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Structuring Collective Bargaining in Public Employment[†]

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I. Introduction

In an earlier article in this Journal, *The Limits of Collective Bargaining in Public Employment*,¹ we asked whether private sector collective bargaining should serve as the model for collective bargaining in the public sector. We concluded it should not. Our argument was, and is, that a wholesale transplant from one sector to the other is inappropriate. First, market restraints on union power are substantially

1. 78 YALE L.J. 1107 (1969) [hereinafter cited as *Limits*].

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different in the two sectors. Second, the consequences of such a transplant for the political process are undesirable. A summary of our reasoning follows.

In the private sector, a high degree of substitutability between various products generally exists: a price increase of one product relative to others will result in a decrease in the number of units of that product sold as consumers adjust their preferences to changed price relationships. Wage increases which exceed rises in productivity usually result in higher prices. Private sector unions generally face, therefore, a trade-off between the level of benefits they can extract from an employer and the level of employment for union members they can maintain. Even when this is not the case—as with expanding industries or products with inelastic demand curves—the threat of both the substitution of capital (machines) for labor and of competition from non-union employers is a significant restraint on union power. Thus, although the private sector is extremely diverse and contains many exceptions, the costs of collective bargaining are kept within arguably tolerable limits by a market of free consumers.

In the public sector, the trade-off between increased benefits and employment is of little importance to public employee unions. The products and services provided by government generally do not have close substitutes and are not subject to competition from non-union enterprises. The reduction of unionized governmental services, moreover, will be resisted not only by the union involved but also by the beneficiaries of those services—the local voters. The pressure on the political leaders, then, will be either to seek new funds or to reduce other governmental services or subsidies.

We concluded that what is involved in public sector bargaining is the redistribution of income by government rather than the allocation of resources by market forces. The desirability of a transplant—including the right to strike—turns, therefore, on the effect of full collective bargaining on the political process.

What Robert A. Dahl has called the “‘normal’ American political process”² contemplates “a high probability that an active and legitimate group in the population can make itself heard effectively at some crucial stage in the process of decision.”³ The issue is whether a full transplant of collective bargaining will, over time, permit well-estab-

2. R. DAHL, A PREFACE TO DEMOCRATIC THEORY 145 (1956).

3. *Id.*

lished public employee unions to exercise a disproportionate share of power in "the process of decision." If public employee unions are free to strike as well as to employ the usual methods of political pressure, interest groups with competing claims and different priorities will be put at a competitive disadvantage and the political process will be distorted.

The interruption of most governmental services will severely inconvenience the beneficiaries of those services, who will, as voters, press for a settlement. Nor will many be concerned about the cost of the settlement. While an inflated municipal budget and tax rate create countervailing pressures, these pressures are often not significant in the typical large city. The delayed effect of a particular settlement on an already incomprehensible municipal budget or tax structure is rarely a matter of high visibility, and it may be in the interest of the political leaders, as well as the unions, to see that it does not become so. The cost of settlement, moreover, may be borne by a constituency, the whole state or nation, different from that which insisted on a quick end to the strike. Therefore, the public employee strike, given the typical political structure of the large municipality, is a powerful political weapon. Since other interest groups rarely have a similar weapon regularly available to them, the strike, if it becomes the normal method for breaking collective bargaining impasses, will give public employee unions a disproportionate share of political power.

In addition, the functioning of the "normal" American political process" will be altered not only in the way it determines monetary issues, critical as they are, but also in the way it resolves other matters which, while they affect union members, are traditional grist for the political mill. The decentralization of the governance of schools or the creation of a civilian tribunal to review the conduct of police officers are but two matters of political moment likely to arise at the bargaining table. Strikes over such matters would, of course, cause some organized interest groups to support a mayor who resisted the union demands. Other groups, however, inconvenienced by the strike and perhaps indifferent to the underlying issues, would mount increasing and frequently irresistible pressure on political leaders to bring about a settlement by compromising with, or capitulating to, the union.

These, then, are the discomfiting conclusions of the *Limits* article. We went on to say:

In the future, if strikes are to be banned, sophisticated impasse

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procedures must be established. If, on the other hand, some strikes are to be tolerated, changes in the political structure which will make the municipal employer less vulnerable to work stoppages must be developed. And, in any event, legislative action will be necessary either to separate out those non-monetary issues which might not be decided solely through collective bargaining, or to change bargaining procedures so that all interested groups may participate in the resolution of such issues. These legislative choices and legal procedures will be the subject of a forthcoming article.⁴

This is that article.

Initially, and by way of establishing a framework, we address two general questions: first, the extent to which a single structure, at either the state or federal level, should govern municipal labor relations; and second, the impact of collective bargaining on the role of government and the functions it performs. We then examine at length what may in short be called the strike problem: what mechanisms can replace the strike if it is to be prohibited; what sanctions should back up the prohibition; and, if strikes are to be permitted in non-emergency situations, what steps can be taken to reduce the vulnerability of the political process. Finally, we address the scope of bargaining issue: what should be the role of collective bargaining in resolving disputed issues which involve terms and conditions of employment but which are also matters of political import.

II. Uniformity and Diversity

Since full collective bargaining by public employees may distort the political process, regulation and changes in the structure of bargaining, other than those imposed by law in the private sector, are necessary. The goal of such restructuring is to ensure that one particular interest group, public employee unions, does not gain a substantial competitive advantage over other interest groups in pressing its claims on government. We are not under any illusion that there now exists some perfect balance among interest groups which must not be disturbed. This is not the point. Of course we favor reform where it is justified. The point is simply that it is a mistake to institutionalize through laws techniques that have the promise of giving one group too much power.

Those aspects of private sector collective bargaining that are not

4. *Limits* at 1127.

inconsistent with this goal, however, should be transplanted to the public sector. Given national endorsement of collective bargaining as the preferred means of ordering the private labor market, considerations of evenhandedness suggest the establishment of roughly similar institutions in the public sector. As the *Limits* article demonstrated, many of the claims which support private collective bargaining press for some form of extension to public employees.⁵ To deny such an extension is to challenge collective bargaining generally. We decline, as we did in our earlier article, to reexamine these claims, and assume they are sufficiently valid to enable us to pursue the implications of private sector policy for public employees.

A. *Recognition and the Establishment of Bargaining*

The establishment of collective bargaining through peaceful and mandatory⁶ recognition procedures,⁷ including appropriate provisions for unit determination and a means of ascertaining employee desires, is not inconsistent with the " 'normal' American political process," for the danger to that process stems mainly from strikes.

Although a policy of non-recognition seems to protect the political process from public employee unions, it is generally not a realistic alternative. Non-recognition is too drastic, too plainly at odds with the premises of collective bargaining in the private sector. It runs the risk of being perceived by society generally, and by public employees in particular, as excessive and unfair. A legal policy which causes a general adverse reaction will be unacceptable to those whose conduct it seeks to control, and society may have qualms about its enforcement. Additional consequences may follow. When a non-recognition policy fails, it will be replaced by a collective bargaining law. That law should impose restrictions on public sector unions beyond those suffered by other unions. It should, that is, if the political process is to remain intact. Yet, the prior policy of non-recognition, particularly

5. *Id.* at 1111-17.

6. Some states have permissive recognition procedures operative at the option of a municipal employer. See ALAS. STAT. §§ 23.40.010 (1959).

7. This article does not deal explicitly with the question of whether recognized unions need be exclusive bargaining representatives. It will suffice to say here that the authors are not persuaded that exclusivity is always an essential element of a successful collective bargaining relationship, particularly in the case of professional employees who seek to use bargaining as a means of affecting the nature of the services they perform. See p. 859, *infra*. Where that is the case, the public interest might arguably be best served by permitting minority groups of employees to be heard, thus avoiding the risk that differences in viewpoints relevant to important issues of government policy—e.g. the disciplining of students by teachers—will be exposed and not submerged in the internal politics of the union.

if it has been adhered to rigidly, may have generated cynicism toward attempts to impose such restrictions. A non-recognition policy, therefore, may not only prove unacceptable and unenforceable itself, but may also create conditions which limit the range of alternative policies.⁸

Beyond establishing mandatory recognition procedures, all we can say with assurance about the proper role of law in public employment is that there is no one "right" law. Indeed, a diversity of structures must be created. Those structures should be designed with two principal problems in mind: the strike and the scope of bargaining. The bulk of this article consists of a discussion of those two problems. We suggest a number of mechanisms and structures, some complementary, some mutually exclusive. Which are appropriate for adoption by a particular city must be determined by political judgments as to a large number of variables. No one structure, no one mechanism can be recommended for all municipalities.

B. *The Role of Federal Regulation*

A recent decision of the United States Supreme Court indicates that federal power to regulate the relations between local governments and their employees exists.⁹ But the existence of a power is not by itself the justification for its exercise. That depends on a demonstration of federal responsibility and a congressional capacity to fashion workable policies. We believe that structuring collective bargaining by local governmental units is a matter of very low priority on the federal agenda, and that desirable structures are best attained by local regulation. Federal legislation seems, therefore, inappropriate.

There are many important differences between the private and public sectors in terms of federal responsibility. Among these are matters of legal history¹⁰ and a hope in 1935 that the Wagner Act would be an

8. See *Limits*, 1108-09. Thus the concept of sovereignty, having been employed to ban all collective bargaining, is now regarded by some as having no weight at all.

9. *Maryland v. Wirtz*, 392 U.S. 183 (1968).

10. When Congress enacted the National Labor Relations Act in 1935, 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 151-168 (1964), it was acting against a history of federal regulation of collective bargaining. By applying the Sherman Antitrust Act to unions in *Loewe v. Lawlor*, 208 U.S. 274 (1908) the Supreme Court had imposed a federal regulatory scheme on union activities. See Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14, 30-38 (1963). That the rules imposed were largely judge-made did not matter. The point was that they could not be changed by state legislatures but only by Congress. And, for better or worse, that body was irrevocably plunged into the debate over the legitimacy of collective bargaining in the private sector. No such historical background exists as to public sector unions.

anti-Depression measure.¹¹ The most important difference, however, stems from the nature of competitive markets. In the private sector, firms compete in the sale of their products across state lines. To permit widely varying labor policies among the states might benefit those firms operating where the law favored unionism least. Not only would that disrupt competitive relationships; it would also limit the effectiveness of laws in other states designed to encourage collective bargaining. If collective bargaining were to become a favored policy, it had of necessity to be formulated at the federal level so that competitive pressures would not destroy it.

No such pressures exist in the public sector. New York City teachers are not paid less because of competition from the school system of Decatur, Georgia. Municipal employers simply do not compete in an interstate product market which effectively prevents some states from adopting collective bargaining as a policy because others do not.

When an issue is a matter of low federal priority, considerations of federalism dictate that governmental action be left to state or local initiative. One can claim more, however, than that municipal public employee bargaining should have a low priority on any agenda for congressional action. One can claim that intervention at the national level would be positively harmful. Federal legislation or regulation necessarily tends to a uniform rule. In the case of public employee unionism, uniformity is most undesirable and diversity in rules and structures virtually a necessity.

Consider just two important examples, although many more exist. We have stated that recognition ought to be mandatory on the part of the municipal employer. But that duty alone necessarily involves the enforcement tribunal in the bargaining of the parties. Just as the National Labor Relations Board cannot avoid imposing some minimal duty to bargain as part of the duty to recognize a union,¹² so too a tribunal enforcing a municipality's obligation to recognize must determine whether it is in fact bargaining with the union and making a good faith effort to reach an agreement. Even so minimal an intrusion

11. In 1935, the nation was still in The Great Depression, and some believed that an economic cure might be found in devices thought to increase the purchasing power of lower income groups. As the preamble to the Act attests, 29 U.S.C. § 141 (1964), believers in the "purchasing power" theory thought collective bargaining such a device. Whatever one thinks of "purchasing power" theory—and as far as we are concerned, not much—it may be effectively pursued only at the federal level. Collective bargaining by public employees, however, is not generally thought of as an anti-depression device, and even if "purchasing power" devotees were shown some sympathy today by informed opinion, that particular call for federal action seems muted.

12. H. WELLINGTON, *LABOR AND THE LEGAL PROCESS* 49 *et seq.* (1968).

entails involvement in matters which may be sensitive issues of local government. Complicated fiscal structures, local budgetary practices, charter limits on taxes, state restrictions on tax increases, statutes designating how certain services are to be performed, etc., may severely limit the power of municipal bargainers to negotiate in a fashion deemed essential as well as traditional by the union.¹³ And when that is the case, the union will quite naturally turn to an enforcement tribunal for an order to bargain on the grounds that it has not been truly "recognized." Equally intractable is the question of who "bargains" for the "employer" with, for example, a teacher's union in a typical small town: the first selectman, board of selectmen, town meeting, board of finance or board of education? That question must be resolved before a legal duty to recognize can be effectively enforced. If the tribunal is a federal one, uniform rules as to the structure of local governments may be the result of such litigation. It understates the case more than a little to say that resolution of such issues at the federal level would be undesirable.

Consider also whether strikes ought to be permitted. We argue in subsequent pages that appropriate structures can be created in which strikes of a non-emergency nature should not be illegal. Essential to the establishment of such structures is the adoption of devices which reduce the vulnerability of particular municipal political processes to such strikes. What measures will accomplish such a reduction clearly will vary from municipality to municipality and no uniform rule ought to be imposed.

C. *The Role of State and Local Regulation*

The role for state legislation seems considerably larger, although perhaps not as large as that for the municipalities. Subordinate governmental units, such as towns, counties and cities, derive their power from the state. Many of the functions performed by lesser governmental units which seem prone to unionization are already performed under significant state regulation. Education, welfare, and health services are frequently provided under a blend of state and local control. Limiting tax structures may have been imposed by a state legislature. And, as a matter of history and tradition, state responsibility for seeing that local governmental functions are performed without interruption has always been substantially greater than that of the federal government.

13. See Rehmus, *Constraints on Local Governments in Public Employee Bargaining*, 67 MICH. L. REV. 919 (1969).

State regulation, moreover, promises a more flexible approach than national legislation. State officials are likely to be more sensitive to problems of local government than federal officials, and legislation which proves inappropriate can be more easily modified at the state level than at the national. Many of the limitations which constrain municipalities in bargaining with unions are the result of restrictions imposed by the state. And within a particular state, a common history gives some assurance that the diversity in local governmental structures will be less than that among states.

Nevertheless, considerable room ought to be left for local regulation and experimentation. The variables are so numerous that comprehensive legislation even at the state level may introduce unwise uniformities. The strike question, for instance, largely turns on the vulnerability of local political structures. The availability of adequate measures to reduce that vulnerability will vary from place to place as will the need to permit strikes rather than resort to other kinds of impasse procedures. Some devices, such as partial operation schemes, necessarily must be worked out on a community by community basis. The scope of bargaining issue will be of different orders of magnitude in different communities. Absent some imperative dictating one rule for all, such matters can be left to local regulation.

The difficulty with state abstention, however, is that municipal inaction may result in labor crises which cannot be ignored by state officials. There is room, therefore, for state legislation which encourages municipal regulation tailored to the needs of the particular community, but which also provides the legal structure minimally necessary for effective bargaining.

We conclude first that the state should establish a mandatory recognition procedure. As to every other provision, a lesser governmental unit should be free to opt out of the state scheme and provide its own mechanisms. The state law should make strikes illegal and provide post-impasse procedures. Local governments might, however, permit various kinds of strikes, provide different impasse procedures, redefine mandatory subjects of bargaining, establish procedures for the resolution of non-monetary issues, etc. Such a statutory scheme, with areas of concurrent power, both encourages local initiative and inventiveness, and guards against the dangers of local inertia.

We also conclude that a state level agency with dual functions ought to be created. First, it should be empowered to enforce the applicable provisions of the state statute and to implement the impasse proce-

dures. Second, it should be available to take on functions delegated to it by municipal regulation. Thus, if a municipality decided to permit non-emergency strikes, the task of determining whether an emergency existed might rest with this agency. Or, if the municipality desired to adopt impasse procedures which varied from those of the state statute, this agency could be empowered to administer them.

The value of such an agency stems not only from the experience and specialized skills it would gain, but also from the fact that it would be neutral so far as municipal labor disputes were concerned. This is essential, for many of the devices we suggest in subsequent pages would best be implemented by a neutral rather than by a party to the dispute.

