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RIGHT OF PUBLIC EMPLOYEES TO STRIKE

In the last thirty years there has been an explosive increase in the number of public employees and today they constitute almost seventeen per cent of the nation's working force.¹ With public employment continually increasing² there has been substantial development in public employee unionism,³ and in the future there may be a greater number of labor disputes and consequently a rise in the number of public employee strikes.⁴ These statistics and predictions emphasize the need to determine the precise legal status of the right to strike in public employment. It will be the subject of this comment to discuss the nature and validity of the theories used to prohibit or permit such strikes. While this article will be concerned with public employees in general, it will focus its attention to actual strikes by public school teachers, since it is felt by leading commentators that, because of their successes in the past, classroom teachers will take the lead as public employees in using the strike to gain their objectives.⁵

Court decisions almost uniformly deny public employees the right to strike.⁶ They support this position with the theory that a strike by public

¹ In 1930, public employees constituted only about six per cent of the civilian labor force. Smith & McLaughlin, *Public Employment: A Neglected Area of Research and Training in Labor Relations*, 16 IND. & LAB. REL. REV. 30, 31 (1962). "Population growth, war and national defense, economic crises, technology, and the desire for additional services have been responsible in the last 25 years for a phenomenal rise in employment in public service." Seligson, *A New Look at Employee Relations in Public and Private Service*, 15 LAB. L.J. 287, 298 (1964).

² "It is estimated that by 1970, for every five employed persons there will be one government employee; by 1980 the ratio will have increased to 1 out of 4." Weisenfeld, *Public Employees—First or Second Class Citizens*, 16 LAB. L.J. 685, 687 (1965).

³ *Id.* at 687. For statistics see, Brinker, *Recent Trends in Labor Unions in Government*, 12 LAB. L.J. 13, 14-18 (1961).

⁴ Anderson, *Disputes Affecting Government Employees*, 10 LAB. L.J. 707 (1959).

⁵ *Supra* note 2, at 697. Radke, *Real Significance of Collective Bargaining for Teachers*, 15 LAB. L.J. 795, 798 (1964). Wollett, *The Public Employee at the Bargaining Table: Promise or Illusion?*, 15 LAB. L.J. 8 (1964).

⁶ Although there have been many strikes by public employees, very few of them have reached the courts of last resort, and consequently there are few reported cases. But see: *City of Los Angeles v. Los Angeles Bldg. & Constr. Trades Council*, 94 Cal. App. 2d 36, 210 P.2d 305 (2d Dist. 1949); *Norwalk Teachers Ass'n. v. Board of Educ.*, 138 Conn. 269, 83 A.2d 482 (1951); *Board of Educ. v. Redding*, 32 Ill. 2d 567, 207 N.E. 2d 427 (1965); *City of Detroit v. Division 26 of the Amalgamated Ass'n. of St. Employees*, 332 Mich. 237, 51 N.W.2d 228 (1952); *Goodfellow v. Civil Serv. Comm'n.*, 312 Mich. 226, 20 N.W.2d 170 (1945); *City of Manchester v. Manchester Teachers' Guild*, 100 N.H. 507, 131 A.2d 59 (1957); *City of Cleveland v. Division 268, Amalgamated Assn. of St. Employees*, 85 Ohio App. 153, 90 N.E.2d 711 (1949); *Local 976, Int'l. Bhd. of Elec. Workers v. Grand River Dam Authority*, 292 P.2d 1018 (Okla. 1956); *City of*

employees would, in effect, be a strike against the government itself.⁷ This could only lead to anarchy and chaos. As stated by President Franklin D. Roosevelt:

militant tactics have no place in the functions of any organization of Government employees. [A] strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of Government until their demands are satisfied. Such action, looking toward the paralysis of Government by those who have sworn to support it, is unthinkable and intolerable.⁸

In *Norwalk Teachers Ass'n. v. Board of Educ.*,⁹ the court, in denying Norwalk teachers the right to engage in a strike or work stoppage, quoted Roosevelt's statement as having come to be regarded as gospel by the executive heads of state and nation.¹⁰ The court also relied upon President Calvin Coolidge's comment on the Boston Police Strike, that "there is no right to strike against public safety by anybody anywhere at any time."¹¹

In addition to judicial decisions denying the right of public employees to strike, state legislatures are tending to specifically prohibit strikes.¹²

Pawtucket v. Pawtucket Teachers' Alliance, 87 R.I. 364, 141 A.2d 624 (1958); *Port of Seattle v. International Longshoremen's Union*, 52 Wash. 2d 317, 324 P.2d 1099 (1958). *Contra*, *Local 266, Int'l. Bhd. of Elec. Workers v. Salt River Project*, 78 Ariz. 30, 275 P.2d 393 (1954); *Board of Trustees v. Now*, 9 L.R.R.M. 789 (Ohio C.P. 1941). For cases permitting a strike of public employees by statutory construction, see *Los Angeles Metropolitan Transit Authority v. Brotherhood of R.R. Trainmen*, 54 Cal. 2d 684, 335 P.2d 905 (1960), 59 MICH. L. REV. 1260 (1961), 47 VA. L. REV. 338 (1961), 18 WASH. & LEE L. REV. 297 (1961) (right to strike implied by statute giving transit authority employees the right to engage in "concerted activities"). See also, Note, 75 HARV. L. REV. 391, 407-408 (1961).

