v. DeLury*,⁴⁹ the Taylor Law⁵⁰ ban on public employee strikes was unanimously upheld. The court stated that:

[T]he orderly functioning of our democratic form of representative government and the preservation of the right of our representatives to make budgetary allocations—free from the compulsions of crippling strikes—require the regulation of strikes by public employees whereas there is no similar countervailing reason for prohibitions in

fourteenth amendments to the Constitution on the ground that if similar work is performed in the private sector with the right to strike it is a denial of due process and equal protection not to permit the strike in the public sector.

44. Burton & Krider, *supra* note 35, at 425.

45. N.Y. Times, Jan. 13, 1966, at 1, col. 8.

46. Law of March 27, 1947, ch. 391. [1947] N.Y. Laws 842, *as amended* Law of April 23, 1963, ch. 702 [1963] N.Y. Laws 2432 (repealed 1967).

47. N.Y. CIV. SERV. LAW § 200-12 (McKinney Supp. 1971). For a review of the deliberations that led the committee recommending the new law, see FINAL REPORT OF THE GOVERNOR'S COMM. ON PUBLIC EMPLOYEE REL., STATE OF NEW YORK (1966) [hereinafter cited as FINAL REPORT].

48. See N.Y. Times, Aug. 7, 1969, at 25, col. 7.

49. 23 N.Y. 175, 243 N.E.2d 128, 295 N.Y.S.2d 901 (1968), *appeal dismissed*, 394 U.S. 455 (1969), *rehearing denied*, 396 U.S. 872 (1969).

50. N.Y. CIV. SERV. LAW § 200-12 (McKinney Supp. 1971).

the private sector.⁵¹

Simply stated, there are major differences between the decision-making processes of government and those of the private sector, a difference which persists whether talking of essential or nonessential government services.⁵² As stated in the Taylor Committee Report, which prepared New York's Public Employee Fair Employment Law:

Careful thought about the matter shows conclusively, we believe, that while the right to strike normally performs a useful function in the private enterprise sector (where relative economic power is the final determinant in making of private agreements), it is not compatible with the orderly functioning of our democratic form of representative government (in which relative political power is the final determinant).⁵³

It has been argued that the devices that one group uses for political pressure (e.g., a citizens' group for a new school) and the economic pressure another group might use (e.g., striking sanitation workers for higher wages) are really the same. Both seek to influence executive and legislative determinations such as the allocation of funds and the tax rate. Even considering the "nature of the means" used to pressure the government, there really is no distinction.⁵⁴ However, this position ignores the *political* result. The new school may have to wait for the completion of a new sewer as a proper governmental decision on priorities, but the pressure to remove the garbage from the streets will not await the political process. In short, strikes inconvenience the voter and pressure is put on the office holder to eliminate that inconvenience. Voters will support those office seekers who avoid the strike or eliminate it swiftly. The results are the vulnerability of the political unit, the increased power of one group to the disadvantage of other political groups, and the distortion of the total political process.⁵⁵

51. 23 N.Y. 175, 186, 243 N.E.2d 128, 134, 295 N.Y.S.2d 901, 909 (1968).

52. Many writers have made distinctions on what is an "essential service." See, e.g., Burton & Krider, *supra* note 35, at 427 where the following breakdown is given:

- (1) essential services—police and fire—where strikes immediately endanger public health and safety;
- (2) intermediate services—sanitation, hospitals, transit, water and sewage—where strikes of a few days might be tolerated;
- (3) nonessential services—streets, parks, education, housing, welfare and general administration—where strikes of indefinite duration could be tolerated.

53. FINAL REPORT, *supra* note 47, at 18-19. It was also noted that to determine what would be "essential and non-essential governmental services" would be "administratively impossible."

54. Burton & Krider, *supra* note 35, at 430.

55. For a good discussion on the political pressures of public employment groups, see Murphy, *The Politics of Employee Relations*, in *THE CRISIS IN PUBLIC EMPLOYEE RELATIONS IN THE DECADE OF THE SEVENTIES* 123 (1970).

Although it is contended that, absent the right to strike, public employees will have too little power at the bargaining table, the real issue is whether or not the public employee is, or believes he is, being treated fairly. Consequently, the task of the legislator is to design alternatives to the collective bargaining-strike concept that achieve acceptability.