D. *The Governing Variables*

In order to tailor a public employee bargaining law to serve best the needs of a particular municipality, an almost infinite number of factors must be considered. And largely political judgments as to the relative weight to be given to each factor must be made by those responsible for local governance. We can only catalogue the more important variables.

The functions that local government performs must be considered in determining what kind of collective bargaining structure should be erected. The number of employees who are potential union members, the kinds of services they provide, the reliance of the community on these services, their essentiality in terms of maintaining public health and safety, the extent to which the character of particular services may become politically controversial, and the ability of the local government to shed certain functions all have a bearing on the form various provisions of the law ought to take.

The nature of local governance in a structural and operational sense is also of great importance. The extent to which political power is centralized or diffused, the visibility of budgetary decisions, the shape of the tax structure, the way particular unionized services are funded and the financial and legal relationships with larger political units all have implications for decisions as to the scope and structure of bargaining, the nature of ratification by the public employer and the strike question.

Size is also a major factor. In small towns, the claims on government will differ from those in a large city. It may be easier for concerned citizens to form *ad hoc* interest groups—for example, taxpayer organizations—which can critically scrutinize the demands of public em-

ployee unions, and publicize the budgetary effects of wage settlements.¹⁴ Moreover, where the public employee has a personal relationship with those who rely on his services—as he often does in smaller communities—he may feel less inclined to disappoint that reliance by striking. Where these circumstances exist, the political process may not be significantly endangered by public employee strikes.

The homogeneity of the political entity's population is yet another factor. A homogeneous population makes politically explosive confrontations over non-monetary issues unlikely; thus, the law can focus on the resolution of wage disputes. Where social, ethnic and racial heterogeneity exists, however, it may be necessary to establish procedures through which other interest groups can become involved in bargaining over disputed political matters.¹⁵

The nature and history of the bargaining relationship is also important to legal structure. Expectations created by existing practices ought not to be disturbed, or relationships that actually work restructured, except for fundamental reasons. This may mean, for instance, that where a very high degree of militancy among union members exists, the goal of protecting the political process from disproportionately powerful unions might better be achieved by a structure which reduces the vulnerability of the political process to strikes rather than by one which prohibits strikes altogether.

Finally, the attitude of the community generally toward collective bargaining must be weighed. Where the prevailing ethos is hostile to unions, a number of options ranging from a total prohibition on strikes to mere reliance on hostility to unions are available.¹⁶ Where the ethos is different and significant segments of the community feel strongly about the importance of the right to strike, structures permitting non-emergency strikes, and reducing the vulnerability of the political process to them, may be more appropriate.¹⁷

A diversity of structures, then, seems not only inevitable but de-

14. The publication of individual salaries has stirred a reaction in a smaller city. See note 105, *infra*, and accompanying text.

15. The racial composition of the disputants is clearly an important factor governing the explosiveness of a dispute. In Memphis and Charleston, the employees were predominantly black, while the political forces dictating the employers' response were white. The New York decentralization dispute, on the other hand, involved white employees and black citizenry.

16. The most tolerant legal approach to public employee strikes is found in Vermont. See note 34, *infra*, and accompanying text.

17. Such an ethos prevails in Michigan and appears to have led to a legal structure in which it is difficult to enforce the anti-strike ban. See notes 34 and 84, *infra*, and accompanying text.

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sirable. The pages that follow suggest a number of alternative directions public employee bargaining laws might take. Choice among structures depends on essentially political judgments weighing the factors sketched above.

III. Collective Bargaining and the Role of Government

A. Bargaining as a Limiting Factor on Governmental Functions

One of the touchstones of the debate between modern-day liberals and conservatives is the question of what functions government may properly undertake. At one end of the political spectrum are those who, because of their belief in individual freedom as a value in itself and as a means to achieve the greatest good for the greatest number, and because of their profound skepticism about the ability of government to perform in a controlled and efficient manner, would limit government strictly to areas where large social cost is clearly involved. At the other are those who are more sanguine about the ability of government to achieve stated ends, and who believe that the total quantum of individual freedom need not be reduced by a large governmental role in restructuring society along egalitarian lines.

We decline to join the debate over these issues, not only because they are somewhere in the great beyond so far as this article is concerned, but also because we have no desire to terminate prematurely an otherwise pleasant collaboration. The relevance of collective bargaining in the public sector to that debate, however, must be considered.

Local government presently performs an extraordinary range of functions: health (in-patient, out-patient, at home care, preventive, educational, etc.¹⁸); education; sanitation (sewers, refuse collection); housing; transportation (streets, trucks, autos, buses, subways, airports, etc.); utility (water, gas, electric); social (baby-sitting to social work); clerical; police; fire; recreational (parks, zoos, museums, etc.); food (in government buildings). Among those employed in providing these services are skilled, unskilled, and professional persons directly involved in each service, and support personnel, who perform custodial and maintenance functions. Some of these occupations—for example,

18. Among the kinds of employees involved are nurses (practical, and registered), doctors (of various kinds), orderlies, public health specialists, elevator operators, maintenance, etc.

refuse collection—are prone to labor disputes.¹⁹ And it seems clear that the sum of the problems a municipality faces grows substantially as these services are unionized. The time, energy and resources expended by the municipality on collective bargaining matters increase along with unionization. In addition, political difficulties multiply quickly. Only a lucky politician, or one with a very divided opposition, can survive a series of strikes which inconvenience his constituents.²⁰

An increase in the number of unionized services, moreover, aggravates the difficult question of parity or relative wage rates.²¹ Government employees engaged in one service are neither ignorant of nor indifferent to the wage scales in other services. Transit workers, sanitation workers, policemen and firemen formulate their demands with an eye to what the others have extracted through bargaining. It is no coincidence that the most militant postal workers' local is in a city in which the ratio of mailmen's wages to comparable municipal employees had recently been drastically altered to the mailmen's detriment.²² The spread of unionization in a city thus makes all settlements harder to achieve.

Finally, public employee labor disputes too often polarize society by raising delicate political issues in ways that reduce the area of permissible compromise and compel political leaders to appear to make decisions on ethnic or racial grounds. Recent labor disputes in Memphis, Charleston and New York are paradigmatic cases.

This is not to say that the unions are right or wrong on the underlying merits of any issue. It is to say that the answer to the question of whether a particular function is appropriate for government depends in part upon the growth of public employee unionism. Refuse collection, for example, seems highly susceptible to unionization. Whether it should be continued as a municipal function, contracted out to a private employer, or left entirely to free enterprise, should

19. Memphis, Atlanta, New York and Cincinnati have had notable disputes. Warren, Michigan, found a solution in contracting out refuse collection to a private firm.

20. Mayor Lindsay's career was clearly endangered by such a series of disputes. His ability to avoid a pre-election school strike through a handsome settlement as well as his good fortune in facing two candidates who split the opposition vote and were unattractive to those most alienated by his handling of the decentralization dispute, may have accounted for his victory.

21. Relative wage rates also create difficult problems in the private sector. Railroads and newspapers are examples. See L. REYNOLDS and C. TAFT, *THE EVOLUTION OF WAGE STRUCTURE* 19 *et seq.* (1955).

22. Because employers and industries in the private sector face different demands for their products and different cost structures and have different abilities to substitute capital for labor, it is easy to overestimate the importance of "pattern-setting" in the private sector. Where non-profit employers are involved, however, as in the public sector, pattern-setting may be more prevalent.

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no longer be determined without considering the inescapable problems that flow from collective bargaining.²³ Indeed, many functions presently performed by local governments should be reconsidered in the light of emerging public employee unionism.

To the extent that public employee unionism is a factor in determining what functions a municipality ought to perform, we believe it always operates in the direction of limiting the role of government. For although a number of constructive suggestions can be made as to legal structures which will help to prevent a distortion of the political process, one must be realistic. Many statutory schemes will fail; many will have only limited effect. That being the case, we believe that where the appropriateness of the government's performing a function is in doubt, the fact of public employee unionism should encourage government to decline to undertake it or to cease to perform it.

B. *The Value of Interposing a Private Employer*

The traditional view, however, is that collective bargaining is not a factor tending to limit government's role because the nature of the function involved is such that it makes little difference whether a public or private employer performs it.²⁴ A strike inconveniences the public neither more nor less because refuse collection remains the municipality's responsibility rather than that of a private employer. The inconvenience caused by the strike will create political pressures on the mayor to achieve a settlement in either case. The source of the funds to be used in the settlement is the municipal budget whether the function is performed directly by the city or is contracted out to private employers. The same is true even when private enterprise carries out the function without a government contract. For then, pressure for a settlement may generate pressure for a governmental subsidy.

Indeed, the *Limits* article itself suggested that the differing impact of collective bargaining in the two sectors might call for reexamination of collective bargaining in certain areas of the private sector and, in particular, in those industries which rely mainly on government contracts.²⁵ Contracting functions out to private employers will not return col-

23. Warren, Michigan, has, in fact, contracted this function out to a private firm. In San Francisco, refuse collection is done by private employers who, during the 1970 general strike by public employees, continued their operations, thus reducing the potential magnitude of the emergency.

24. See generally Burton and Krider, *The Role and Consequences of Strikes by Public Employees*, 79 YALE L.J. 418 (1970).

25. *Limits*, at 1124 n.57.

lective bargaining to a state identical with the private sector's paradigm case, one where the product market substantially limits union bargaining power. On the other hand, we believe that contracting out, all other things being equal, is preferable to retaining a function that has been unionized. There are several reasons why this is so.

First, while there have been few general (or almost general) strikes by public employees, there have been some. A recent one in San Francisco was made less unbearable because that city does not collect refuse. The garbage men are unionized, but they did not join the strike.

Second, a private employer is better organized to resist union demands than a political subdivision. The organization of a private business is directed largely to one end: the maximization of profits. While there may be internal conflicts over policy, and policy may be formulated only after a series of internal bargains, the hierarchical structure of a firm permits a final decision binding all those within it.

Public employers are organized for totally different purposes. There is a division of power between state and local levels, and within each level there are complex organizational arrangements designed to divide functions and allocate power in a way which creates a system of checks and balances. The principal purpose of these structures seems to be to encourage division and weakness—or at least to prevent omnipotence. As a result, a united front by a public employer in a labor dispute frequently is impossible; each affected group or political unit within the government will have a different perspective on the dispute and will pursue its interest in the matter individually. This fact has not been lost on the unions. Two of the principal adversaries in the most recent New York City sanitation dispute, for example, were the Mayor and the Governor. And in Hartford, Connecticut, the firefighters' union wields such effective power in the city council that it has eschewed the legal role of exclusive bargaining representative in order to avoid negotiating with a relatively obdurate executive.

The organization and motives of a private employer, then, seem better suited to countervail union power than those of a public employer. The threat of unemployment as a result of increased benefits, moreover, is greater in private employment. The profit motive creates an incentive to resist wage demands and to place capital elsewhere if the return is too low. The private employer is better able to substitute capital for labor as a result of a change in the relative costs of those factors of production.

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To be sure, the one-step removal of government from the performance of functions does not solve the problem of the disruption of essential services by a strike. We are, however, accustomed to deal with the emergency strike problem in the private sector and there is reason to believe, given the right balance of political forces, that appropriate legal structures can be erected so as to approach a tolerable solution to that problem.²⁶ Furthermore, transforming an emergency strike by public employees to one by private employees has an important additional advantage. Governmental intervention becomes *neutral* intervention. The mayor is not a party to the dispute with the interest of a party in the outcome. This is the case in two important respects. First, the government need not seem to intervene as the adversary of the union, the position it inevitably adopts when it is the employer. Second, the appearance of neutrality gives political leaders more breathing space *vis-à-vis* those constituents who are inconvenienced by the strike and are clamoring for a settlement. When the government is the employer, it appears to the public to have the power to settle immediately. One step removed, it appears able to achieve a settlement only by bringing two other parties together. The price of a service, moreover, will reflect costs directly where a private employer is involved and not be hidden in an unintelligible municipal budget. This increased visibility of the costs of a settlement will also reduce the pressure on political leaders to settle. Great pressure there will be, but of a different order nevertheless.

Contracting out is not the sole alternative. We have discussed it as if it were because our case is weakest where a function is merely contracted out rather than shed entirely.

Contracting out suffers from the fact that some pressure will inevitably develop to increase the monetary size of the government contract in order to settle a dispute. Although we believe that the pressure on the budget will be less than if the government were the formal employer, it may nevertheless be enough to skew the political process undesirably. Shedding the function entirely solves that problem and might, since the consumers of the services may be free to choose among entrepreneurs, create a more competitive situation than would occur under a contracting out scheme.

It may be argued, however, that the poor, having now to purchase the service, will be penalized by such a solution. This does not follow.

26. See H. WELLINGTON, *supra* note 12, at 269-297 (1968).

The impact on the poor depends in part, of course, on the nature of the shed service. It also depends on whether the excess sums public employees would have extracted, if the government were the formal employer, will not now benefit the poor either through direct subsidies or improved municipal services. Moreover, the poor pay taxes both directly (regressive sales taxes) and indirectly (property taxes reflected in rent and increased costs of goods). In this role they are interested in seeing municipal services obtained as cheaply as possible.

To the extent, however, that the poor are disadvantaged, the government might subsidize the purchase of the service through vouchers to eligible individuals or families, as many on both the political right and left are now suggesting with regard to education.²⁷ During a strike, there would, of course, be pressure on government to increase its subsidy in order to permit the payment of higher wages. The visibility of the cost of increasing the subsidy, however, is apt to be greater, and thus arouse greater opposition, than that of merely changing a contract. And if non-subsidized consumers can limit their purchase of the service, a pressure to resist union demands will be generated.²⁸

Public employee unionism, therefore, is a force restraining expansion of the role of government. *Other considerations being equal*, it is a force requiring government to decline new functions or to shed those it already has.

Under no circumstances, of course, will government shed its labor problems by shedding functions. As a third party, government will have a role to play in helping to resolve disputes. And try as it might to shed functions or contract out, it must remain the employer in many, many areas. What labor relations law should be in those areas requires consideration of the function of strikes and investigation into whether workable alternatives to the strike exist.

IV. The Strike and Its Alternatives

A. *The Role of the Strike*

We have argued that distortion of the political process is the major, long-run social cost of strikes in public employment. The distortion results from unions obtaining too much power, relative to other interest groups, in decisions affecting the level of taxes and the allocation

27. See, e.g., M. FRIEDMAN, *CAPITALISM AND FREEDOM* 85 *et seq.* (1962).

28. Refuse collection, again, is an example, for there may frequently be ways in which individuals can dispose of their refuse other than by hiring a contractor.

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of tax dollars. This distortion may, therefore, result in a redistribution of income by government, one in which union members are subsidized at the expense of other interest groups. And, where non-monetary issues, such as the decentralization of the governance of schools or the creation of a civilian board to review police conduct, are resolved through bargaining in which the strike or threat thereof is used, the distortion of the political process is no less apparent.²⁹

It has been earnestly argued, however, that if public employee unions are successfully denied the strike, they will have too little relative power.³⁰ To unpack the claims in this argument is crucially important. In the private sector collective bargaining depends upon the strike threat and the occasional strike. It is how deals are made, how collective bargaining works, why employers agree to terms and conditions of employment better than they originally offered. Intuition suggests that what is true of the private sector also is true of the public. Without the strike threat and the strike, the public employer will be intransigent; and this intransigence will, in effect, deprive employees of the very benefits unionization was intended to bring to them. Collective bargaining, the argument goes, will be merely a facade for "collective begging."

Initially, it must be noted that even in the absence of unionism and bargaining the market imposes substantial limitations on the ability of public employers to "take advantage" of their employees. Because they must compete with private employers, and other units of government as well, to hire workers, public employers cannot permit their wages and conditions of employment to be relatively poorer than those offered in the private sector and still get the needed workers. And, as we noted in the *Limits* article, the fact that most public employees work in areas in which there are numerous alternative employment opportunities reduces the likelihood that many public employers are monopsonists. Even if they are, moreover, the lack of a profit motive reduces the likelihood that government's monopsony power, if it exists, will be exercised.³¹

Much of the argument about the role of the strike is, in any event,

29. The unique aspects of non-monetary disputes are dealt with in a separate section on scope of bargaining, pp. 852-70 *infra*. The discussion in this section will focus principally on disputes over monetary issues.