⁷ SPERO, *GOVERNMENT AS EMPLOYER* 15 (1948).

⁸ Letter from President Franklin D. Roosevelt to L. C. Stewart, President, National Fed'n. of Fed. Employees, Aug. 16, 1937, in RHYNE, *POWER OF MUNICIPALITIES TO ENTER INTO LABOR CONTRACTS* 24 (1941).

⁹ 138 Conn. 269, 83 A.2d 482 (1951).

¹⁰ *Id.* at 273, 83 A.2d at 484.

¹¹ *Ibid.* See also Message to Legislature 36, Jan. 4, 1961, where Governor Nelson A. Rockefeller of New York has recently said, "A strike or threat of a strike by public employees is wrong in principle and utterly inconsistent with their special responsibilities as public servants."

¹² At least twelve states prohibit strikes of public employees by legislation: FLA. STAT. § 839.221 (1963); HAWAII REV. LAWS § 5-8 (1955); MICH. STAT. ANN. § 17.455 (2) (1960); MINN. STAT. ANN. § 179.51 (Supp. 1964); NEB. REV. STAT. § 48-821 (1943); N.Y. CIV. SERV. § 108; OHIO REV. CODE ANN. § 4117.02 (Anderson 1965); ORE. REV. STAT. § 243-760 (1963); PA. STAT. ANN. tit. 43; § 215.2 (1964); TEX. REV. CIV. STAT. art. 5154-c (Supp. 1964); VA. CODE ANN. § 40-65 (Supp. 1964); WIS. STAT. § 111.70 (4) (1) (1963). See also, *Pruzan v. Board of Education of City of New York*, 25 Misc. 2d 945, 209 N.Y.S. 2d 966 (1960) holding an anti-strike law constitutional. *Contra*, a number of bills have been introduced in state legislatures which would grant the right to strike to all or

Congress also has specifically prohibited employees of the United States government from participating in a strike.¹³ The reason given for the passage of anti-strike laws, instead of relying on protection fashioned by the courts, is that occasional threats of organized public employees and actual strikes by them cause embarrassment not only to public officials but to leaders of employee organizations, as well as tax the patience of the public.¹⁴

The major theory advanced against public employees' strikes is the sovereignty of the governmental employer.¹⁵ This theory argues that the people are the ultimate repository of authority. However, they can only act through the sovereign state, which is the embodiment of the will of the people. The state's employees are the means by which the will of the people is effectuated, and herein they differ from private employees. The government employee owes unquestioning loyalty and obedience to the state, for to disobey the state is to disobey the will of the people.¹⁶ A strike against a governmental body is often thought of as equivalent to a revolt against governmental authority,¹⁷ or tantamount to treason itself.¹⁸

at least in some areas of public employment, but none has yet been enacted. Zander, *Trends in Labor Legislation for Public Employees*, 83 MONTHLY LABOR REV. 1293, 1296 (1960).

¹³ Federal law declares that employees of the United States Government may not participate in any strike, assert the right to strike against the Government, or knowingly belong to an organization of government employees that asserts such a right. 69 STAT. 624 (1955), 5 U.S.C. § 118-p-r (1964). For a discussion of other foreign countries' laws on the legality of strikes by government employees, see Brinker, *Recent Trends of Labor Unions in Government*, 12 LAB. L.J. 13 (1961).

¹⁴ KAPLAN, *THE LAW OF CIVIL SERVICE*, 325 (1958).

¹⁵ For discussions of the sovereignty argument see, COMM. ON EMPLOYEE RELATIONS IN PUBLIC SERVICE, *EMPLOYEE RELATIONS IN THE PUBLIC SERVICE* 57 (1942); Spero, *Collective Bargaining in the Public Service*, 248 ANNALS 146 (1946); Agger, *The Government and its Employees*, 47 YALE L. J. 1109 (1938); Watt, *The Divine Right of Government by Judiciary*, 14 U. CHI. L. REV. 409, 453 (1947).

¹⁶ The theory of sovereignty forms the basis of certain arguments by analogy. The right to strike, it is argued, is analogous to the right to sue the state; unless the sovereign permits, it cannot be done. Kaplan, *Have Public Employees the Right to Strike? No*, 30 NAT'L. MUNIC. REV. 518, 520 (1941). Some go so far as to compare all government workers to the military forces and argue that the sovereign demands the same loyalty and obedience from both. Agger, *Supra* note 15 citing from SPERO, *THE LABOR MOVEMENT IN A GOVERNMENT INDUSTRY* 17-20 (1927).