The author of the legislation in the 92nd Congress that would impose federal jurisdiction collective bargaining on the states and local entities stated:

Those who oppose the idea of collective bargaining for public employees will inevitably object that the right to bargain collectively ultimately means the right to strike. *Although this bill neither creates nor prohibits the right to strike*, it should be noted that the present system has not avoided strikes by public employees even though such strikes are illegal.⁵⁶

Although it is all too true that the illegal strike has become an "alternative" to the legal process, the answer is not to condone, or even encourage, illegal strikes by such legislation, but rather to seek and support the viable alternatives that will avoid the disruption or the threat thereof. Conferring collective bargaining rights on public employees (silent or not on the right to strike) does not provide the panacea to work stoppages. Within the first year after the passage of Michigan's Public Employee Relations Act,⁵⁷ providing collective bargaining for non-state public employees, there were 12 strikes by municipal employees. In the 17 years prior to passage, there were only 13 strikes.⁵⁸ The Taylor Committee was mindful of this experience and even anticipated an increase in strikes when they recommended granting exclusive recognition and bargaining rights to public employees.⁵⁹ The strikes occurred as predicted.⁶⁰ In 1969, Governor Rockefeller stated that the Taylor Law "[j]udged solely on its ability to prevent [work] stoppage . . . is indeed imperfect."⁶¹

It would not seem to be an irrelevant inquiry to ask whether this nation is prepared to accept legislation to grant exclusive recognition and bargaining

56. Statement of Rep. Abner I. Mikva (D. Ill.) on introduction of H.R. 1225, 92d Cong., 1st Sess. (1971), 117 Cong. Rec. E 1647-48 (daily ed. Mar. 9, 1971) (emphasis added).

57. MICH. COMP. LAWS ANN. §§ 423.201 to -.216 (1967). This law does not cover state employees but only employees of cities, counties, and school boards. The difference in public employee labor relations will be discussed later in the article.

58. Rapoport, *Militant Public Employees*, Wall St. J., Aug. 9, 1966, at 14, col. 4.

59. *Supra* note 47, at 42, 43, 53.

60. *E.g.*, in September 1967, the teachers struck for 14 days. N.Y. Times, Sept. 11, 1967, at 1, col. 8. The Taylor Act had to be set aside to avert a 1968 transit strike. N.Y. Times, Jan. 1, 1968, at 1, col. 3. In the fall of 1968, New York's city schools were closed for two months. Mayer, *The Full and Sometimes Very Surprising Story of Ocean Hill, The Teachers' Union and the Teachers' Strikes of 1968*, N.Y. Times, Feb. 2, 1969, § 6 (Magazine), at 18.

61. The Chief, The New York City Civil Employees' Weekly, Jan. 17, 1969, at 1.

rights to *all* public employees, when that legislation is purposely silent on the question of strikes. Collective bargaining with the right to strike is admittedly a tool in labor relations, but it does not necessarily follow that it *must* be employed simply because it is there.

Based upon their circumstances, experience, and individual needs, the states have developed a variety of measures to deal with the issue. Some of these measures include fact-finding with recommendations,⁶² collective bargaining with provisions designed to ban the strike,⁶³ meet-and-confer mechanisms,⁶⁴ and a variety of combinations thereof. In short, there is a middle ground.

An example of such a middle ground is the Michigan experience. In a letter to the *Detroit Free Press*, the Michigan State Personnel Director asserted that, by using a system of formally organized joint advance fact-finding and conference mechanisms with all levels participating, "the State is developing a viable alternative in public employee paysetting to the strike and confrontation now commonly used with disturbing frequency in determining pay for public workers."⁶⁵ In answering the charge that the state employees had no voice and were completely bound by budgets, the Director stated:

It is a tragic mistake to assume that simply because state employees are not exclusively organized and geared to automatically attempt to enforce their demands via a strike they should be expected to accept a Civil Service Commission decision dictated *solely* by "budget" restraints. This did not happen this year and if that time ever comes, such a system will result in the same "solution" we find under [the Public Employee Relations Act utilizing collective bargaining for non-state public employees].⁶⁶

62. See, e.g., CONN. GEN. STAT. ANN. §§ 7-467-78 (Supp. 1969); MASS. ANN. LAWS ch. 149, § 178D (Supp. 1970), §§ 178 F-N (Supp., 1969); MICH. COMP. LAWS ANN. 17.455 (1968); N.Y. Civ. Ser. Laws §§ 200-12 (McKinney Supp. 1971); WIS. STAT. § 111.70 and §§ 111.80-94 (1969). See also Gould, *Public Employment: Mediation, Fact Finding and Arbitration*, 55 A.B.A.J. 835 (1969). Cf. Lev, *Strikes By Government Employees: Problems and Solutions*, 57 A.B.A.J. 771 (1971) which was the article winning the 1971 ABA Ross Essay Contest that recommended a statute to establish a Public Employee Mediation Board for all public employees resulting in the unionization of all public employees. This article was strongly attacked in an editorial in *The Dallas Morning News* on September 6, 1971 and called upon the ABA to make its position on the point clear. ABA President Leon Jaworski answered the editorial by letter, dated September 14, 1971, stating that the ABA had no position on the views of Mr. Lev since no official policy had been taken. 57 A.B.A.J. 1129 (1971).

63. See, e.g., DEL. CODE ANN. tit. 19, §§ 1301-13 (Supp. 1971); MO. REV. STAT. § 105.500-.530 (Supp. 1967); R.I. GEN. LAWS ANN. § 28-9.4-1 to .4-19 (Supp. 1970); WASH. REV. CODE § 41-56.010-.900 (Supp. 1969).