30. See, e.g., Wollett, *The Taylor Law and the Strike Ban*, in *PUBLIC EMPLOYEE ORGANIZATION AND BARGAINING* 29 (H. Anderson ed. 1968); Kheel, *Strikes and Public Employment*, 67 *MICH. L. REV.* 931 (1969).

31. *Limits* at 1120-21.

overstated. First, it exaggerates the power of the strike weapon in the private sector. As we argued in the *Limits* article,³² the power of private sector unions to gain comparative advantages, while real, is inherently limited by what we there called the employment-benefit tradeoff.

Second, the very unionization of public employees creates a powerful interest group, at least in large urban centers, that seems able to compete very well with other groups in the political decision-making process.³³ Indeed, collective bargaining (the strike apart) is a method of channeling and underscoring the demands of public employees that is not systematically available to other groups. Public employee unions frequently serve as lobbying agents wielding political power quite disproportionate to the size of their membership. The failure of the Hartford firefighters, mentioned earlier, to seek formal status as a bargaining agent demonstrates how much punch such organizations can wield. And where a strong local labor council exists, association with it can significantly increase the power of public employee unions. This is some assurance, therefore, that public employees, even if prohibited from striking, will not be at a comparative disadvantage in bargaining with their employers.

Thus, on the merits, when one takes the trouble to unpack its claims, the argument for the strike in public employment is hardly inexorable. But the merits are only part of reality. The attitudes and convictions of public employees and their leaders cannot be put aside. There simply cannot be an effective ban on strikes if public employees believe that they are being treated in a relatively unfair fashion, unless, perhaps, we were prepared to accept the consequences of a major political crisis in which the ultimate coercive power of the state were used on a large scale against its own employees.

If this analysis is correct, a major problem for those designing legislation for labor relations in the public sector is to create institutions capable of achieving a high degree of acceptability. Because most men are greedy and few are deterred by legal norms which, while wise, are hard to explain, nothing may prove wholly effective in the quest to eliminate public employee strikes. If this proves to be the case, the municipal employer will have to be made less vulnerable to the strike.

32. *Id.* at 1117-19.

33. Thus, for example, in San Francisco municipal employees did very well without the strike, and indeed, without real collective bargaining for many years. And in New Haven, collective bargaining worked well without the strike or strike threat. In both cities the unions were skillful participants in the political process. Cf. R. DAHL, *WHO GOVERNS* 253-55 (1961).

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At any rate, one thing seems sure. Absent institutional arrangements more or less acceptable to all the parties, some strikes are inevitable when collective bargaining leads to an impasse. We now turn to a discussion of arrangements which, while they prohibit strikes, provide mechanisms to temper the impact of the prohibition.

B. *The Illegal Strike Model*

1. *Post-Impasse Procedures Without a Final Settlement Mechanism*

While in Vermont it appears to be legal for municipal employees to strike unless to do so "will endanger the health, safety or welfare of the public," and in some other states, such as Michigan, it may prove to be difficult to obtain an injunction against an illegal strike, most states that have addressed the question through legislative act or judicial decision do impose a legal prohibition, backed by the injunctive remedy, on strikes by public employees.³⁴ A number of states that have enacted comprehensive statutes providing for collective bargaining in the public sector, moreover, have developed institutions aimed at making the strike ban effective.³⁵

a. *The Nature of Fact-Finding with Recommendations*

Many statutes provide for fact-finding with recommendations or its virtual equivalent, advisory arbitration, when an impasse exists after both bargaining and mediation.³⁶ Considerable discussion of these post-impasse procedures has appeared lately in the learned journals, and an issue with jurisprudential pretensions has surfaced.³⁷ What

34. VT. STAT. ANN. tit. 21, § 1704 (Supp. 1968). MICH. COMP. LAWS ANN. §§ 423.201-254 (1967), and see *Holland School Dist. v. Holland Educ. Ass'n.*, 380 Mich. 314, 156 N.W.2d 206 (1968). See, e.g., CONN. GEN. STAT. ANN. §§ 7-467 to -478 (Supp. 1969); MINN. STAT. ANN. § 179.51 (1966); N.J. REV. STAT. §§ 34:13 A-1 to 34:13 A-9 as amended (Supp. 1969); N.Y. CIV. SER. LAW § 210 (McKinney Supp. 1969), WIS. STAT. § 111.70(4)(2) (1969). The legislature of Hawaii passed a statute (which has not yet been signed by the Governor) on May 6, 1970, making strikes by public employees legal in certain circumstances. See 349 BNA GOVT. EMPT. REL. REP. F-1 to 9 (May 18, 1970) [hereinafter cited as GERR].

35. See, e.g., DEL. CODE ANN. tit. 19, §§ 1301-13 (Supp. 1968); MO. REV. STAT. § 105.500-530 (Supp. 1968); R.I. GEN. LAWS ANN. § 28-9.4-1 to -19 (1968); WASH. REV. CODE § 41.56.010-900 (Supp. 1967).

36. See, e.g., CONN. GEN. STAT. ANN. §§ 7-467 to -478 (Supp. 1969); MASS. ANN. LAWS ch. 149, § 178D (1965), §§ 178F-N (Supp. 1969); MICH. COMP. LAWS ANN. §§ 423.201-254 (1967); N.Y. CIV. SER. LAWS §§ 200-12 (McKinney Supp. 1969); WIS. STAT. § 111.70, and §§ 111.80-.94 (1969).

37. See, e.g., McKelvey, *Fact Finding in Public Employment Disputes: Promise or Illusion?* 22 IND. & LAB. REL. REV. 528 (1969); Gould, *Public Employment: Mediation, Fact Finding and Arbitration*, 55 A.B.A.J. 835 (1969); Stern, *The Wisconsin Public Employee Fact Finding Procedure* 20 IND. & LAB. REL. REV. 3 (1965); Schmidt, *Observations on the Process of Fact-Finding in Michigan Public Education Teacher-School Board Contract Disputes*, in PUBLIC EMPLOYEE ORGANIZATION AND BARGAINING 81 (H. Anderson ed. 1963);

should fact-finding with recommendations be? Should it be adjudication or adjustment, a judicial process or super-mediation? Although these questions are best dealt with in terms of the goals to be achieved by the procedures, some initial misconceptions generated by the manner in which the questions are put must be cleared away.

To ask whether fact-finding with recommendations should be viewed as adjudication through a judicial proceeding, is to suggest that fact-finding with recommendations can approximate a typical case in a court of law. It cannot, and for fundamental reasons rooted in the nature of the judicial process. Courts generally decide disputes over rights and obligations in terms of standards knowable to the parties at the time the dispute arose. While this may not mean that there is only one correct resolution of any dispute, it does mean that judges generally have limited discretion in the decision-making process.

Only in a Pickwickian mood would one suggest that a post-impasse tribunal must decide a dispute over rights and obligations in terms of standards knowable to the parties at the time the dispute arose. The issues before such a tribunal are so much more fluid in terms of decisional standards as to be of a totally different order from those faced by judges. The legitimate discretion of the decision-maker is enormous relative to that generally accorded judges. Absent limiting authoritative instructions—a statute or agreement of the parties—the boundaries of that discretion are fixed by the goals of the procedure: namely, a resolution acceptable to all the parties, including the governmental entity with *de facto* control of the budget.

The question of what is an acceptable result depends, of course, upon a variety of factors. And there are a number of related ways to view these factors. One is to look at the power configuration within a municipality. Consider what may be the hardest case, namely, where the governmental unit which negotiates does not have effective political control of the budget. If the final budgetary authority³⁸—the city legislative body—is not the governmental branch which negotiates—the executive—there is a high probability of contract rejection when the

Howlett, *Arbitration in the Public Sector*, in *SOUTHWESTERN LEGAL FOUNDATION 15TH ANN. INST. ON LABOR LAW, LABOR LAW DEVELOPMENTS 1969*, at 231, 249; Anderson, *The Use of Fact Finding in Dispute Settlement*, paper delivered before National Academy of Arbitrators (Jan. 31, 1969).

38. The final budgetary authority is not necessarily the legislature: "Where the legislative body is the town meetings, approval of the [collective bargaining] agreement by a majority of the selectmen shall make the agreement valid and binding upon the town and the board of finance shall appropriate or provide whatever funds are necessary to comply with such collective bargaining agreement." *CONN. GEN. STAT. ANN. 7-474(b)* (Supp. 1969). See also *CONN. GEN. STAT. ANN. § 7-468(c)* (Supp. 1969).

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union's political power is substantially less *vis-à-vis* the legislative body than the executive.

If a post-impasse tribunal's processes are invoked after rejection of a contract by the legislature, the central fact the tribunal must determine, for it to function effectively, is the existence of the political situation we have hypothesized. The tribunal's principal task is to help work out an agreement acceptable to union, executive and legislature. This task does not entail a disinterested and principled quest for "truth"—beyond an accurate assessment of political forces—unless that is thought to be the best tactic for gaining acceptability.³⁹ Accommodation among the disputants, not the principled application of pre-existing standards, is the goal. The job of the post-impasse tribunal is to protect the public from a strike by achieving a compromise, and that may mean recommending that employees earn more than the tribunal believes they are "worth" by other arguably relevant standards. Maximizing long-run public welfare in the sense of finding what the services are "worth" or what settlement is "fair"—by looking to the demand for, or supply of, labor or to comparable private sector wages, for instance—is not the job of the post-impasse tribunal. Indeed, the tribunal's quest is always inconsistent with maximizing public welfare in that sense, except for the case in which the balance of political forces fortuitously leads to a result consistent with it.

A second way to approach the question of what factors make a result acceptable is to attend to the institutional arrangements, rather than to the power relationships, that exist in a particular situation. A post-impasse tribunal's role must vary according to whether law or practice makes it difficult for the union to by-pass one branch of the public employer, the executive for instance, and "bargain" with another, the legislative body. For where a union is able to choose its ultimate bargaining partner, the post-impasse tribunal may find either itself bypassed or its position undermined. Close attention to municipal practice makes clear that experiences vary enormously, but that the by-pass problem is very often significant.⁴⁰

Finally, but without any suggestion that the subject has been exhausted, the factors affecting the acceptability of a post-impasse tribunal's recommendation may be illustrated by asking whom the tribunal

39. Compare Marshall, Report #29, *City of Watertown v. International Brotherhood of Teamsters, Local 695* (July 20, 1964), quoted in Anderson, *supra* note 37, at 15.

40. See generally Wender, *Fragmentation of Authority for Collective Bargaining at the Local Level* (1969), (unpublished senior studies paper on file in Yale Law Library).

is trying to influence. Several possibilities, of which the following are examples, suggest themselves: 1) Where those negotiating for the public employer have effective political control over its budget, recommendations serve functions similar to recommendations of post-impasse tribunals in the private sector. They may aid the parties by fashioning inventive solutions to the impasse, or they may crystallize public opinion and thus exert pressure toward a negotiated settlement growing out of the recommendations.⁴¹ 2) In the more usual situation, where there is some effective review by a budgetary authority, recommendations may serve the additional function of influencing that authority directly through the persuasiveness and prestige of the tribunal, and indirectly through public opinion.

Having discussed the theory of fact-finding with recommendations, we now turn to an examination of its procedures in the practice of some states that employ it.

b. *Fact-Finding Procedures*

The states are truly chambers of experimentation in the field of public employment and collective bargaining. Fact-finding with recommendations, however, is something of an exception, since the variations which exist are generally matters of procedural detail rather than fundamental structure. These differences exist with respect to such questions as who may invoke the post-impasse procedure and at what point in time; how is the tribunal chosen and who pays for its services; and finally, what is the official state attitude toward mediation by the fact-finders?

If, as we have argued, the goal of these procedures is achieving a settlement acceptable to all the parties, and if achieving this depends upon the several factors we have showcased, considerable flexibility should be built into any statutory scheme. There is, however, a consideration that places some limits on the degree of permissible flexibility. The post-impasse procedure should not hinder collective bargaining. The major hope for avoiding strikes in the public sector is not the post-impasse procedure, but the bargaining process; not the resolution of impasses, but their avoidance. Resort to post-impasse procedures, therefore, ought not be so automatic as to become a routine step in the process of reaching a settlement. For if it does,

41. See WELLINGTON, *supra* note 12, at 284-85 (1968).

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serious bargaining may be deferred until the procedures are invoked, and impasses will also become routine.⁴²

It should, therefore, be relatively difficult for the parties to obtain the services of a post-impasse tribunal, and those services should be relatively expensive—but only relatively, because the overriding aim is to avoid the strike, not to limit the role of outside intervention. When it can help, the post-impasse tribunal should not be priced out of the market, nor should the parties, for other reasons, fail to use it.

Limiting the chilling effect of fact-finding with recommendations is attempted in several states by vesting an agency with the task of determining, prior to the selection of the post-impasse tribunal, whether a *bona fide* impasse exists. The agency is normally provided with some criteria as to what constitutes an impasse. In Connecticut, for example, the State Board of Mediation and Arbitration, upon receipt of a petition requesting fact-finding from either a municipal employer, a union, or both, must investigate and determine whether a “dispute [exists between the parties] . . . after a reasonable period of negotiation over the terms of an agreement” or whether “no agreement has been reached within a reasonable period of time prior to the final date for setting the municipal budget”⁴³ The Massachusetts statute is virtually identical, and the Wisconsin provisions similar.⁴⁴

In New York, an impasse is defined in terms of the budget submission date—“an impasse may be deemed to exist if the parties fail to achieve agreement at least sixty days prior to the budget submission date of the public employer.”⁴⁵ The Public Employment Relations Board performs much the same screening function under the New York statute as does the Board of Mediation and Arbitration in Connecticut. There are some nuances in the New York statute, however. First, the Board, without the request of the parties, may initiate the post-impasse procedure. This seems desirable, for there may be situations where neither party will want to petition the Board. On the other hand, a second aspect of the New York statute seems undesirable.

42. This phenomenon has occurred in some teacher-school board negotiations in Connecticut. The Connecticut Teacher Negotiation Act, CONN. GEN. STAT. ANN. §§ 10-153(a), (e), (g) (1958), §§ 10-153(b)-(d), (f) (Supp. 1969), provides for mediation after an impasse, and then for advisory arbitration. In some cases the parties defer serious bargaining because they anticipate arbitration, and fear the effect of serious bargaining, with the compromises it entails, on their success in arbitration.

43. CONN. GEN. STAT. ANN. § 7-473(a), (Supp. 1969).

44. MASS. ANN. LAWS ch. 149, § 178F(7), as amended (Supp. 1969); WIS. STAT. § 111.70(4)(c) and (f) (1969) (municipal employees); WIS. STAT. § 111.88 (1969) (state employees).

45. N.Y. CIV. SERV. LAW § 209, ¶ 1 (McKinney Supp. 1969).

Because the confidence of the parties in the post-impasse tribunal may be necessary for it to function successfully, the parties should participate in the selection of its membership. This is not in terms provided for in New York, but it is in a number of other states.⁴⁶ The New York statute, however, does explicitly invite the parties to develop through contract their own post-impasse procedures.⁴⁷ If there is any truth in the widespread belief that people have more confidence in their own handiwork than in that of others, this explicit invitation makes sense. But there would seem to be no prohibition on contractual arrangements of the type encouraged by New York in those states that are silent on the issue.

Several states deal with the problem of compensation for post-impasse fact-finding with recommendations.⁴⁸ As we noted, the problem is to make the process expensive enough to encourage settlement without its use, but not so expensive that it will not be invoked when it might prove helpful. A favored solution is to tax the parties equally for the service and to have the fees set by the agency charged with administering the post-impasse procedure.⁴⁹

Several states also deal wisely with the mediation function of the post-impasse tribunal.⁵⁰ Recognizing that the goal of the procedure is to achieve a successful resolution of the dispute, they make it clear that the fact-finders are free to mediate.⁵¹ Mediation is not a wise strategy in every situation, but it often can be very helpful. Attempts to separate the fact finding-recommendation procedure from mediation, as in Michigan, seem misguided.⁵²

46. See, e.g., CONN. GEN. STAT. ANN. §§ 7-473(b) (Supp. 1969).

47. N.Y. CIV. SERV. LAW § 209, ¶ 2 (McKinney Supp. 1969).

48. In Connecticut, for example, the memorandum on Fact Finding Procedure, promulgated by the State Board of Mediation and Arbitration provides: "The cost of fact finding, including fees and expenses, will be shared equally by the parties The fee schedule for days in which a fact finder conducts hearings or devotes to the study, and preparation of his report is as follows: for cities with a population under 15,000, \$100 per day; for cities of 15,000 to 50,000, \$125 per day; and for cities of over 50,000, \$150 per day Expenses incurred by the fact finder such as travel, rental of hearing rooms, and other necessary expenses will also be paid by the parties." Fact Finding Procedure 3 (March, 1967).