¹⁷ "In the American system, sovereignty is inherent in the people. They can delegate it to a government which they create and operate by law. They can give to that government the power and authority to perform certain duties and furnish certain services. The government so created and empowered must employ people to carry on its task. Those people are agents of the government. They exercise some part of the sovereignty entrusted to it. They occupy a status entirely different from those who carry on a private enterprise. They serve the public welfare and not a private purpose. To

The sovereignty theory, however, has been called a fiction.¹⁸ The chief fallacy lies in its failure to differentiate the government as a sovereign and as an employer. In its latter capacity the government merely hires people to perform services.²⁰ In the normal course of events disputes arise which are settled by negotiation, conciliation or arbitration. But these methods may be insufficient, and employees may resort to a strike in an attempt to enforce their position. This pattern in labor relations is not altered by the fact that the employer involved is some unit or agency of the government.²¹

Another basis for denying the right to strike is that the authority of the state depends in a large measure on its prestige. Therefore, public policy cannot tolerate a strike which would inevitably weaken the state's prestige.²² However, this argument has been criticized:

It is doubtful that the loss of a strike would cause such a loss of prestige as to cause a breakdown of the state's authority. A greater loss might occur by the resort to repressive labor policies. In any event no strike by government employees has yet had the effect of causing a breakdown of the state's authority.²³

Furthermore, it is unlikely that such strikes would dampen the state's prestige, since they have no political motive and are not aimed at the function of government itself. They are aimed at particular politicians or

say that they can strike is the equivalent of saying that they can deny the authority of government and contravene the public welfare." *Supra* note 9, at 276, 83 A.2d at 485.

¹⁸ See *City of Cleveland v. Division 268, Amalgamated Ass'n. of St. Employees*, *supra* note 6; see *supra* note 2, at 686.

¹⁹ Sovereignty theory has been criticized in other areas of the law. "It would seem somewhat anomalous that American courts should have adopted the sovereign-immunity theory in the first place since it was based upon the divine right of Kings." *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 30-31, 115 N.W.2d 618, 620 (1961) (abrogating the doctrine of governmental immunity from tort claims). See generally *City of West Frankfort v. United Ass'n. of Journeymen*, 53 Ill. App. 2d 207, 202 N.E.2d 649 (1964).

²⁰ Agger, *supra* note 15.

²¹ "Government employees like their counterparts in private enterprise are subject to the same vicissitudes of insecurity of employment, rising prices, accident, illness and old age. Everywhere, from the remotest corners of the earth to the most sophisticated, people seek to assert a measure of control over the conditions under which they live. The public employee, no less than his private counterpart, labors under the same apprehensions and frustrations and seeks the same measure of fulfillment from his daily chores." Weisenfeld, *supra* note 2, at 688. "Strikes in government employment have had the same causes as those in private employment." Note, 2 VAND. L. REV. 414, 445 (1949) citing ZISKIND, ONE THOUSAND STRIKES OF GOVERNMENT EMPLOYEES, 187 (1940).

²² Note, *supra* note 21, at 446.

²³ ZISKIND, *supra* note 21, at 191, 249.

administrators and in that respect are exactly like strikes in private industry.²⁴

Some authorities feel that since the profit motive is lacking in government, there can be no conflict between the employer and employees for a greater share of the profits as there is in private industry.²⁵ However, the absence of a profit motive is often compensated for by the constant pressures for governmental economy.²⁶ Also, government officials, strongly motivated by a desire for advancement or for the added personal prestige which results from outstanding agency records, often behave in much the same fashion as do private employers.²⁷

Yet, a fundamental difference exists between employment in private industry and employment in public industry, which renders strikes and unionism inappropriate. The management of a governmental enterprise is responsible to the body politic for the performance of the enterprise and provisions of law often limit the management in many matters which in private industry would be subject to the decision of the employer or collective bargaining.²⁸ In *City of Springfield v. Clouse*,²⁹ the plaintiff sought a declaratory judgment to determine the right of the city to enter into collective bargaining contracts with city employee labor unions. The court, in holding that the collective bargaining contracts concerning wages, hours, collection of union dues and working conditions were void, said that:

Although executive and administrative officers may be vested with a certain amount of discretion and may be authorized to act or make regulations in accordance with certain fixed standards, nevertheless the matter of making such standards involves the exercise of legislative powers. Thus qualifications, tenure, compensation and working conditions of public officers and employees are wholly matters of lawmaking and cannot be the subject of bargaining or contract. . . .³⁰

²⁴ Baldwin, *Have Public Employees the Right to Strike?—Yes*, 30 NAT'L. MUNIC. REV. 515, 516 (1960).

²⁵ Sullivan, *Labor Problems in Public Employment*, 41 ILL. B.J. 432 (1957). See also, *Board of Education v. Redding*, 32 Ill. 2d 567, 207 N.E.2d 427 (1965); *City of Manchester v. Manchester Teachers Guild*, 100 N.H. 507, 131 A.2d 59 (1959).

²⁶ Rains, *Collective Bargaining in Public Employment*, 8 LAB. L.J. 548, 549 (1957).

²⁷ Agger, *supra* note 15, at 1110; Baldwin, *supra* note 24.