64. See, e.g., CAL. EDUC. CODE § 13,085 (West Supp. 1971); ORE. REV. STAT. § 342.460 (1) (1969).

65. Letter from Sidney Singer, State Personnel Director, State of Michigan to Editor, *Detroit Free Press*, Dec. 27, 1971, on file in Catholic University Law Review Library.

66. *Id.*

The "solution" of collective bargaining for employees of cities, counties, and school boards in Michigan has resulted in "[m]illions of lost man-hours in hundreds of strikes in public employment in Michigan in recent years"⁶⁷

Another consequence of the national institution of the industrial collective bargaining concept would be the demise of the merit system. Supported by independent public employee associations, the merit system advocates the selection and promotion to all positions in government service on the basis of merit as demonstrated by competitive examination; the removal or suspension of an employee only for cause after a fair hearing; the right of every citizen to compete competitively for a public position without regard to race, creed, color, religion, or political affiliation; and the exemption from the merit system of those who are elected and those involved in policy-making functions.⁶⁸ The policies which guide the independent public employee organization are conceived and executed at the local jurisdictional level, as opposed to the union concept of outside control and discipline. Further, the independents support the statutory approach to public employee relations as opposed to the union concept of contract. The major distinction in philosophy is that the independent advocates the resolution of impasses by mediation and arbitration without the threat or use of work stoppages and strikes.⁶⁹

The differences are dramatic. The 1970 Convention of the American Federation of Government Employees (AFGE) voted to repeal a section of its constitution which stated that the organization was "opposed to, and will not engage in strikes." This had been "basic law" since the founding of AFGE in 1932.⁷⁰

67. *Id.* One writer has observed that regardless of the merits, public employee gains through collective bargaining will be costly to the public by (1) the unavoidable increase in tax burdens which they will produce, for costs-per-unit-of-public service produced show no likelihood of being reduced; (2) the interruptions which will occur in the flow of public goods and services; and (3) the reductions which may occur in the quality of public service as significant numbers of public employees reflect new found strength by contesting the efforts of public managers to improve efficiency and quality in the public service. Gitlow, *Public Employee Unionism in the United States: Growth and Outlook*, 21 *LAB. L.J.* 766, 778 (1970).

68. See Position Statement of the Assembly of Governmental Employees, Labor Management Relations in State and Local Public Service 8-11 (1969).

69. The independents as well as the unions also oppose the subcontracting of public services to political or profit oriented concerns. For a discussion of this point as it relates to the bargaining position in the strike concept see Burton & Krider, *supra* note 52, at 425, 440. It has been observed that "a great many collective bargaining contracts are concluded without strikes." Therefore, "the crucial issue is not whether strikes should be permitted in the public sector, but whether the collective bargaining process itself can be made so effective absent the right to strike that the need for work stoppages will be obviated." Anderson, *Strikes and Impasse Resolution*, 67 *MICH. L. REV.* 943, 947 (1969). The point is certainly well taken to the merits of avoiding strikes, but if the threat and option of the strike remains, the issue is still before the parties during the negotiations.

70. U.S. NEWS & WORLD REP., *New Era For Federal Workers—Bigger Unions, Strike Threats*, Aug. 24, 1970, at 62.

As mentioned earlier, the American Federation of State, County and Municipal Employees reaffirmed their right to strike in 1966.⁷¹ Quite clearly then, the traditional merit system which insures tranquility in the public sector and promotes orderly procedures for the needs of public employees would be eliminated with collective bargaining that includes the right to strike.

There is no room for debate that for "those states which have yet to develop state policies in public employee labor relations, time is running out."⁷² There *is* room for doubt, however, as to whether the answer is to impose legislation which, as even its author concedes, is silent on the strike issue, and to overrule all state and local laws governing public employee relations. Through the political process it has been demonstrated that procedures can be developed to meet the peculiar problems of the jurisdiction, short of the industrial concept of collective bargaining. Justice Brandeis once observed that "[n]early all legislation includes a weighing of public needs as against private desires; and likewise a weighing of relative social value."⁷³

The public needs and the demands of the public employee *can be* equitably resolved without the social disruption of strike tactics.

In sum, it is suggested that the ban on public strikes be continued with realistic penalty procedures designed to cope with violations. Secondly, if a no-strike policy prevails, it will be successful only if the demands of public employees are met through appropriate merit system and bargaining techniques. This goal can be achieved through the political processes not as a *total* solution, but as an effort to achieve a *workable* situation. There is no final solution, but we should not as a nation try to achieve finality and uniformity without the clear understanding of the results, and a full exploration of the alternatives.

71. *Supra* note 36.

72. *State-Local Employee, Labor Relations*, in THE COUNCIL OF STATE GOV'TS 51 (Dec. 1970).

73. *Truax v. Corrigan*, 257 U.S. 312, 356 (1921) (dissenting opinion).