49. See, e.g., Massachusetts Rules for Fact Finding, Rule 25, promulgated by the Board of Conciliation and Arbitration (April 3, 1968), reprinted in 4 LAB. REL. REP. 31 S.L.L. 250(g) (1968).

50. See, e.g., CONN. GEN. STAT. ANN. § 7-473(f) (Supp. 1969); WIS. STAT. § 111.88(3) (1969).

51. MASS. ANN. LAWS ch. 149, § 178J(f), as amended (Supp. 1969). It would seem that in those situations where the parties are unable to reach agreement on monetary issues, they have a tendency to postpone to the post-impasse stage the resolution of non-monetary issues. Mediation at this point is often helpful in clearing up a number of these unresolved issues.

52. The Chairman of the Michigan Labor Mediation Board has stated that Board's

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c. *The Effects of Fact-Finding*

The most interesting and sophisticated studies of the effects of fact-finding with recommendations come from researchers at the Institute of Industrial Relations at the University of Wisconsin.⁵³ These studies evaluated post-impasse procedures in terms of what happens to disputes that go to fact-finding, whether it reduces strikes, how the parties view the process, and whether the process is over-employed and does deter collective bargaining. These studies suggest—and others⁵⁴ elsewhere tend to confirm—that fact finding is generally successful.

While any evaluation is difficult because one does not know what would have happened absent the existence or employment of the post-impasse procedure, the evidence shows that many disputes are resolved without the issuance of formal recommendations; that recommendations usually are accepted; that while there are strikes after recommendations, they are few; that in most jurisdictions the parties do not resort to fact-finding with too great frequency; and that, by and large, the parties regard these impasse tribunals as helpful.⁵⁵ Criticism exists, to be sure. Non-finality, post-impasse tribunals are no panacea, but expectations realistically set have not been disappointed.

2. *Post-Impasse Procedures which Provide for Final Settlements*

a. *Binding Arbitration: Effectiveness*

Compulsory and binding arbitration is no panacea either. It does not prevent all work stoppages; witness the recent police strike in Montreal.⁵⁶ And it cannot help but chill, to some extent at least, the bargaining process. The nature of these difficulties with compulsory and binding arbitration often is not fully understood by lawyer or layman.

view that mediation and fact-finding should be separated. "In 1968, we instructed our fact finders to be judges, not mediators. We do not rule out an 'in chambers' settlement if it appears possible. In August/September, 1968, our fact finders, particularly those with collective bargaining experience, were not always obedient to our instructions. They preferred to mediate. Some of the bargaining teams preferred it that way." Howlett, *supra* note 37, at 249.

53. See E. Krinsky, *An Analysis of Fact Finding as a Procedure for the Settlement of Labor Disputes Involving Public Employees* (unpublished 1969); Stern, *The Wisconsin Public Employee Fact Finding Procedure*, 20 *IND. & LAB. REL. REV.* 3 (1966).

54. See McKelvey, *supra* note 37, at 531-534.

55. See Krinsky, *supra* note 37; Anderson, *The Uses of Fact Finding in Dispute Settlement* 8-11 (paper delivered to National Academy of Arbitrators, Jan. 31, 1969).

56. The October, 1969 strike of policemen and firemen in Montreal followed a binding arbitration award granting a substantial wage increase, but declining an increase that would establish parity with Toronto. Such parity has long been a goal of the police and firefighters' organizations in Montreal. See *N.Y. Times*, Oct. 9, 1969, at 3, col. 1.

Compulsory and binding arbitration seeks to prevent strikes in two ways, neither of which is completely successful. First, it attempts to enforce a settlement by application of legal sanctions. Ordinarily, this will be enough for all but the aberrational case. And the occasional strikes which still occur sometimes may be prevented if the law responds with very harsh penalties. Such penalties, however, often do not have the support of the community and may stir a feeling of revulsion. In those circumstances, they are unlikely to be effective,⁵⁷ and, in any event, workers willing to accept such penalties can still make a strike effective. Legal sanctions, therefore, do not provide total protection.

Compulsory and binding arbitration, however, seeks to prevent strikes in a second way. Because the strike in private employment is viewed by many as a fundamental right located well within the foothills of the Constitution,⁵⁸ there is, in some places, a corresponding sense that laws against strikes in the public sector are unfair.⁵⁹ This attitude—which survives in a fierce state of tension with counter attitudes⁶⁰—makes bold public employees to break the law.⁶¹ A procedure which offers public employees a seemingly fair alternative to the strike, however, may change the community's sense of the propriety of the strike, and may in the long run influence the attitude of public employees. They may in time reach that desirable state of accepting

57. The history of the Condon-Wadlin Law, Law of March 27, 1947, ch. 891 [1947] N.Y. LAWS 842, as amended, Law of April 23, 1963, ch. 702 [1963] N.Y. LAWS 2432 (repealed 1967), is the classic example. The statute required automatic dismissal of striking employees, and a three year ban on higher pay for any rehired striker, plus a five year probationary period. In many situations it not only failed to deter strikes, but was too harsh to be enforced. See Montana, *Striking Teachers, Welfare, Transit, and Sanitation Workers*, 19 LAB. L.J. 273 (1968).

58. The principle is expressed, for example, in § 13 of the National Labor Relations Act, 29 U.S.C. § 163 (1964): "Nothing in this subchapter except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

59. "Ultimately, laws depend for their effectiveness upon voluntary acceptance by the vast majority of the decent persons in the groups regulated. Without such acceptance, the police and the courts are powerless to uphold the law, as our experience with prohibition proved. We see another demonstration of this truth when the words on the statute books were defied by a highly respectable, normally law-abiding group—public school teachers. In my view, the teachers were basically right. The law should not forbid them to strike merely because they are public employees." St. Antoine, *Public Employees and Strikes*, 13 MICH. L. QUADRANGLE 13, 19 (1969).

60. The "counter attitude" is dramatically reflected in the laws of the states, particularly those states where organized labor is strong and where collective bargaining for municipal employees has been established.

61. "There is a readily discernible, sharply upward trend in the number of strikes in Government employment over the last decade and in the number of employees involved. From a total of only 15 strikes involving 1,700 workers in 1958, the numbers have grown to 254 strikes of 202,000 employees in 1968. . . . Preliminary figures for 1969 and estimates for the current year indicate the trend continues unabated." TWENTIETH CENTURY FUND, *PICKETS AT CITY HALL* 31 (1970).

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an award that they find less than totally fair. This is the goal of compulsory arbitration, and what differentiates it from non-finality procedures. There is no moral imperative, above and beyond the preexisting moral imperative of not breaking the no-strike law, generated by non-finality procedures such as fact-finding with recommendations. They are advisory only. An aim of arbitration, binding on both parties, is to generate just such an imperative. Again, however, total success cannot be expected.

The second factor limiting the effectiveness of arbitration is that it deters collective bargaining. The point is simple enough. Either the public employer or the union will reckon that an arbitration award will be more advantageous than a negotiated settlement. That party will then employ tactics to ensure arbitration by bargaining without a sincere desire to reach agreement.⁶²

It is almost impossible wholly to solve this problem; but the route to partial and perhaps satisfactory resolution is to fashion a procedure sufficiently diverse and uncertain so as to make a negotiated settlement more attractive to the parties than arbitration.

The composition of an arbitration panel can importantly influence its award. Honest men acting disinterestedly often see things differently. The behaviorists are surely right in thinking that results are influenced by the perspectives of decisionmakers. Thus, to the extent that the composition of an arbitration panel is unknown beforehand and is outside the control of the parties, some uncertainty will exist. On the other hand, the parties are more likely to have confidence in an award rendered by arbitrators they have chosen. This tension can be eased by allowing each party to select one member of a three-man panel.

Another device to reduce the chilling effect is "one-or-the-other" arbitration, in which the arbitrator's choice would be limited to either the employer's final position or the union's final position—all of one or all of the other.⁶³ This creates some uncertainty but very high stakes, and the fact that the stakes are so high is counted on by its advocates to make "one-or-the-other" arbitration work. The predictions made are as follows: Employer and union, realizing that the arbitrator's power is limited to accepting the entire proposed contract of one or

62. The problem is discussed in more detail in WELLINGTON, *supra* note 12, at 288-91.

63. See Stevens, *Is Compulsory Arbitration Compatible with Bargaining*, 5 *IND. REL.*, Feb. 1966, at 38, 45. The President has proposed a form of one-or-the-other arbitration in national transportation disputes. See 73 *LAB. REL. REP.* 197 (March 9, 1970).

the other party, will each bargain in good faith and in great earnestness to reach an agreement. If this process fails to produce agreement, it will, nevertheless, narrow very substantially the area of disagreement. The parties' final proposals, moreover, may further narrow disagreements as each party strains for a favorable decision from the arbitrators by attempting to make its position appear the more reasonable of the two.⁶⁴

One-or-the-other arbitration has, however, substantive difficulties which suggest that it may work better in some disputes than in others.⁶⁵ If the parties assume positions out of ideological commitment rather than practical needs, the original disagreement may not be narrowed in the bargaining process by the all or nothing nature of possible arbitration.⁶⁶ The arbitrators, moreover, may occasionally not know what the effects of certain proposals would be. There is sometimes the danger of the seemingly more reasonable proposal being disruptive or otherwise impracticable. This may be an aggravated difficulty in the public sector where the complexity of municipal fiscal affairs or the heated political atmosphere surrounding particular non-monetary issues obscure the stakes in the dispute.

b. *Binding Arbitration: Legal Considerations*

The major legal threat—and puny it is—to compulsory and binding arbitration is the doctrine of illegal delegation. The constitution of each state gives legislative power to the legislature. The question is, to what extent can the legislature delegate that power? Of course, it can delegate power over the wages and conditions of employment of municipal employees to municipal legislatures. If collective bargaining is legal in a state, the further delegation required by collective bargaining is legal. But the legislative body may exercise some continuing control. In Connecticut, for example, bargaining is between the executive and the employee representative, but the legislative body (the City

64. With the agreement of the parties, one-or-the-other arbitration was used in a teacher-board of education dispute in Connecticut. The parties came to advisory arbitration after serious good faith bargaining which had substantially narrowed the differences between them. The one-or-the-other suggestion, after it was explained to the parties and agreed to by them, led to several hours of bargaining that almost resulted in a contract.

65. Some insight into people's attitudes toward arbitration may be gleaned from their reactions to one-or-the-other arbitration. Perhaps it is because so many see arbitration as "adding up the claims on both sides of a dispute and dividing the sum by two," *Local 28, Int'l Bhd. of Elec. Workers v. Maryland Chapter, Nat'l Elec. Contractors Ass'n*, 191 F. Supp. 494, 497 (D. Md. 1961), that their first reaction to the one-or-the-other variety is to call it a game of Russian roulette.

66. This is more of a problem in the public sector than it is in the private. See the discussion on scope of bargaining, pp. 852-70 *infra*.

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Council or the Board of Aldermen) must approve or disapprove *in toto* any contract negotiated by these parties with budgetary consequences.⁶⁷ Binding arbitration, however, if it means anything, means that it binds the legislative body as well as the executive and the employee representative; and this, it might be thought, could pose difficulties.

As it has evolved, the delegation doctrine, at least in most jurisdictions, is satisfied if there is a rational reason for the delegation, and if power is given to a state official who is directed to exercise it according to decisional standards supplied by the legislature.⁶⁸ This is probably too loose a formulation to satisfy the requirements for a legal delegation in any particular jurisdiction, but it should make clear that a legislature can, if it is careful, draft a binding arbitration statute and be reasonably confident that the statute will be held constitutional.

The most illuminating case addressing the constitutionality of binding arbitration involves a Rhode Island statute giving the right of collective bargaining to firefighters, and providing:

In the event that the bargaining agent and the corporate authorities are unable, within 30 days . . . to reach an agreement . . . all unresolved issues shall be submitted to arbitration.⁶⁹

Each party is given the responsibility of selecting an arbitrator; the two arbitrators selected are themselves to choose a third, who serves as chairman of the panel.⁷⁰

This method of selecting the arbitration panel raises more legal difficulties than would other approaches. It makes it harder for a court to find that the arbitrators are state officials than would, for example, a statute that empowered the Governor to appoint a standing panel of fifteen or twenty men from which a three-man arbitration board was chosen by the parties for a particular case. The Rhode Island Supreme Court, however, moved surely to its holding that the arbitrators were state officials and that the three-man panel was a state agency. Said the Court:

We find that the legislature delegated to each of the ar-

67. CONN. GEN. STAT. ANN. § 7-474 (Supp. 1969).

68. See, e.g., *City of Warwick v. Warwick Regular Firemen's Ass'n*, 256 A.2d 206 (R.I. 1969); *Collective Bargaining for Public Employees and the Prevention of Strikes in the Public Sector*, 68 MICH. L. REV. 260, 279-288 (1969).

69. R.I. GEN. LAWS § 28-9.1-7 (1968).

70. R.I. GEN. LAWS § 28-9.1-8 (Supp. 1969). The case is *City of Warwick v. Warwick Regular Firemen's Ass'n*, 256 A.2d 206 (R.I. 1969).

bitrators a portion of the sovereign and legislative power of the government, particularly the power to fix the salaries of public employees, clearly a legislative function. It is clear that each arbitrator is free to perform this duty without control or supervision from any superior. It is also to be observed that the provisions . . . of the act establish a fixed term and specific duties for the incumbent. It is our conclusion then that an arbitrator appointed under the pertinent provisions of the statute is a public officer and that collectively the three constitute a public board or agency.⁷¹

The Court also had no trouble, under the Rhode Island statute, with the question of decisional standards. "In the instant case," the Court said, "the legislature prescribed standards for the exercise of the delegated power that clearly are reasonably open to the conclusion that the exercise of power by the arbitrators would be sufficiently confined to meet the constitutional requirements."⁷² The statute, as the Court tells us,

sets out specifically a number of comprehensive limitations on the actions of a board of arbitrators when exercising the power delegated. They require that certain factors ". . . be given weight by the arbitrators in arriving at a decision . . ." These factors include specifically a comparison of wage rates or hourly conditions of employment of the fire department in question with prevailing wage rates or hourly conditions of employment of skilled employees of the building trades and industry in the local operating area. They require also that consideration and weight be given to the wage rates or hourly conditions of employment of the fire department in question in comparison to similar wage rates or hourly conditions of employment of other cities or towns of comparable size. They require that weight be given to the interest and welfare of the public and specifically spell out that weight be given to the hazards of the employment and physical and education qualifications of the job training and skills. In our opinion, these standards clearly are sufficient to meet the constitutional requirement that the delegated power be confined by reasonable norms or standards.⁷³

Other states are experimenting with compulsory and binding arbitration in portions of the public sector, but experience remains limited. Michigan has a Police and Firemen's Arbitration Act which became effective on October 1, 1969, and is due to expire June 30,

71. 256 A.2d at 210-211.

72. *Id.* at 211.