²⁸ "For example, the following matters may be erased from the bargaining table by law: (a) recruitment and promotions because they are governed by civil service regulations; (b) retirement and pension programs because for financial and actuarial reasons, they have been fixed by state law; (c) if an increase in teachers' salaries depends upon expansion of the revenues available for the school district, the procedures of collective bargaining are useless." Wollett, *The Public Employee at the Bargaining Table: Promise or Illusion?*, 15 LAB. L.J. 8, 10 (1964). See also Radke, *Real Significance of Collective Bargaining for Teachers*, 15 LAB. L.J. 795 (1964).

²⁹ 356 Mo. 1239, 206 S.W.2d 539 (1947).

³⁰ *Id.* at 1251, 206 S.W.2d at 543.

Nevertheless, it is asserted that administrative officers frequently have wide discretionary powers over working conditions³¹ and many strikes have been effective in improving working conditions.³²

It is contended that government employees are responsible for the public welfare³³ and are obligated to remain at their jobs.³⁴ For example, the right to strike would seem completely incongruous and improper for employees directly concerned with the public safety and preservation of order.³⁵ However, the state's interest in avoiding work stoppages is not the same in all areas of public service.³⁶ Few persons would argue that the practical effect of a strike by the employees of the city municipal golf course would be as threatening to the public health and safety as a strike among employees of a private hospital. And a strike by employees of a private contractor at Cape Kennedy would obviously have a potentially more serious effect upon the public than a dispute among the employees of a public school system.³⁷ Rather than classify all public employees together some courts apply a distinction based upon whether the service performed is governmental or proprietary in nature.³⁸ These courts find it in-

³¹ "In public education, however, 54 per cent of the local school boards are fiscally independent and they, therefore, determine their own budgets. For the other 46 per cent of the school districts, which are fiscally dependent, a reviewing agency must give approval to the school board's budget." Moskow, *Collective Bargaining for Public School Teachers*, 15 LAB. L.J. 787, 792 (1964).

³² ZISKIND, *supra* note 21, at 254.

³³ Rains, *supra* note 26, at 549.

³⁴ This notion appears to stem from an 1892 decision of the Supreme Judicial Court of Massachusetts involving the right of cities to restrict political activities of policemen. The court, by Mr. Justice Holmes, said: "There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech . . . by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle, the city may impose any reasonable condition upon holding offices within its control." *McAuliffe v. New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 518 (1892).

³⁵ The city is certainly justified in placing certain restrictions on employees entrusted with public health safety and welfare. This class would include policemen, firemen, health officers and others similarly situated. Note, 4 DUQUESNE U.L. REV. 137, 138 (1965).

³⁶ See, e.g., Rains, *supra* note 26; Weisenfeld, *supra* note 2, at 702.

³⁷ Anderson, *supra* note 4, at 708; for other similar comparisons of the gravity of the consequences involved in strikes by public and private employees, see Keyes, *Right to Strike by Employees*, 31 DICIA 267-275 (1954); Agger, *supra* note 15, at 1130.

³⁸ E.g., *International Bhd. of Elec. Workers v. Salt River Project*, 78 Ariz. 30, 275 P.2d 393 (1954); *Board of Trustees v. Now*, 9 L.R.R.M. 789 (Ohio C.P. 1941). This distinction has been rejected by the majority of courts, e.g., *City of Los Angeles v. Los Angeles Bldg. & Constr. Trades Council*, 94 Cal. App. 2d 36, 210 P.2d 305 (2d Dist. 1949); *Port of Seattle v. International Longshoremen's Union*, 52 Wash. 2d 317, 324 P.2d 1099 (1958).

congruous to say that if a utility worker is working for a non-public employer he has the right to strike and perhaps imperil the welfare and safety of the public, whereas the same man, working for a government-operated utility, would not have the right to strike.³⁹ Thus, these courts allow strikes by public employees engaged in operations similar to activities in the private sphere.⁴⁰

ALTERNATIVES TO THE PUBLIC EMPLOYEE STRIKE

In light of the sentiment against public employee strikes, some authorities feel that the public employee should only have recourse to other methods to settle their disputes.⁴¹ The primary alternatives to the strike which are available to public employees are political persuasion and pressure, mediation, compulsory arbitration, picketing and strike threats.

Political persuasion and pressure by public employee groups is said to be the best substitute for economic pressure.⁴² Lobbying and political pressures, brought upon those in authority,⁴³ are tactics natural to government and are better understood by the legislature and executive than the traditional theories of collective bargaining.⁴⁴ Well organized legislative and political programs by powerful public employee unions can result in new laws providing for increases in wages and may suggest new sources of revenue which can be used to give increased benefits.⁴⁵ Even so, there has been a considerable difference of opinion as to whether or not political pressures should be employed by public servants. In 1960, when President Eisenhower vetoed a bill granting a pay raise to postal employees, he openly criticized the concealed pressures asserted on members of Congress.⁴⁶ Some courts have gone farther than criticism and have placed restrictions on the right of public employees to organize or participate actively in politics. They have, in effect, pre-

³⁹ Rains, *supra* note 26, at 549.

⁴⁰ *Supra* note 37.

⁴¹ Note, 54 HARV. L. REV. 1360, 1365 (1940).

⁴² Anderson, *supra* note 4, at 709.

⁴³ "The process is not unlike the pressures developed in major private disputes when the parties seek the help of the executive to bring about the settlement of a dispute by exerting some form of pressure upon the parties to the dispute." *Id.* at 709-710. The recent air-lines strike is an example where we have seen requests for executive help.

⁴⁴ The postal employees are a good example of public employee groups which traditionally apply strong and effective political pressures to achieve their legislative goals. Smith and McLaughlin, *supra* note 1, at 37 n. 29.

⁴⁵ Wortman, *Collective Bargaining Strategies and Tactics in the Federal Civil Service*, 15 LAB. L.J. 482, 489-490 (1964).

⁴⁶ Smith & McLaughlin, *supra* note 1, at 37 n. 29.

vented them from crystallizing public opinion so as to change the employment practices of their employer.⁴⁷

A few states, in an effort to avoid strikes by public employees, have provided for mediation wherein a neutral third party is employed to help the parties reach a voluntary agreement.⁴⁸ Though neither party is compelled to accept the recommendations of the mediator, the mediation process is still valuable for it may remove the emotional walls separating the parties and improve the communication lines between them.⁴⁹ Nevertheless, it is still questionable whether mediation is an adequate substitute for the right to strike because in most instances public employees are denied access to the various arbitration and mediation boards set up under federal and state labor relation acts.⁵⁰

A third alternative to the strike is compulsory arbitration, which has occasionally been authorized by statute or municipal charter.⁵¹ Legislation providing for arbitration is based on the view that uninterrupted public service is absolutely essential.⁵² In the absence of such legislation courts tend to consider any arbitration agreement entered into as an unlawful delegation of governmental authority.⁵³ Even where compulsory arbitration is authorized problems exist which discourage its use as a strike alternative. In most areas of public employment, collective bargaining is new and undeveloped, thus, inexperienced bargainers tend to rely

⁴⁷ For examples of restrictions on the organization of public employees, see cases: *Perez v. Bd. of Police Commissioners* 75 Cal. App. 2d 368, 178 P.2d 537 (1947); *CIO v. Dallas*, 198 S.W.2d 143 (Tex. Civ. App. 1946); *Seattle High School v. Sharples*, 159 Wash. 424, 293 Pac. 994 (1930). For examples of restrictions on political activities, see cases: *Oklahoma v. U.S. Civil Service Commission*, 330 U.S. 127 (1947); *U.S. Public Workers v. Mitchell*, 330 U.S. 75 (1947).

⁴⁸ See ORE. REV. STAT. §§ 243.750, 662.435 (Supp. 1963); WIS. STAT. § 111.70(4) (b) (1963); of particular interest is MICH. STAT. ANN. §§ 17.45(1)-(8) (Supp. 1963).

⁴⁹ For full discussion of the mediation process in the area of public employment, see Moskowitz, *Mediation of Public Employee Disputes*, 12 LAB. L.J. 54 (1961); Chisholm, *Mediating The Public Employee Dispute*, 12 LAB. L.J. 56 (1961).

⁵⁰ E.g., TEX. REV. CIV. STAT. art. 5154-c (Supp. 1964): "It is declared to be against the public policy of the State of Texas for any official or group of officials to recognize a labor organization as the bargaining agent for any group of public employees." See also Westwood, *The Right of an Employee of the United States Against Arbitrary Discharge*, 7 GEO. WASH. L. REV. 212 (1938).

⁵¹ E.g., 92 NEB. REV. STAT. §§ 48-801-823 (Supp. 1964); R.I. Gen. Laws Ann. §§ 28-9.1-1-9.2-14 (Supp. 1964). Sometimes such arbitration is limited to disputes arising under an existing labor contract. See CONN. GEN. STAT. REV. § 7-422 (1958).

⁵² One union executive notes that there is little that can be done if the governmental employer does not grant the union requests: "For this reason . . . there should be some form of compulsory arbitration machinery in lieu of the right to strike." Wortman, *supra* note 45, at 490.

⁵³ E.g., *Everett Fire Fighters v. Johnson*, 46 Wash. 2d 114, 278 P.2d 662 (1955).

on arbitration to settle every major disagreement and are confronted with an uncontrollable work load.⁵⁴

Picketing can also be used as a legitimate tactic by public employees. Although picketing was once held to fall "within that area of free discussion that is guaranteed by the Constitution,"⁵⁵ the Supreme Court has since declared that "picketing by an organized group is more than free speech"⁵⁶ and it has been held constitutional for a state to enjoin peaceful picketing which is "aimed at preventing effectuation [of] some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts."⁵⁷ This rule has been applied to uphold the granting of injunctions to prohibit picketing by public employees.⁵⁸ However, in these cases the picketing was carried on in conjunction with a strike or had the immediate purpose of a work stoppage.⁵⁹ Nevertheless, when picketing does fall within the constitutionally protected area established by the Supreme Court,⁶⁰ it alone will not suffice to ensure the equitable resolution of labor-management disputes. When picketing is employed against the Government while the Government continues to be judge and jury, the bargaining process strains the principle of good faith to the utmost.⁶¹