73. *Id.*

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1972.⁷⁴ Decisional standards to be used "as applicable," are spelled out in some detail in the Michigan law.⁷⁵ In contrast the Pennsylvania Police and Firemen Arbitration Act contains no standards, other than the general policy of the statute, to guide the arbitrators.⁷⁶ While this does not violate the delegation doctrine as it has evolved in Pennsylvania,⁷⁷ it probably would subject a similarly drafted statute to constitutional attack in a number of jurisdictions.⁷⁸

c. Legislative Finality

A very different approach to the impasse problem is suggested in the Taylor Committee Report which led to the enactment of New York's Public Employees' Fair Employment Law. The Taylor Committee suggested, "that in the event of the rejection of a fact-finding recommendation, the legislative body or committee hold a form of 'show cause hearing' at which the parties review their positions with respect to the recommendations of the fact-finding board. The appropriate budgetary allotment or other regulations are then to be enacted by the legislative body."⁷⁹

The statute as initially enacted did not adopt this proposal, but a 1969 amendment provides:

74. MICH. COMP. LAWS ANN. §§ 423.231-247 (Supp. 1970).

75. They include:

- (a) The lawful authority of the employer.
- (b) Stipulations of the parties.
- (c) The interests and welfare of the public and the financial ability of the unit of government to meet those costs.
- (d) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally:
 - (1) In public employment in comparable communities.
 - (2) In private employment in comparable communities.
- (e) The average consumer prices for goods and services, commonly known as the cost of living.
- (f) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
- (g) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
- (h) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

Id. at 423.239.

76. PA. STAT. ANN. tit. 43, §§ 217.1-12 (Supp. 1969).

77. *Harvey v. Russo*, 435 Pa. 183, 255 A.2d 560 (1969).

78. *See generally*, K. Davis, ADMINISTRATIVE LAW TREATISE § 2.15 (1958).

79. New York Governor's Committee on Public Employee Relations, Final Report 39 (1966).

In the event that either the public employer or the employee organization does not accept in whole or in part the recommendations of the fact-finding board, (i) the chief executive officer of the government involved, shall within ten days after receipt of the findings of fact and recommendations of the fact-finding board, submit to the legislative body of the government involved a copy of the findings of fact and recommendations of the fact-finding board, together with his recommendations for settling the dispute; (ii) the employee organization may submit to such legislative body its recommendations for settling the dispute; (iii) the legislative body or a duly authorized committee thereof shall forthwith conduct a hearing at which the parties shall be required to explain their positions with respect to the report of the fact-finding board; and (iv) thereafter, the legislative body shall take such action as it deems to be in the public interest, including the interest of the public employees involved.⁸⁰

One difficulty with this legislative finality approach is that in some situations the employer ("chief executive officer of the government involved") and "the legislative body of the government involved" may in fact be the same—a school board with independent fiscal authority, for example. In other situations it may be that "the legislative body of the government involved" has already acted, indeed has precipitated the crisis by turning down a collective agreement. This could certainly happen in Connecticut if the legislative finality approach were appended to that state's municipal bargaining law.

Another troublesome question is whether it is desirable for the legislature to deal in detail with labor relations. This varies, to be sure, from legislative body to legislative body and also with the nature of a particular labor dispute. But the long-run fear must be that public employee unions will by-pass the executive, the public employer, whenever they think they can do better with the legislature. This is a serious problem today in many municipalities that are developing collective bargaining relationships with their employees. The legislative finality proposal, if widely adopted, could exacerbate this unhappy state of affairs.

d. *Choice of Procedures*

None of the difficulties with legislative finality, however, requires its total rejection. For if it were part of a choice-of-procedures statute—one that permitted a choice among a number of post-impasse proce-

80. N.Y. CIV. SERV. LAW § 209, ¶ 3(e) (McKinney Supp. 1969).

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dures—it could be employed selectively. It would not be used where the legislature had already spoken. And, because it would be used only from time to time, it would not aggravate the by-pass problem; at least not very much.

The choice-of-procedures approach—an oldish idea in the area of emergency disputes in the private sector⁸¹—has two major advantages. First, it tailors the post-impasse procedure to the particular dispute. The difficulty we noted with one-or-the-other arbitration is a good example. If it is true that one-or-the-other is suited only to some situations, the technique of selective application would seem desirable.

The second major advantage of a choice-of-procedures is that it builds uncertainty into the post-impasse stage and thereby makes it difficult for the parties to estimate the consequences of failing to agree. Because neither party is likely to find every procedure favorable to achieving its demands, the fear that the least desirable may be chosen will itself generate settlement pressures.⁸²

Under such an approach, the agency charged with enforcing the state public employee law would be empowered, after investigation, to determine the procedure best suited to the particular dispute, be it fact-finding with recommendations, regular arbitration, the one-or-the-other variety or legislative finality. This breadth of choice should be sufficient both to create uncertainty and to permit choice of an appropriate procedure.

A choice of procedures approach, like every other approach consistent with an open society, is no panacea. It will not stop all strikes, but it has the best chance of reducing their incidence. And that is all we have any right to expect.

3. Penalties for Striking

In a system of labor relations that bans the strike, the proper role of sanctions is no less vexing a problem than the proper design for post-impasse procedures. Only the outer boundaries of the problem are reasonably clear. The command that the strike be illegal must be more than hortatory, and the sanctions for breach of the primary rule must not be so harsh as to engender a feeling of revulsion in the community.

81. See, e.g., Wirtz, *The "Choice-of-Procedures" Approach to National Emergency Disputes*, in *EMERGENCY DISPUTES AND NATIONAL POLICY* 149 (I. Bernstein, H. Enarson, R. Fleming, eds., 1955); Shultz, *The Massachusetts Choice-of-Procedures Approach to Emergency Disputes*, 10 *IND. & LAB. REL. REV.* 359 (1957); A. COX, *LAW AND THE NATIONAL LABOR POLICY* 55-58 (1960).

82. Wirtz, *supra* note 81, at 158-59.

Within these boundaries the aim of sanctions is to deter strikes effectively and to do justice. At best, this is a complicated business. Not only is there the response of the general community; there is also the response of the public employees involved. In some situations, for example, the incarceration of a union leader for contempt will turn that leader into a martyr and stiffen support for the strike. Yet it is also true that fairness or justice requires that like situations be treated alike. And it may be difficult to show forbearance toward one union leader and incarcerate another.

Harsh penalties automatically invoked, moreover, run the risk of converting an economic strike into a strike for amnesty which will be difficult to settle without openly abandoning the law. The harsher the penalties, the less the strikers will feel they have to lose, and the effect may be to extend rather than end the strike. These considerations suggest gradually escalating sanctions which seek to make the cost of continuing the strike at any point in time greater than the cost of ending it.

Other problems exist as well. To what extent should sanctions be directed against the organization, its leaders, or its members? The answer to this question may be influenced by what has come to be known as the ratification problem; *i.e.*, the increasing frequency with which union members turn down negotiated settlements.⁸³ This is a manifestation of rank and file militancy which overrides the union leadership, and, where it exists, the threat of sanctions against the membership may be necessary if strikes are to be reduced. This threat, indeed, may be essential to any attempt by the leadership to assert control.

Different sanctions, of course, are appropriate to different situations. This argues for flexibility, but with some guidelines.

Many states use the courts to develop sanctions. In the *Holland* case, the Michigan Supreme Court suggested that a trial court "inquire into whether the public employer has refused to bargain in good faith, whether an injunction should be issued at all, and if so, on what terms and for what period in light of the whole record to be adduced."⁸⁴ Apart from the issue of good faith, it is far from clear what the Michigan court would have a trial court examine. It may be that the

83. One classic example is the airline strike of 1966. President Johnson announced a settlement on television between five major carriers and the International Association of Machinists only to have the union membership repudiate it the next day. *See, e.g.*, N.Y. Times, Aug. 1, 1966, at 1, cols. 5 and 8. Another example is the railroad-shopcraft dispute of this year. *See, e.g.*, 73 LAB. REL. REP. 297 (April 13, 1970).

84. *School Dist. v. Holland Educ. Ass'n*, 380 Mich. 314, 327, 157 N.W.2d 206, 211 (1968).

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process of "litigating elucidation" is a good way to develop differentiated sanctions for different situations, but it requires considerable wisdom on the part of judges. For if like cases are not treated alike, the system is unfair and probably unworkable. There is no reason to think that judge-created sanctions will be as, or more, effective than those prescribed by the legislature. The imprimatur of the political process may be necessary to the creation of a moral imperative against striking, or to the dissipation of the belief that stern sanctions for striking are inconsistent with our notions about fundamental freedoms.

One differentiating factor of importance is the procedures that have been employed prior to the strike. Those procedures which seek to substitute for the strike a fair method of dispute resolution must themselves be protected. For example, a strike in the teeth of a binding arbitration award should be met with the maximum of sternness consistent with the community's sense of fairness. Yet the Michigan Police and Firemen Arbitration Act seems to undercut its policy of limited, binding arbitration. The statute provides, "[n]o person shall be sentenced to a term of imprisonment for any violation of the provisions of this act or an order of the arbitration panel." The statute does provide, however, that if a party "willfully disobeys a lawful order of enforcement [of an award by a court] or willfully encourages or offers resistance to such order . . . the punishment for each day that such contempt persists, may be a fine fixed in the discretion of the court in an amount not to exceed \$250.00 per day."⁸⁵

There is considerable diversity as to sanctions among other states with public employee bargaining statutes. Connecticut's Municipal Employee Relations Act is silent except to provide that "[n]othing [in this Act] shall constitute a grant of the right to strike to employees of any municipal employer and such strikes are prohibited."⁸⁶ Connecticut has not been free of strikes, and the sanction used has been the injunction.⁸⁷

Contrast Section 210 of the New York law, which imposes sanctions on employees who engage in a strike: "probation for a term of one year;" deduction from compensation of "an amount equal to twice his daily rate of pay for each day or part thereof" that an employee is on strike. It also penalizes the employee organization through the loss of mem-

85. MICH. COMP. LAWS ANN. §§ 423.246 and 423.241 (Supp. 1969).

86. CONN. GEN. STAT. ANN. § 7-475 (Supp. 1969).

87. See, e.g., Injunction against strike by employees of New Haven Department of Public Works, reported in 283 GERR B-9 (Feb. 10, 1969).

bership dues deduction for a period to be determined by the Public Employment Relations Board.⁸⁸ Moreover, Section 211 mandates "the chief legal officer of the government involved" to apply for an injunction.⁸⁹ Section 210 has elaborate procedural safeguards, and builds flexibility into the sanction aimed at the union.⁹⁰ As it applies to individual employees, however, Section 210 seems to be rather inflexible, and therefore in some situations will be overly harsh.

Within the boundaries that describe the role of sanctions in the no-strike model—more than hortatory but within the community's sense of fairness—each state must experiment and find its own way. Time will help the policy-maker reach evaluative judgments; but it is doubtful that a clear picture of a proper structure will ever emerge. Nor should there be any expectation that wise sanctions for strikes will eliminate strikes. Neither sanctions nor impasse procedures, alone or in combination, can do more than ease the situation. In some cities and states this will be enough. Society can tolerate some flouting of the no-strike norm without it generating disrespect for law; and the political process can tolerate some without becoming too distorted. In other localities the prohibition on strikes may not work, no matter what. Where this is the case, the task for policy-makers will be to accept the strike and reduce its effects. There are more ways to do this than may be generally thought.

C. *The Legal Strike Model*

The essentiality of governmental services has been urged by some as the touchstone with which to judge the permissibility of public employee strikes.⁹¹ Unfortunately, however, commentators have not often recognized that this criterion describes three distinct problems: first, the fact that disruption of some services will create an immediate danger to public health and safety; second, the inelasticity of demand for most governmental services; and, finally, the vulnerability of the typical large city political structure to the strike weapon. A statutory scheme which permits strikes must take each of these aspects of the essentiality problem into account.

88. N.Y. CIV. SER. LAW § 210 (McKinney Supp. 1969).

89. N.Y. CIV. SER. LAW § 211 (McKinney Supp. 1969).

90. See note 88 *supra*.

91. See generally, Wellington and Winter, *More on Strikes by Public Employees*, 79 YALE L.J. 441 (1970).

1. *The Emergency Dispute Problem*

Let us assume for analytic purposes that the emergency dispute problem is the only one the municipality need consider. Clearly, where a strike creates an immediate danger to public health and safety, the strike weapon should be outlawed and resort to the prescribed post-impasse procedures mandatory. Where the length of the strike determines the magnitude of the danger, however, special procedures for invoking post-impasse procedures are necessary. For the strike, by hypothesis, is tolerable for a time. One approach would be to empower a public official, the governor or mayor, to invoke the procedures when he determines that a health or welfare danger exists. This factual determination should be final and not subject to judicial review. While such review exists under Title II of the Taft-Hartley Act,⁹² its extension to the public sector seems unwise. To require that a court review a purely prudential decision entails that the court do little more than rubberstamp what has been done. This is not a good way to use courts.

A difficulty with giving the executive authority to determine when a strike must stop is that he is apt to be a party to the dispute. If it is thought that the appearance of unfairness will significantly lessen the law's acceptability, it may be preferable to entrust the power to determine whether an emergency exists to an independent, specialized agency, such as the one empowered to administer the public employees law. That agency would act upon the petition of the public employer. Its procedures should ensure a speedy decision, which, again, should be final. However, the employer should, after a period of time, be free to renew a rejected petition on grounds of changed conditions.

In the private sector, the question of when a strike constitutes a genuine emergency has, however, never been resolved with finality. The reason is not that an emergency cannot be defined in a way that will satisfy informed opinion,⁹³ but rather that the public inevitably finds such a definition too narrow. Indeed, many of the cases of *ad hoc* intervention by Presidents, or of resort to the "cooling off" provisions of Taft-Hartley, have not involved disputes which were, strictly speaking, emergencies. The political pressures surrounding strikes which are severely inconvenient but not dangerous are such that strict obedience to the criterion of actual emergency would involve too great a political risk for a President to incur.⁹⁴

92. 29 U.S.C. § 178 (1964); *United Steelworkers v. United States*, 361 U.S. 39 (1959).

93. Hildebrand, *An Economic Definition of an Emergency Dispute*, in *EMERGENCY DISPUTES AND NATIONAL POLICY*, *supra* note 81, at 3.

94. WELLINGTON, *supra* note 12, at 270-274 (1968).

The feasibility of a non-emergency strike model in the public sector is, therefore, doubtful from the start, for it requires that the law distinguish between true emergency and inconvenience. That is the very distinction which has proved unacceptable in the private sector. Most strikes in the public sector—all those worth staging⁹⁵—inconvenience a substantial part of the community. If the total ban on strikes by public employees is to be relaxed, political adherence to a distinction between true emergencies and real inconvenience will be needed.

Paradoxically, this may make the utilization of a strict definition of an emergency politically more acceptable in the public sector than in the private. Contrary to the myth, it is often in the interest of a striking union in the private sector to involve the government in the search for a settlement. Long strikes frequently work to the advantage of the employer, and a union which can avoid the long strike by invoking government pressures for a settlement may have strengthened its hand at the bargaining table.⁹⁶ One reason for the unacceptability of the strict definition of an emergency in the private sector, therefore, may be the interest of labor in seeing the distinction between emergency and inconvenience blurred.

Public employee unions, however, may view the problem differently. Their choice is not between accepting a rational distinction or gaining helpful government intervention. Rather, they must choose between accepting the distinction between strikes which create an emergency and those which inconvenience, or a complete statutory ban on strikes. For this reason, such a distinction may be more acceptable politically in the public sector than it has proven to be in the private.

On the other hand, the fact of inconvenience remains and the distinction must be accepted by what may be a reluctant public. This probably means that where discretion to determine whether an emergency exists is delegated, it should go to the independent, administrative tribunal rather than to an elected public official who will be politically unable to apply the distinction.

A structure that permits strikes to continue only until they create emergency conditions may, however, chill collective bargaining, because

95. Taylor, *Public Employment: Strike or Procedures*, 20 *IND. & LAB. REL. REV.* 617 (1967).

96. "Government intervention and its anticipation are very likely to increase the probability of the short strike, and to make the short strikes pay off, by frustrating normal negotiation and removing the option of the long strike." Livernash, *The Relation of Power to the Structure and Process of Collective Bargaining*, 6 *J. LAW & ECON.* 10, 15 (1963).

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the parties will be able to predict the length of the strike and calculate accordingly. The party which stands to gain by waiting out the strike will do so. Much of this effect can be mitigated, however, by utilizing a choice of procedures as a post-impasse structure, and by taking whatever steps are available in a particular dispute to create uncertainty as to the length of time the strike will be permitted.⁹⁷

The definition of strike-created emergency conditions should not be overly difficult to write, although local conditions will produce the usual variations. There must be an immediate danger of serious injury to public health and safety. Police and fire services, it would seem, may not be disrupted for any amount of time without such a danger being created. Here the damage occurs so quickly and in such unforeseen ways that no hiatus can be safely permitted.⁹⁸ Other kinds of strikes are not so clear-cut. The disruption of utility services, for instance, may not create an emergency for some time, depending on the degree of disruption, the nature of the service, the time of year, the availability of substitutes at a subsistence level, the extent of automation, and other factors.

A strike in health services is, for example, most critical where the operation of hospitals is concerned. But even with hospitals, variables, such as the ability to maintain partial operations, the location of non-struck hospitals, and the time of year, may keep the impact of the strike below the emergency level.

Sanitation disputes similarly do not inevitably endanger public health and safety. The problem is most aggravated in large urban areas, but a suburb with an accessible dump may encounter little danger. Even strikes in transportation may be tolerated for a period, sometimes until settlement, depending on substitutes and the extent to which the damage done is mainly economic. Strikes by welfare employees probably do not constitute an emergency immediately. The disruption of services surrounding public housing will create emergencies most often in cold weather and in circumstances in which the tenants are unable to make minimal provision for themselves. And in education, most experience has shown that the risk is to political careers rather than to the health and safety of the public. Lost school days can be recaptured, often at times of the year which might make teachers think twice before striking. Strikes by support personnel must be judged by

97. See notes 81-82, *supra*, and accompanying text.

98. The recent experience in Montreal suggests that a real danger to health and safety can occur within hours of the start of a walk-out.

the extent to which they disrupt related functions. Other governmental services do not by any standard seem to threaten the health and safety of the public, or even produce significant inconvenience.

Two things, then, are clear. First, the size of a municipality and the degree to which it is prone to strike-created emergencies are related. The extent of division of labor and the distance to alternative services combine to make large cities highly vulnerable. The problem of public employees is truly part of the "urban crisis." Second, strikes by most public employees that fall short of emergencies are nevertheless severely inconvenient to a significant segment of the community. If there are to be strikes, that is the minimum price that must be paid.

To sum up: the emergency dispute problem does not compel a complete ban on strikes. Many public employee strikes are not a danger to health and safety, at least not immediately.⁹⁹ And while non-emergency strikes cause inconvenience, that may not be reason enough to ban strikes.

2. *The Inelastic Demand Problem*

The second sense in which essentiality may be used as the touchstone upon which the strike question is resolved relates to the inelasticity of demand for most governmental services. Because there are few close substitutes for such services and virtually no fear of entry by a non-union rival, the demand for many governmental services is relatively insensitive to price. And because the demand for labor is derived from the demand for the product, this means that public employee unions face a relatively insignificant trade-off between benefits received and unemployment incurred in pursuing their demands.

It must be conceded that government can do little about the lack of close substitutes for its services. Indeed, it is often the very lack of substitutes which led government to undertake these functions in the first place. But the inelasticity of demand for governmental services does not necessarily mean excessive wages for governmental employees, any more than the inelasticity of demand for some agricultural products means excessive income for farmers. It is the lack of competition—monopoly—which permits producers to take advantage of an inelastic demand schedule. And where unions are concerned, it is principally the strike and the strike threat which enable them to exploit such an advantageous market position. If we employ measures which reduce

99. See Burton and Krider, *The Role and Consequences of Strikes by Public Employees*, 79 YALE L.J. 418, 432 *et seq.* (1970).

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the effectiveness of the strike weapon, therefore, at least part of the difficulty created by the inelasticity of demand for governmental services will be solved. We turn then, to that problem.

3. *The Problem of the City's Vulnerability*

The final sense in which essentiality is used goes to the effectiveness of the public employee strike. Such strikes generally inconvenience people and these people are also voters. Other things being equal, they will vote in a way which eliminates the inconvenience; that is, which avoids or brings about an end to the strike. And all too often, other things will be equal.¹⁰⁰ Because the cost of a settlement may frequently be passed on to larger political units or hidden in the bowels of an incomprehensible municipal budget, voters will tend to choose political leaders who avoid inconveniencing strikes over those who work to minimize the costs of settlements at the price of a strike. Costs which are not imposed on voters are hardly likely to deter them from pressuring for a settlement no matter what its size. And costs effectively hidden by the genius of municipal accountants as well as understated by the parties will not induce voters to urge firmness by their elected officials in the face of an inconveniencing strike. The net effect is that the typical municipal political structure is altogether too vulnerable to strikes by public employees, and that other groups in the political process are thereby disadvantaged. This is true whether the strike is over monetary or non-monetary issues, although in the latter case organized groups whose interests are threatened by union demands may create countervailing pressures of varying impact.

The suggestions we are about to make aim to reduce the vulnerability of the public employer. They are neither mutually exclusive nor always complementary. Depending upon local variables, they may be employed individually or together.

a. *Contingency Planning*

The first thing government should consider are various ways in which the effect of strikes by public employees can be mitigated. To

100. This is not to suggest that large numbers of politicians will have their careers terminated as a result of large numbers of strikes, for they are far too shrewd not to appreciate the risk. These facts of life are already more apparent to the politicians than to industrial relations commentators, which is perhaps to be expected. Mayor Lindsay's early and generous settlement with the teachers showed his lack of confidence in the repeated assertions by labor "experts" that strikes in the public sector do not differ from those in the private. That insight, and his great luck in having his most formidable opponents eliminated in the Democratic primary, may have been the most important factors in his election victory.

this end, a municipality with a potential for public employee labor trouble should engage in careful contingency planning. There are, of course, limits to what can be accomplished through planning, particularly where the unions involved regard any attempt to find substitutes for struck services as a form of strikebreaking and use all of their considerable powers to stop it.¹⁰¹ Nevertheless, some things can be done. Prepared emergency traffic patterns and parking facilities can offset some of the consequences of a transit strike. Contingency plans as to the use of neighboring hospitals may avoid disasters in a hospital strike. Automating the most critical functions before a dispute occurs can reduce the impact of a strike enormously. Many utility strikes today are hardly noticed by the public because automation permits continued service. And prepared written directions to businesses and individuals indicating how they may help themselves and others can limit the impact of many kinds of strikes. Again, the helpfulness of such measures can be easily overstated, but there may be a great temptation to procrastinate, either because of lethargy or a desire not to appear provocative.

b. *Partial Operations*

Another approach deserves serious consideration. It seems evident that emergencies, and the most severe inconveniences caused by strikes, can be avoided by partial operation of the struck facility. Partial operation, moreover, can be tailored so as to leave substantial pressure on government to settle. Policemen can keep order without giving out parking tickets, directing traffic, arresting for minor offenses, doing paper work, or testifying for the prosecution in criminal cases. Firemen can prevent conflagrations without doing the normal housekeeping details. Welfare checks can be processed, and all other welfare services cease. Garbage can be collected, but less often. Subway service can be reduced by half.

The goal of any partial operation scheme is, first, to ensure performance of those functions essential to health and safety and the avoidance of severe inconveniences; and, second, to maintain sufficient pressure on government to settle. From the union's point of view, the advantage is a legal, albeit partial, strike and some continuing income for its members.

101. The reaction of the New York City sanitation workers to Mayor Lindsay's threat of using the National Guard to pick up garbage was both volatile and effective. It stirred the emotions of those who view "strikebreaking" with contempt and caused Governor Rockefeller to refuse to abide by the Mayor's wishes.

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Partial operation schemes will, of course, work best as law if agreed upon by the parties. In the private sector, agreement on such schemes has been so infrequent or non-existent as to discourage, until recently, much inquiry along this route. But private sector unions have the right to strike and often are helped by government intervention.¹⁰² In the public sector, the right to strike has been withheld and may be an acceptable *quid* for the *quo* of continuing specified operations. Such operations, moreover, may be spread among the affected workers so they all receive some compensation during the strike period.

Consideration of partial operations in the private sector has perennially raised the issue as to which of several plants or companies should continue to operate under the arrangement.¹⁰³ The inability to find a way to spread the benefits of partial operation has been one of the reefs on which such schemes have been wrecked. In the public sector, the lack of competing employers, and the relative ease with which almost all the employees can share,¹⁰⁴ may facilitate the working out of such arrangements, which can then be enacted into legislation.

c. *Changing the Political Process*

We have argued, in effect, that government should take steps which lessen the impact of strikes by public employees. In addition, it should consider certain measures which tend to decrease public willingness to call for settlements without much regard for the costs involved. Such measures, if institutionalized, might be accompanied by a relaxation on the ban against strikes in non-emergency situations.

One source of vulnerability is that the cost of settlement is hard to find in a municipal budget. Any measure which sharpens the public's awareness of the cost of a settlement, therefore, will tend to decrease the political pressure for a precipitous settlement.

A tactic, more useful in small and middle-sized communities than in giant urban centers, is to publish the salaries of the individual public employees involved by name. Where these salaries seem higher than those received for comparable work in the private sector, public sympathy for the strikers will not be very great, and political leaders may be less fearful of a backlash at the polls because they resist union de-

102. See note *supra* and accompanying text.

103. Partial operations in the private sector usually permits one or more firms and one group of workers to profit while the rest suffer the effects of a strike. Thus, it is the internal divisions within the employer group and unions which prevent agreement.

104. If the subways operate at 50% capacity, for instance, it ought to be possible to find ways to see that all employees work around 50% of their normal time.

mands at the price of a strike. In Waterbury, Connecticut, a taxpayers' revolt over teachers' salaries was caused by just such a tactic.¹⁰⁵

Another device might be to specify in tax bills the allocation of taxes among various functions of government or the amount attributable to collective agreements. Taxpayer groups, and the like, may thus be aided in leading opposition against union demands.

Another source of vulnerability is the municipalities' ability to pass costs on to larger political units. Voters who do not pay the costs of a settlement will not encourage their elected officials to resist union demands. There is one measure which serves both to put the costs of the settlement on those who have the greatest incentive to call for settlement, and to increase the visibility of those costs. One not uncommon and suggestive feature of the municipal scene is the fiscally independent school district.¹⁰⁶ Such districts have independent power to finance their budgets by raising taxes directly without the approval of a reviewing body. It may be possible to fashion analogues of such districts for bargaining units of public employees by creating coextensive independent tax districts. Such districts might finance the performance of the whole function involved, as the fiscally independent school districts do, or merely raise the amount necessary to finance the monetary costs of a collective agreement.

The advantage of tax districts coextensive with bargaining units are evident. Those who clamor for a settlement will see in the plainest possible way the cost. In addition, the ability of a municipality to pass these costs on will be limited since the money will be raised automatically from a tax district within its boundaries. A similar device is the imposition of user costs on those who benefit from municipal services.

The subsidization by the state or federal government of municipal functions from which funds have been diverted for collective bargaining purposes may seem to be no more than an indirect means of paying the costs of collective bargaining. It seems doubtful, however, that state or federal governments will regulate their subsidies so carefully that municipalities with strong public employee unions will get proportionately more money for other functions than municipalities without such unions. If that is the case, the ability of some municipalities to pass on the costs of settlements will be lessened.

Other structural changes in the organization of municipal govern-

105. Lewis and Lynch, *Budgets and Public Bargaining 25* (unpublished 1969), on file in Yale Law Library.

106. See LIEBERMAN & MOSKOW, *COLLECTIVE NEGOTIATIONS FOR TEACHERS 277 et seq.* (1966).

ments may permit non-emergency strikes, but penalize their use in some way. Settlements reached after a strike might be subject to approval by a referendum among registered voters. The referendum might ask the voters to approve the estimated tax consequences of the settlement. If conducted within the framework of tax districts coextensive with bargaining units, the referendum would not only ratify the settlement but also levy the necessary taxes.¹⁰⁷

Where analogous structures actually exist, considerable pressure on the size of financial settlements has occurred. In Portland, Oregon, the local education tax cannot increase more than 6% per year without a local vote or a special levy. As a result, the settlements reached appear to be considerably less than would have been the case had the school board and union been free to bargain without having to persuade the voters.¹⁰⁸ And in San Francisco, the only substantial check on the ability of public employee unions to achieve their demands through political pressure has been the willingness of the city's Chamber of Commerce to threaten to utilize local procedures which permit wage rates to be submitted to a referendum. Indeed, the principal negotiations in San Francisco are often between the unions and the Chamber.

The referendum device increases the visibility of a settlement's cost and places it on those voters with the most power to resist. Furthermore, union leaders are encouraged to make their deal with elected officials rather than risk the unknowns of a referendum. Such settlements are apt to be smaller than those which would follow strikes under present structures. The officials, moreover, have an incentive to settle and thereby claim credit for avoiding a strike, but are able, if no settlement is reached, to escape the dilemma of choosing between the wrath of those inconvenienced by a strike and those enraged by increased taxes. The officials in such structures are, once an impasse is reached and a strike called, able to assume more of a neutral stance since they lack the power to make a final settlement. Thus, in Portland and San Francisco, local officials sometimes have been more concerned with helping the unions estimate what the voters will accept than with acting as true adversaries. This has been so even though the referendum device in neither case requires that a strike precede it.

107. This device may in some circumstances be a case of overkill. *See generally*, Rehmus, *supra* note 13. The example of Youngstown, Ohio, where taxpayers refused to authorize sufficient funds to keep the schools open for a full school year suggests that considerable resistance to tax increases can be expected where specific items are put to a referendum. 273 GERR B-4 (Dec. 2, 1968). On the other hand, such a mechanism may be wholly inadequate when a union represents a small number of employees because their total wage bill may never be enough to affect the voter adversely.

108. Lewis & Lynch, *supra* note 105, at 34 *et seq.*

All of these suggestions indicate the direction in which collective bargaining structures in public employment must go if non-emergency strikes are to be permitted. Arrangements which lessen the impact of such strikes should be created and the costs of settlement made more visible. Those who can decide to settle a dispute must know the costs of that settlement and must bear them. Where possible, incentives to settle without a strike should be created and public officials relieved of the dilemma strikes now put them in. These suggestions are just that, and they are not exhaustive. Local conditions will determine the appropriateness of any particular device and of permitting non-emergency strikes at all. And such conditions will undoubtedly suggest other devices. Experimentation is necessary, for it is clear that the strike ban, wise as it is in theory, will not work in all places at all times.¹⁰⁹

Whatever arrangements a community makes for dealing with strikes by public employees, a second major labor question, namely, what should be the scope of collective bargaining in the public sector, still awaits community attention.

V. The Scope of Bargaining

As we have stated, one problem raised by public employee unionism is how to resolve issues which arise at the bargaining table but are also controversial political matters. This problem is difficult because it threatens to distort the political process and sometimes crops up in ways which place considerable stress on society—witness the New York decentralization dispute.

A. *The Public Schools and Other Illustrations*

Scope of bargaining problems in public employment are best illustrated by our schools. In primary and secondary education there are at least three subjects with important educational policy implications that have found, and increasingly are finding, their way into the bargaining process. They are class size, student discipline, and curricular reform.

Of the three, class size is the most “ancient,” the subject most regularly negotiated, and the one most clearly related to teachers’ working conditions. Bernard Donovan, the former Superintendent of Schools

109. The Bureau of Labor Statistics’ study, *Work Stoppages in Government, 1958-68* (1970) shows substantial differences among the Midwest, Northeast, South and West in the number of strikes by government employees during the decade. The study is reproduced in 350 GERR D-1. See particularly D-8, D-9 and D-15.

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in New York City, described his ambivalence about the legitimacy of union bargaining over class size when he asked:

What is class size? Is it a working condition or is it a matter of educational policy? If you think it over, you will find it is a gray area. There are elements in it that have to do with a teacher's working conditions, in terms of load. But there are also elements in it that have to do with the proper number of children that can be handled for a specific type of subject under particular circumstances.¹¹⁰

In New York City, collective agreements have addressed questions of class size since 1963. In Chicago the present agreement relates class size to the subject matter taught; in Detroit, to student scores on reading tests.¹¹¹ The New Haven contract provides:

No class from Grades 1-12 shall have more than 35 [pupils].
In the school year 1969-1970 no class shall have more than 34 pupils.