Some labor practitioners agree that the threat to strike may be a more effective weapon than the strike itself, for it may not turn out to be as hard to live with as feared. Also, a prolonged strike inflicts serious harm on the strikers and the danger of a break in ranks. By instilling fear in the community and mobilizing pressure on the management of the enterprise the union can have its demands answered without reverting to the actual strike.⁶² But it remains doubtful whether strike threats will be

⁵⁴ HERRICK, UNIONS FOR GOVERNMENT EMPLOYEES—THEIR IMPLICATIONS, N.Y.U. FIFTEENTH ANN. CONF. ON LAB. LAW 129, 135 (1962).

⁵⁵ *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940). See also, Comment, 15 DE PAUL L. REV. 331 (1966).

⁵⁶ *International Bhd. of Teamsters v. Vogt, Inc.*, 354 U.S. 284, 289 (1957).

⁵⁷ *Id.* at 293.

⁵⁸ See, e.g., *City of Los Angeles v. Los Angeles Bldg. Trades Council*, 94 Cal. App. 2d 36, 210 P.2d 305 (Dist. Ct. App. 1949); *Bd. of Educ. v. Redding*, 32 Ill. 2d 567, 207 N.E.2d 427 (1965).

⁵⁹ *Ibid.*

⁶⁰ For example, the parade of the members of the Chicago Teachers Union on the Board of Education offices in January, 1961. *Chicago Sun Times*, Jan. 11, 1961, p. 1. col. 1 (final turf ed.).

⁶¹ Note, 75 HARV. L. REV. 391, 412 (1961), citing ABA LABOR RELATIONS LAW, PROCEEDINGS 90 (1959).

⁶² For a full discussion of the strike threat alternative and its actual use see, Wollett, *supra* note 28, at 12-13.

genuinely effective for they tend to alienate the public opinion and support which is needed in order to finance improvements in the economic welfare and work situation of public employees.⁶³ The alternatives to the strike previously discussed are limited tools, but public employees consider it important that they be provided with a substitute for the strike weapon and have even struck to achieve such a substitute.⁶⁴

The American Bar Association at its 1955 meeting recognized the urgent need for some type of system whereby public employees could settle their grievances. Commenting on the dichotomy of Government's encouraging full freedom of association and bargaining rights to employees in private industry, but denying similar rights to its own employees, the ABA said:

Government which denies to its employees the right to strike against the people, no matter how just might be the grievances, owes to its public servants an obligation to provide working conditions and standards of management-employee relationships which would make unnecessary and unwarranted any need for such employees to resort to stoppage of public business. It is too idealistic to depend solely on a hoped-for beneficent attitude of public administrators. Promises of well-meaning public officials imbued with a sense of high authority who resort to the pretense of alleged limitations on their powers to avoid dealing forthrightly with representatives of their subordinate employees only aggravate grievances. Some practical machinery for handling grievances, fancied or real, needs to be provided to insure to employees that public management is concerned with their just complaints.

Every public jurisdiction should carefully review its laws pertaining to the conditions of service of public employees to be sure they meet present day concepts of sound employee relationships.⁶⁵

INEFFECTIVENESS OF ANTI-STRIKE LEGISLATION

Regardless of the legal status of public employee strikes as determined by statute or case decisions, the fact remains that public employees do have disputes with their employers and do engage in strikes.⁶⁶ As with so many other problems in law and morals, merely stating thou shall not

⁶³ *Ibid.*

⁶⁴ The recent strike of social workers in New York City involved among other things, such an issue. See, Address by Al Bilik, President, Cincinnati AFL-CIO, University of Chicago Conference on Public Employment and Collective Bargaining, Feb. 5, 1965.

⁶⁵ Cornell, *Collective Bargaining by Public Employee Groups*, 107 U. PA. L. REV. 43, 56 (1958) citing AMERICAN BAR ASSOCIATION, SECOND REPORT OF THE COMMITTEE ON LABOR RELATIONS OF GOVERNMENTAL EMPLOYEES (1955).

⁶⁶ From 1947 through 1959 more than 450 strikes were called by public employees. Note, 75 HARV. L. REV. 391, 407 (1961). A recent study illustrates the failure of anti-strike legislation; in New York the average annual number of public employee strikes increased after the passage of a no-strike law. Krislov, *Work Stoppages of Government Employees, 1942-59*, I.Q. REV. OF ECONOMICS & BUS. 87 (1961).

does not automatically prevent lawbreaking.⁶⁷ In light of the actual public employee strikes contrary to law there has been much criticism of anti-strike legislation, especially where the recorded penalties are severe. While violation of the federal government's no strike law is a criminal offense,⁶⁸ state statutory provisions do not generally contain criminal sanctions. Instead they call for the dismissal of public employees engaging in strikes.⁶⁹ Although some states do permit the reinstatement of striking employees under certain conditions⁷⁰ most statutes calling for dismissal are inflexible.⁷¹ They offer the public administrator no choice of alternatives, such as fines or suspension, which could be based on the facts and circumstances of the individual case.