The tendency for class size to become a subject of collective bargaining may not be of great concern. While the subject is important to educational policy, it bears directly upon working conditions, and few would argue that smaller classes are undesirable. Moreover, existing physical facilities tend to limit the range of demands a union can realistically make, at least in the short run.¹¹² Yet, if class size should have rather low priority as a matter of educational policy, and if there are many more important factors in education, all of which compete with class size for too few dollars, then one can hardly fail to be anxious about the distortion built into educational policy decisions that may result from determining class size through collective bargaining.

Little community agreement exists with respect to the role and nature of student discipline in public education; yet student behavior is an increasingly major concern in many public schools, particularly those located in racially tense urban centers. The deterrent effect of punishment for misbehavior, the educational and rehabilitative goals of disciplinary proceedings, and the safety of teachers and other stu-

110. Donovan, *Speaking for Management*, in READINGS ON COLLECTIVE NEGOTIATIONS IN PUBLIC EDUCATION 287, 288 (S. Elam, M. Lieberman and M. Moskow eds. 1967).

111. The Chicago agreement is reproduced in § 6(b), 287 GERR 32 (Mar. 10, 1969) (contracts); and § 336 GERR 7 (Feb. 16, 1970) (contracts). For the Detroit provision, see 303 GERR B-4 (June 30, 1969).

112. However, in Chicago, the CTO president has said that: "Where no space exists for the increased number of classes [resulting from the reduction in class size], portable classrooms will be employed" 333 GERR B-8 (Jan. 26, 1970).

dents are matters of vast importance and an item of high visibility on many communities' agenda. The teachers' interest in the matter is undeniable; but so is the students', the parents' and the rest of the community's.

Traditionally, discipline has been the prerogative of management; the superintendent and the school board (generally elected by the community) have set policy.¹¹³ Increasingly, however, student disciplinary problems are becoming, in one form or another, a subject for collective bargaining. Some contract provisions, such as the one in the New Haven agreement, raise no questions of disproportionate control over the decision-making process in this area. The provision merely ensures that a teacher injured by a student will receive full salary while recovering. This clause does not, therefore, address questions of educational policy.¹¹⁴

This is not the conclusion, however, to be drawn from a provision found in other collective agreements. The language in the Huntington, Long Island contract obviously represents a decision about educational policy. It reads,

Any child designated by a school psychologist as . . . emotionally disturbed shall be admitted to or retained in a regular class only with the consent of the teacher.¹¹⁵

In such cities as Philadelphia, Washington, D.C., and Wilmington, Delaware, "the adjustment of behavioral problems" as a "joint responsibility [bargainable issue]" seems well established. In the Wilmington agreement, principals are required to suspend students under circumstances spelled out in the contract and to refer certain types of cases to the police. The agreement also entitles a teacher to call a parental conference or to refer a student to a psychologist without the approval of his principal.¹¹⁶

Some negotiated disciplinary provisions may move a school system toward proper educational goals. But the position taken by a union is unlikely to reflect more than what its members believe is good educational policy consistent with their own self-interest. Other groups may have different views and ought to have an opportunity to "make [them-

113. "About 15 per cent of the boards of education, mostly in large cities, are appointed by the mayor or municipal governing body." Moskow and Doherty, *United States*, in *TEACHER UNIONS AND ASSOCIATIONS: A COMPARATIVE STUDY* 295, 296 (A. Blum, ed. 1969).

114. Art. XII, 287 GERR 29, 40 (Mar. 10, 1969) (contracts).

115. Art. VIII (g), 270 GERR 123, 128 (Nov. 11, 1968) (contracts).

116. Art. V (G), 316 GERR 159, 164 (Sept. 29, 1969) (contracts).

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selves] heard effectively at some crucial stage in the process of decision."¹¹⁷ Unhappily, collective bargaining may make that impossible.

When bargaining is over curricular changes, the educational stakes may be even higher. This, coupled perhaps with the fact that curricular matters are less obviously related to conditions of teachers' employment, may explain the relatively slower development of collective bargaining about curricular matters. Yet, as Donald Wollett has testified, "[t]eacher involvement in the development of curriculum and other educational programs is increasingly common."¹¹⁸ This involvement often touches educational policy at its most sensitive point: programs for underprivileged children.

The More Effective Schools program (MES) of New York City, for example, seeks to improve the education of ghetto elementary students through drastic cuts in class size and a series of specialized services. While MES was not developed in collective bargaining, the United Federation of Teachers had a role in the program's design.¹¹⁹ In 1967, when the UFT anticipated that MES would be reduced in scope, it sought a specific contractual commitment to the program from the Board of Education. The bargaining process produced a promise of ten million dollars to programs in this general field and a tripartite union-administration-community board of governance, with veto power in the Superintendent.¹²⁰

The 1969 UFT Agreement clearly establishes collective bargaining as a method through which educational innovation is to develop in New York City. In addition to the MES program, the contract requires, for example, the Board of Education to create yet unplanned pre-school centers in fifty elementary schools.¹²¹

What happens in New York City often sets the pace in other cities. Joint control over curricular matters is taking hold in such places as Chicago and Washington, D.C.¹²² In Detroit and Philadelphia there are beginnings, and in some smaller communities the same trend is discernible.¹²³

117. R. Dahl, *supra* note 2, at 145 (1956).

118. Wollett, *The Coming Revolution in Public School Management*, 67 MICH. L. REV. 1017, 1027 (1969).

119. See Klaus, *The Evolution of a Collective Bargaining Relationship in Public Education: New York City's Changing Seven-Year History*, 67 MICH. L. REV. 1033, 1047-48 (1969).

120. *Id.* at 1060-64.

121. 303 GERR B-7 (June 30, 1969).

122. See Bd. of Educ. & Chicago Teachers Union, 336 GERR 7 (Feb. 16, 1970) (contracts). See generally, T. Brunner, *Including Educational Policy Issues in the Scope of Teacher Bargaining: Some Legal and Political Considerations 1969* (unpublished manuscript on file in Yale Law Library).

123. Wollett, *supra* note 118.

These scope of bargaining problems in public education have their counterparts in other areas of public employment. Consider the police and the issue of a civilian police review board. For the officer and his union a review board which can determine whether his official conduct was improper is a condition of employment analogous to the handling of discipline and discharge in the private sector. Yet the interest of the community in the civilian review board issue is immense. So, too, are the questions of how many shifts or platoons should be established, whether police are to be required to receive sensitivity training, what such training should consist of, and the use of para-police personnel for special assignments.¹²⁴

Similar problems with similar complexities exist in collective bargaining by firefighters, nurses and social workers. These are nascent problems with a potential for confrontation between public employees and other interest groups in the community. Today in most municipalities this potential is obscured, either because there is no real collective bargaining or because collective bargaining is very new.

Where there is no bargaining in a strict sense, there may be various forms of consultation by city management with employee groups. The consultation may be private; it may be at public hearings. The employees and their unions constitute an interest group with access to municipal decision-makers similar to that enjoyed by other interest groups in a community. Sometimes the influence of the unions is great, sometimes not. The important point, however, is that there is, in the absence of bargaining, no formal, legal, institutionalized arrangement for influencing decisions available to the employee and his union that is different from those available to other groups in the community.

Where the union is undifferentiated from other interest groups, consultation between union and management may be very broad or very narrow in scope. In such circumstances, the influence a union may bring to bear will be determined by the political power it can wield as an interest group active in the political process. This may be a cause of community concern on occasion, but the concern is of a different sort from that which we have been addressing. It is the result primarily of apathy by other groups, and skill by the union, rather than of laws that create institutional arrangements designed to increase the power of a particular group.

124. See generally, J. Futch, P. Gewirtz, & T. Humphrey, *Collective Bargaining in the Public Sector: "Fuzz, Flamers, and Garbage,"* 1969 (unpublished manuscript on file in Yale Law Library).

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Where genuine collective bargaining is new, as it is in many of our cities, the unions are still primarily occupied with recognition, financial terms, and union security. With time they can be expected to press for expansion of the scope of bargaining, and then the problems will come clearly into focus. One way to measure the breadth of these problems is again to examine the differences between the public and private sectors.

B. *The Private and Public Sectors Compared*

From the beginning of American labor history the scope of bargaining has been a vexing question. Even today no labor problem in the private sector is more overgrown with ideological rhetoric.¹²⁵ This controversy is durable because union pressure has been to expand the scope of bargaining. While negotiations once were limited to "traditional" subject matter—wages, hours, etc.—they now extend to such matters as plant location, pensions, contracting-out of work, and the pace of technological change. Indeed, it is changing technology and changing economic relationships and structures that lead to changing bargaining demands and changing areas of dispute.¹²⁶

Under the Labor-Management Relations Act, the employer does not have to agree. He need only bargain in good faith over "wages, hours, and other terms and conditions of employment."¹²⁷ It is this phrase, "other terms and conditions of employment," through which the law exerts leverage on the scope of bargaining.

However, because the employer need not agree, and because the market restrains him, an expanding legal definition of terms and conditions of employment means, that if a union negotiates an agreement over more subjects, it generally trades off more of less for less of more. From the employer's point of view, most encroachments on what has been its unilateral power to manage are measured on a single scale: their effect on cost. Of course there is internal political conflict within an enterprise when a union seeks to extend its control. But the pressure on the employer, as an enterprise, is to resist any increase in cost and, ultimately, it is hurt no more or less because that cost is extracted through inefficient work rules or high wages. Management resistance to union demands, therefore, will tend to force the union to make trade-offs based on those costs.

125. See generally, N. CHAMBERLAIN, *THE LABOR SECTOR* 340-53 (1965).

126. See W. WIRTZ, *LABOR AND THE PUBLIC INTEREST* 48 (1964).

127. 29 U.S.C. § 158(d) (1964).

From the consumer's point of view this in turn means that the price of the product he purchases is not significantly related to the scope of bargaining. And since unions rarely bargain about the nature of the product produced,¹²⁸ the consumer can be relatively indifferent as to how many or how few subjects are covered in any collective agreement.¹²⁹

In the public sector the cluster of problems that surround the scope of bargaining are much more troublesome than they are in the private sector. The problems have several dimensions.

First, there would seem to be less of a trade-off between subjects of bargaining in the public sector than in the private. Where political leaders view the costs of union demands as essentially budgetary, a trade-off can occur. Thus, a demand for higher teacher salaries and a demand for reduced class size may be treated as part of one package. But, where a demand is viewed as involving essentially political costs, trade-offs are more difficult. A mayor, for example, may be under great pressure to make a large monetary settlement with a teachers' union whether or not it is joined with demands designed to deter a decentralization scheme. Interest groups will exert pressure against union demands only when they are directly affected. Otherwise, they will join that large constituency which wants to avoid labor trouble. Trade-offs can occur only when several demands are resisted by roughly the same groups. Thus, budgetary demands can be traded off when they are opposed by taxpayers. But when the identity of the resisting group changes with each demand, political leaders may find it expedient to strike a balance on each issue individually, rather than as part of a total package, by measuring the political power of each interest group involved against the political power of the constituency pressing for labor peace. Expansion of the subjects of bargaining in the public

128. The fact that American unions and management are generally economically oriented is a source of great freedom to us all. If either the unions or management decided to make decisions about the nature of services provided or products manufactured on the basis of their own ideological convictions, we would all, as consumers, be less free. Although unions may misallocate resources, consumers are still generally free to satisfy strong desires for particular products by paying more for them and sacrificing less valued items. This is because unions and management generally make no attempt to adjust to anything but economic considerations. Were it otherwise, and the unions—or management—insisted that no products of a certain kind be manufactured, consumers would have much less choice.

129. The major qualification to these generalizations is that sometimes unions can generate more support from the membership for certain demands than for others (more for the size of the work crew, less for wage increases). Just how extensive this phenomenon is, and how it balances out over time, is difficult to say; however, it would not seem to be of too great importance in the overall picture.

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sector, therefore, may increase the total quantum of union power in the political process.

Second, public employees do not generally produce a product. They perform a service. The way in which a service is performed may become a subject of bargaining. As a result, the nature of that service may be changed. As we have seen, some of these services involve questions that are politically, socially or ideologically sensitive. In part this is because government is involved and alternatives to governmentally provided services are relatively dear. In part, government is involved because of society's perception about the nature of the service and society's need for it. This suggests that decisions affecting the nature of a governmentally provided service are much more likely to be challenged and are more urgent than generally is the case with services that are offered privately.

Third, some of the services government provides are performed by professionals—teachers, social workers, etc.—who are keenly interested in the underlying philosophy that informs their work. To them, theirs is not merely a job to be done for a salary. They may be educators or other “change agents” of society. And this may mean that these employees are concerned with more than incrementally altering a governmental service or its method of delivery. They may be advocates of bold departures which will radically transform the service itself.

The issue is not a threshold one of whether professional public employees should participate in decisions about the nature of the services they provide. We take it as given that any properly run governmental agency should be interested in, and heavily reliant upon, the judgment of its professional staff. The issue rather is the method of that participation. Conclusions about this issue may be facilitated by addressing some aspects of the governmental decision-making process—particularly at the municipal level—and the impact of collective bargaining on that process.

Few students of our cities would object to Herbert Kaufman's observation that:

Decisions of the municipal government emanate from no single source, but from many centers; conflicts and clashes are referred to no single authority, but are settled at many levels and at many points in the system: no single group can guarantee the success of any proposal it supports, the defeat of every idea it objects to. Not even the central governmental organs of the city—the Mayor, the Board of Estimate, the Council—individually or in combination, even approach mastery in this sense.

Each separate decision center consists of a cluster of interested

contestants, with a "core group" in the middle, invested by the rules with the formal authority to legitimize decisions (that is to promulgate them in binding form) and a constellation of related "satellite groups" seeking to influence the authoritative issuances of the core group.¹³⁰

Nor would many disagree with Nelson W. Polsby when, in discussing community decision-making that is concerned with an alternative to a "current state of affairs," he argues that the alternative "must be politically palatable and relatively easy to accomplish; otherwise great amounts of influence have to be brought to bear with great skill and efficiency in order to secure [its] adoption."¹³¹

We suggest that such matters as school decentralization and a civilian police review board are, where they do not exist, alternatives to the "current state of affairs," which are not "politically palatable and relatively easy to accomplish." If a teachers' union or a police union were to bargain with the municipal employer over these questions, and were able to use the strike to insist that the proposals not be adopted, we wonder how much "skill and efficiency" on the part of the proposals' advocates would be necessary to effect a change. And, to put the shoe on the other foot, if a teachers' union were to insist through collective bargaining (with the strike or its threat) upon major changes in school curriculum, would not that union have to be considerably less skillful and efficient in the normal political process than other advocates of community change? The point is that with respect to some subjects, collective bargaining may be too powerful a lever on municipal decision-making, too effective a technique for changing or preventing the change of one small but important part of the "current state of affairs."

Nor is the problem merely the strike threat and the strike. In a system where sophisticated impasse procedures involving third parties substantially reduce work stoppages, third party intervention must be partly responsive to union demands. If the scope of bargaining is open-ended, the neutral, to be effective, will have to work out accommodations which inevitably advance some of the union's claims some of the time. And the neutral, with his eyes fixed on achieving a settlement, can hardly be concerned with balancing all the items on the community agenda or reflecting the interests of all relevant groups.

If this is so, how should the scope of bargaining in the public sector be regulated so as adequately to limit the role of unions in the politi-

130. *Metropolitan Leadership*, quoted in N. Polsby, *infra* note 131, at 127-28.

131. N. POLSBY, *COMMUNITY POWER AND POLITICAL THEORY* 135 (1963).

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cal decision-making process? An answer to this question depends, in part, upon the current state of the law.

C. *Regulation of the Scope of Bargaining*

I. *Civil Service*

In most jurisdictions the law pertaining to the scope of bargaining in public employment not only fails adequately to deal with the problems we have addressed, but often interferes with appropriate collective bargaining by perpetuating an anachronistic civil service system. Civil service or merit systems were established to rationalize the relationship of government and its employees. Mindful of a spoils system with its corrupting influence on the public service and of the need for impartiality and objectivity in the recruitment, promotion and discharge of government employees, advocates of civil service have been extremely successful in obtaining legislation at the state, county and municipal levels. Not infrequently, however, the civil service has become encrusted with bureaucratic barnacles, and frequently its administration complicates the achievement of a rational regime of collective bargaining.