The effectiveness of harsh penalties such as discharge or imprisonment has been negligible for several reasons. First, severe penalties are rarely a deterrent to a strike by public employees who believe present conditions are intolerable and no other practical alternatives to the strike exist.⁷² Secondly, even when the statute gives a public official discretion to invoke certain penalties against striking employees, the penalties are rarely invoked when strikes do occur. Public officials in metropolitan communities which employ a large number of workers and where organized labor has great political strength are reluctant to seek injunctive relief because of possible political repercussions.⁷³ The principal concern of the public official is to see that services are resumed as promptly as possible. Obviously, the best way to accomplish this is to induce the employees to return to work.⁷⁴ Where the statute provides no discretion a similar result

⁶⁷ Anderson, *supra* note 4, at 707.

⁶⁸ 69 Stat. 624 (1955), 5 U.S.C. §§ 118-p-r (1964). Violation of the act is a felony; it is punishable by a fine of up to \$1,000, imprisonment of up to one year and a day, or both. *Supra* note 13.

⁶⁹ E.g., TEX. REV. CIV. STAT. art. 5154-c(3) (Supp. 1964): "Any such (public) employee who participates in such a strike shall forfeit all civil service rights, re-employment rights and any other rights, benefits, or privileges which he enjoys as a result of his employment or prior employment."

⁷⁰ See, e.g., PA. STAT. ANN. tit. 43 § 215.3 (Supp. 1964).

⁷¹ *Supra* note 69.

⁷² "The recent strikes of teachers and welfare workers in New York City was in direct violation of law and resulted in the case of the latter dispute in the jailing of the strike leaders for criminal and civil contempt. . . ." Weisenfeld, *Public Employees—First or Second Class Citizens*, 16 LAB. L. J. 685, 695 (1965).

⁷³ Moberly, *The Strike and Its Alternatives in Public Employment*, 1966 WIS. L. REV. 549, 551 (1966).

⁷⁴ In 1957, motormen and other employees of the New York City Transit Authority engaged in an illegal strike. When asked why the strict statutory penalties provided by the state of New York for engaging in an illegal strike were not invoked, the chief administrator replied: "We'd never have got the subways running." N.Y. Times, Dec. 29, 1957, § 4, p. 4, col. 4.

is also reached since strikers may refuse to return to work until they receive guarantees of immunity from the statutory penalties. Moreover, in many cases, it is physically impossible to resume services unless they are rehired.⁷⁵

In a recent New York case,⁷⁶ a group of school teachers sought to have the Condon-Waldin Act declared unconstitutional.⁷⁷ The Act provided that public employees absenting themselves from their positions in an effort to change conditions of employment or compensation shall terminate their employment.⁷⁸ Though the court upheld the Act, it spoke out against its harsh penalties.

A word may not be amiss, at this juncture, about the desirability that the Condon-Waldin Act be clarified as to some features. . . . It is thought by some that at least one reason for the general reluctance of public officials to invoke the Act is the severity of some of its provisions. . . . Leading newspaper editorials and many magazine articles have urged revision of the Condon-Waldin Act by easing penalties and providing state machinery for giving the fullest and most considerate hearing to grievances of public employees.⁷⁹

Legislation which provides for inflexible and harsh penalties to be invoked against striking employees, without providing them with alternatives to voice their grievances, is correctly criticized as being unduly negative.⁸⁰

ILLEGAL STRIKES BY PUBLIC SCHOOL TEACHERS

In recent years, the teaching profession has erupted with demands for consideration of its views. Still making obeisance to their professional status, teacher organizations behave like trade unions as they discuss mutual problems with their respective Boards of Education.⁸¹ From 1940 through 1965 public school teachers were involved in 107 actual work stoppages,⁸² and school board members are deeply concerned that teacher militancy will increase in the future.⁸³ Some reasons for this growing

⁷⁵ See Note, *Union Activity in Public Employment*, 55 COLUM. L. REV. 343, 360-61 (1955).

⁷⁶ *Pruzan v. Bd. of Educ. of City of New York*, 25 Misc.2d 945, 209 N.Y.S.2d 966 (1960).

⁷⁷ N.Y. CIV. SERV. LAW § 108 (1963).

⁷⁸ *Ibid.*

⁷⁹ *Supra* note 76, at 956, N.Y.S.2d at 977-978.

⁸⁰ Note, *Labor Relations in the Public Service*, 75 HARV. L. REV. 391, 410 (1961).

⁸¹ *Supra* note 7, at 694.

⁸² U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, March, 1966. For an understanding of the extent and duration of past and present strikes see SCHNAUFER, *THE USES OF TEACHER POWER* 28-30 (1966).

⁸³ A National School Board Survey conducted in 1964 found that 34 state school board associations believed the number of board-teacher disputes would increase in number and significance in their own state. Radke, *Real Significance of Collective Bargaining for Teachers*, 15 LA. L.J. 707, 798 (1959).

militancy by teachers are: (1) the steady growth in the size of school districts making the personal relationships which once existed in many districts more difficult to achieve, (2) frequently teachers salaries are not equal to those in other professions or to wages paid for jobs of less importance and requiring less training and skill, (3) the male percentage of the teaching force is increasing and the turnover in the teaching profession has declined, (4) the interest of labor unions in attracting teachers to memberships, and (5) the success of strikes conducted by teachers elsewhere.⁸⁴ In recent years, teachers have struck or threatened strikes in defiance of anti-strike laws. The result in almost every instance was an accomplishment of some, if not all, of the desired objectives, without penalty.

In September of 1961 Utah teachers called off their threatened close-down of the schools in all 40 districts after reaching an agreement with the Governor on a procedure for determining how additional revenue for public education would be appropriated.⁸⁵ Teachers in Hamtramck, Michigan, conducted a four day union meeting until the school board agreed to terms and signed the first contract in any Michigan school district.⁸⁶ In South Bend, Indiana, after teachers struck for four days and 65 Notre Dame faculty members signed a petition supporting their demands for a higher salary schedule, the striking teachers received telegrams to return to work or be fired. Only after the firing threat was rescinded and an agreement for an orderly discussion of the grievances was reached did the teachers return to work.⁸⁷ One of several successful strikes called by teachers in 1966⁸⁸ was held in Plainview, Long Island. There the school board and the state commissioner of education called in strikebreakers and threatened the loss of teaching certificates. After the threat was rescinded, the teachers returned to work with a comprehensive contract including a salary increase and improved working conditions.⁸⁹

CONCLUSION

From these successful strikes it is apparent that public school teachers have been willing to disregard statutory prohibitions against strikes in an effort to better their positions. It seems no less likely that public employees in other areas will follow this lead and resort to strikes, if neces-

⁸⁴ *Id.* at 799-800.

⁸⁵ Moskow, *supra* note 31, at 793.

⁸⁶ *Supra* note 72, at 694; also AFL-CIO News, May 22, 1965.

⁸⁷ *Ibid.*

⁸⁸ See also, Detroit Free Press, June 3, 1966, p. 1, col. 2 (strikes held in four suburban Detroit, Michigan, school districts).

⁸⁹ SCHNAUFER, *supra* note 82, at 11.

sary, to accomplish their goals. Flatly prohibiting public employees the right to strike⁹⁰ is clearly not the answer to the problem. To continue to deny grievance procedures or not to provide alternative solutions to public employee disputes can only lead to more serious disputes. This will result in a lower level of morale among public employees and a lower standard of public service.

The use of a Public Employees' Act which denies the right to strike to all public employees⁹¹ is no more equitable than a criminal law statute which calls for the same punishment irrespective of the crime committed. Different areas of public employment should be classified into categories which establish or deny the right to strike according to the nature of the employment. A test which can be employed to categorize areas of employment is, "the nature and gravity of the consequences involved in a strike by that area of employment."⁹² Using this test three categories may be arrived at. First, as to those areas of public employment controlling public health and safety,⁹³ the right to strike against the government should be denied. However, other means of mediation and arbitration should be opened. Secondly, in areas which do not directly affect public health and safety but are practically indispensable to society's everyday functioning,⁹⁴ the right to strike should be granted subject to provisions reminiscent of the Emergency Dispute procedures of the Taft-Hartley Acts⁹⁵ where the governor of each state is given authority to invoke an 80-day cooling-off period. Finally, in those areas of public employment where a strike against the government would present no threat to public health or safety, nor inconvenience the functioning of everyday society,⁹⁶ the right to strike should be the same as in private industry.

In private industry it is government itself, in its role as lawmaker, which

⁹⁰ *E.g.*, *Norwalk Teachers Ass'n v. Bd. of Educ.*, 138 Conn. 269, 83 A.2d 482 (1951); *Board of Educ. v. Redding* 32 Ill. 2d 567, 207 N.E.2d 427 (1965); *City of Manchester v. Manchester Teachers' Guild*, 100 N.H. 507, 131 A.2d 59 (1957); *City of Pawtucket v. Pawtucket Teachers' Alliance*, 87 R.I. 364, 141 A.2d 624 (1958). *Contra, e.g.*, *FLA. STAT. § 839.221* (1963); *HAWAII REV. LAWS §§ 5-8* (1955); *MICH. STAT. ANN. § 17.455(2)* (1960); *MINN. STAT. ANN. § 179.51* (Supp. 1964); *NEB. REV. STAT. § 48-821* (1943).

⁹¹ *Supra* note 69.

⁹² Each area is categorized by viewing the potential injury to a particular state by a strike in that section of government employment.

⁹³ This category would include policemen, firemen, health officials, and others similarly situated.

⁹⁴ This class would include teachers, transit workers, welfare workers, sanitation workers and others similarly situated.

⁹⁵ 61 Stat. 155 (1947), as amended, 29 U.S.C. §§ 176-180 (1958).

⁹⁶ This class would include, for example, employees of a state, owned liquor store, employees of municipal golf courses and others similarly situated.