Conflict between civil service systems and unionization transcend scope of bargaining issues. Indeed, the major task of accommodating the two relates to a pervasive and peculiarly governmental labor problem: determining who the public employer is. It is not uncommon for civil service commissions to insist that they, alone or in combination with other agencies, are the public employer for purposes of employee relations. David T. Stanley makes clear the source of difficulty:

What do we mean by merit systems? We should distinguish them from the *merit principle* under which public employees are recruited, selected, and advanced under conditions of political neutrality, equal opportunity, and competition on the basis of merit and competence. Public employee unions do not question this principle in general and have done little to weaken it, as yet. When we say *merit systems*, however, this has come to mean a broad program of personnel management activities. Some are essential to carrying out the merit principle: recruiting, selecting, policing of anti-political and anti-discrimination rules, and administering related appeals provisions. Others are closely related and desirable: position classification, pay administration, employee benefits, and training. Unions are of course interested in both categories.¹³²

132. Stanley, *What Are Unions Doing to Merit Systems?* 31 PUBLIC PERSONNEL REV. 108, 109 (1970).

Two general types of situations should be distinguished. The first is where there is no legislation mandating collective bargaining and such bargaining is desired by employees. As we remarked earlier, unions nevertheless may have penetrated the decision-making process to varying degrees of depth and scope. By and large, neither the depth nor the total impact on decisions, however, is as great as where there is legislation.¹³³ In the absence of legislation, the union may have to attempt to influence many different "employers," including a civil service commission, on matters of hiring and firing, promotions, re-classifications, wages, and grievance procedures. Unless the locus of employer authority is in the civil service commission, or the civil service commission is controlled by the mayor or his designee, the unions' task can be frustrating indeed. Nor is it uncommon to find, for example, competing grievance procedures, one established between agency and union, the other administered by the civil service commission.¹³⁴

Where there is legislation for public unions, the problem will persist if the statute is unclear in its definition of the public employer—unless informal accommodations are created.¹³⁵ But even if the public employer is defined, the civil service commission may retain most of its statutory powers and undermine collective bargaining over subjects normally considered appropriate for union-management negotiations.

Few states have addressed the role of civil service commissions in the collective bargaining process. Of those that have, the majority appear to resolve conflicts in favor of the commissions. Typical is the Massachusetts statute which states: "Nothing in section . . . 178M [the Right to Bargain statute] . . . shall diminish the authority and power of the civil service commission"¹³⁶

Likewise, the California statute provides:

Nothing contained herein shall be deemed to supersede the provisions of existing state law and the charters, ordinances and rules of local public agencies which establish and regulate a merit or civil service system or which provide for other methods of administering employer-employee relations. This *chapter is intended, instead, to strengthen merit, civil service* and other methods of ad-

133. See generally, Gerhart, *The Scope of Bargaining in Local Government Negotiations*, in PROCEEDINGS OF THE 1969 ANNUAL SPRING MEETING, IRRA 545.

134. This had been the situation, for example, in Dayton, Ohio. See generally, J. Wender, *Fragmentation of Authority for Collective Bargaining at the Local Level*, 1969 (unpublished manuscript on file at Yale Law Library).

135. See, e.g., *Civil Service Commission for the County of Wayne v. Wayne County Board of Supervisors*, 73 L.R.R.M. 2822 (Mich. Ct. App. 1970).

136. MASS. LAWS ANN. ch. 149, § 178N (Supp. 1969).

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ministering employer-employee relations through the establishment of uniform and orderly methods of communication between employees and the public agencies by which they are employed. (Emphasis added.)¹³⁷

The Oregon and Washington statutes also appear to subordinate the collective bargaining provisions to civil service rules and regulations.¹³⁸ However, there is some uncertainty among local officials, especially in Washington, as to which statute takes precedence.

The Wisconsin law, on the other hand, spells out those items over which a public employer need not bargain:

Nothing herein shall require the employer to bargain in relation to statutory and rule provided prerogatives of promotion, layoff, position classification, compensation and fringe benefits, examinations, discipline, merit salary determination policy and other actions provided for by law and rules governing civil service.¹³⁹

The Connecticut Municipal Employee Bargaining Law goes the furthest of any state enactment in limiting the role of civil service commissions. Section 8(g) provides:

Nothing herein shall diminish the authority and power of any municipal civil service commission, personnel board, personnel agency or its agents established by statute, charter or special act to conduct and grade merit examinations and to rate candidates in the order of their relative excellence from which appointments or promotions may be made to positions in the competitive division of the classified service of the municipal employer served by such civil service commission or personnel board. The conduct and the grading of merit examinations, the rating of candidates and the establishment of lists from such examinations and the appointments from such lists and any provision of any municipal charter concerning political activity of municipal employees shall not be subject to collective bargaining.¹⁴⁰

However, the previous section states:

Where there is a conflict between any agreement reached by a municipal employer and an employee organization and approved in accordance with the provisions of this act on matters appropriate to collective bargaining, as defined in this act, and any charter, special act, ordinance, rules or regulations adopted by the municipi-

137. CAL. GOV'T CODE § 3500 (Supp. 1969).

138. ORE. REV. STAT. §§ 243.710-780 (1967); WASH. REV. CODE ANN. §§ 41.56.010-900 (Supp. 1969).

139. WIS. STAT. § 111.91(2) (1969).

140. CONN. GEN. STAT. ANN. § 7-474(g) (Supp. 1969).

pal employer or its agents, such as a personnel board or civil service commission . . . the terms of such agreement shall prevail.¹⁴¹

Thus, the Connecticut statute excludes from collective bargaining *only* the employment and promotion functions of civil service.

Apart from the employment of new applicants, the "merit principle" probably should be pursued through collective bargaining and not through a civil service system. For our present purposes, however, it is important to observe that many governments through their civil service laws have placed considerable restraints on the scope of bargaining.

2. *Other Restrictions on the Scope of Bargaining*

Legal restraints on the scope of collective bargaining exist in statutes other than those establishing civil service systems. The vast network of state laws may, here and there, affect various aspects of public employment and, because they are rarely specifically directed at public employees, impose bizarre patterns of regulation.¹⁴² The principal source of law, however, is the public employee labor statutes themselves.

One type of public employee legislation is not directly on point: the consult, or meet and confer, statute. The obligation such statutes impose on public employers is to consult with the employee representatives rather than to bargain with them. Even some of these do establish guidelines for the scope of required consultation. Contrast, for example, the California teachers' statute with the Oregon enactment. Oregon confines talks to "matters of salaries and related economic policies affecting profession services."¹⁴³ In California, consultation is envisioned over "all matters relating to employment conditions and employer-employee relations and . . . with regard to all matters relating to the definition of educational objectives, the determination of the content of courses and curricula, the selection of textbooks, and other aspects of the institutional program to the extent such matters are within the direction of the public school employer."¹⁴⁴

If, in fact, consultation rather than bargaining were a viable labor policy for a state or municipality, there would seem to be little reason

141. *Id.* at § 7-474(f).

142. See Wender, *supra* note 134.

143. ORE. REV. STAT. § 342.460(1) (1969).

144. CAL. EDUC. CODE § 13085 (West 1969).

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to impose any limitations on the scope of discussion. Such limitations, however, may be necessary because consultation seems increasingly a position which can be held only temporarily, with collective bargaining frequently replacing it.¹⁴⁵ When the replacement occurs, the scope of bargaining will be a battleground, and the outcome may be affected by the positions the parties staked out for themselves at the consultation stage.

Statutes that do impose an obligation on a public employer to bargain often follow the language of the National Labor Relations Act: the employer is under a duty to bargain over "wages, hours and other terms and conditions of employment."¹⁴⁶ Countless decisions of the NLRB and the courts have elaborated this federal requirement. The following may be taken as a too general, but for the purposes sufficiently accurate, summary of that elaboration: The duty is one requiring bargaining in good faith; that is, with a sincere desire to reach agreement.¹⁴⁷ It does not, however, require agreement.¹⁴⁸ Nor does it preclude an employer from bargaining in good faith for unilateral control over a matter (pension plans, for example) subject to the duty.¹⁴⁹ Some matters, moreover, are not subject to the duty; that is, the employer need not, if he chooses not to, negotiate about them with the union. These are matters—the price of a product would be a clear example—which have been held not to come within the phrase "wages, hours and other terms and conditions of employment."¹⁵⁰ While most matters unions raise in bargaining arguably fall within that phrase (and arguably should be held so to fall) many matters have nevertheless been excluded by the Board or courts. Indeed, unless a matter is likely to have a significant impact on unit employee's job interests, it will probably not be subject to the bargaining duty.¹⁵¹ And the courts have held that some "business decisions" are not within the duty even though they do have a significant impact on employment.¹⁵² The *effect* of the business decision on employees, however, is negotiable.

This body of federal law ought to have little influence on the scope

145. See, e.g., Klaus, *supra* note 118.

146. See, e.g., CONN. GEN. STAT. ANN. § 7-469 (Supp. 1969) (duty to bargain in good faith "with respect to wages, hours and other conditions of employment . . .").

147. See, e.g., NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953).

148. 29 U.S.C. § 158(d) (1964).

149. NLRB v. American Nat. Ins. Co., 343 U.S. 395 (1952).

150. See NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958).

151. Westinghouse Electric Corp., 150 N.L.R.B. 1574 (1965).

152. See Platt, *The Duty to Bargain as Applied to Management Decisions*, 19 LAB. L.J. 143 (1968).

of bargaining problem as it develops in public employment, for the underlying problems to which the federal law is a response are very different from those with which we are concerned. In the first place, federal law reflects mainly solutions to issues which arise out of large-scale manufacturing. The legal problems which come before the NLRB involve the effect on employees of the technological innovations taking place in industry. In public employment the legal problems in the public sector will, by and large, result from social and political change rather than a technological innovation.

In the second place, as we have observed, the stakes in the two situations are very different. The market disciplines the private sector more directly and insistently than it does the public. Therefore, an expanded bargaining agenda in the private sector means only that unions are trading off benefits in some areas for benefits in others. As we have said, this trade-off occurs less frequently in the public sector.

While it is impossible now to say how state agencies and courts will deal with the phrase, "wages, hours and other terms and conditions of employment," it seems clear to us, given the lack of further legislative guidance, that agencies and courts are unsuited to their assigned task. Elaboration of this seemingly innocuous phrase will require agencies and courts to resolve issues that are politically, socially and ideologically frequently among the more explosive in our society; ones that adjudicatory tribunals are institutionally ill-suited to resolve. Agencies and courts are not forums in which contesting interest groups should be able to influence decisions through the skillful employment of political pressure. Either the legislature or some multi-party bargaining structure is the appropriate forum for deciding these types of questions. This does not mean that there is no role for administrative agencies and courts, but that if they are to perform properly they need standards and, in this area, fairly specific standards at that.

Some jurisdictions have provided standards. One example is Nevada which, after using the phrase "wages, hours and other terms and conditions of employment," enacted the management's rights clause of Executive Order 10988. That order regulated federal employee relations from January 17, 1962 to October 29, 1969, and the management's rights provision in its Nevada form provides:

Each local government employer is entitled, without negotiation or reference to any agreement resulting from negotiation: (a) To direct its employees; (b) To hire, promote, classify, transfer, assign, retain, suspend, demote, discharge or take disciplinary action against any employee; (c) To relieve any employee from duty be-

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cause of lack of work or for any other legitimate reason; (d) To maintain the efficiency of its governmental operations; (e) To determine the methods, means and personnel by which its operations are to be conducted; and (f) To take whatever actions may be necessary to carry out its responsibilities in situations of emergency.¹⁵³

Even more explicit, perhaps, is the provision in the New York City statute:

It is the right of the City, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. The City's decisions on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees, such as questions of workload or manning, are within the scope of collective bargaining.¹⁵⁴

The approach of New York City and Nevada seems promising, and the language of the former ("to determine the standards of services to be offered by its agencies") is at least partly responsive to the concerns here expressed. The difficulty with the New York City statute is that the contribution of professional and semi-professional employees, if it is to be made through the bargaining process, must meet a test which is irrelevant to their professional status. Managerial decisions are not within the scope of bargaining, but questions concerning the "practical impact that [such] decisions . . . have on employees, such as questions of workload or manning, are within the scope of collective bargaining." This approach can be both too restrictive, where there is no "practical impact," and too liberal, where "the standards of services" plainly do have the necessary impact. In both situations, a limited contribution for employees may be desirable. The New York City statute seems more

153. Nev. Local Gov. Employee-Management Relations Act, ch. 650, L. 1969, § 10.2, reproduced in 42 LAB. REL. REP. 38 S.L.L. 227 (1969). The Kennedy executive order may be found at 27 FED. REG. 551 (1962).

154. The Conduct of Labor Relations between the City of New York and its Employees, N.Y. City, Executive Order No. 52, § 5C (Sept. 29, 1967).

influenced than it should have been by the industrial model of collective bargaining—a model that is appropriate for some municipal employees but not for others.¹⁵⁵

An approach that is responsive to the underlying problem is found in the Maine public employees right to bargain statute as it applies to public education. Maine requires school boards:

To confer and negotiate in good faith with respect to wages, hours, working conditions and contract grievance arbitration . . . [and to] meet and consult but not negotiate with respect to educational policies[;] for the purpose of this paragraph, educational policies shall not include wages, hours, working conditions or contract grievance arbitration.¹⁵⁶

The Maine experiment deserves to be watched with care. In situations where collective bargaining has itself provided for consultation over matters of educational policy, and the two have been employed together as joint methods of ordering, consultation generally either has atrophied or has been a preliminary phase to expanded collective bargaining.¹⁵⁷ But because Maine establishes bargaining and consultation by statute, these prior experiences may not foretell the fate of that state's experiment.

3. *Three Suggested Approaches*

As alternatives to the Maine statute, we would suggest three approaches to the scope of bargaining question in public employment. First, in addition to collective bargaining over "traditional" subjects, it may be possible, in some municipalities and for some employees, to establish multi-party bargaining over subjects that relate to the nature of the services the employees provide. For example, in education there is good reason to believe that decentralization of educational policy-making is desirable and that orderly community participation in schools is a goal worth pursuing. Whatever the appropriate decentralized unit may be (and it generally should be different from the traditional bargaining unit), three-party bargaining in the appropriate unit might proceed on some or all matters of educational policy. Where school decentralization exists, the "employer," whether the central school board or mayor, cannot effectively represent the interests

155. See *City of N.Y. (Fire Dep't)*, Office of Collective Bargaining Docu. No. B-9-68, 271 GERR G-1 (Nov. 18, 1968). Cf. BCB-22, Decision 16, GERR No. 280, at C-1 (Jan. 20, 1969).

156. Chap. 9-A Laws 1969, as amended by Ch. 578, Law 1970, § 965.1.C., reproduced at 29 S.L.L. 218 in 4 LAB. REL. REP. (1970).

157. See Klaus, *supra* note 135; T. Brunner, *supra* note 122.

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of the smaller unit. In such a case, the statute or ordinance establishing the smaller unit, or the collective agreement with the teachers for that matter, ought to provide for intervention by a specific third party. The third party should be a representative and duly elected community group, for example, parents with students in the school or schools. And it ought to have the power to intervene as a matter of right where its interests are affected. The proposal envisions that the three-party bargaining should aim for formal agreement which would be an accommodation of the interest groups principally concerned: the teachers, school management, and the most affected portion of a particular community.

One can claim for this proposal more than labor relations benefits. Few areas of major public concern will profit more than the public schools from a multiplicity of Brandeisian "chambers of experimentation." For few institutions are more in quest of themselves, and more at a loss to discover their identity.

Our second proposal looks to the suggestive example of third party bargaining in San Francisco. As we remarked earlier, the Chamber of Commerce has at times become a *de facto* party to the bargaining between the city and its employees. The ability of the Chamber to intervene stems from its ability to submit wage settlements to a referendum. Since a favorable vote is politically assured if the Chamber agrees to the settlement, the unions involved have found it to their advantage to make their peace with the Chamber as an independent party with an interest in the bargaining.

Analogous structures for the settlement of non-monetary issues in which other groups in the community feel that they have an interest can be constructed. Intervention by a third party might be permitted upon the petition of a certain number of citizens. Or a referendum over an issue might be required on such a petition, thus compelling the unions involved to seek out representatives of opposing interests. These devices may be too permissive to opposing interest groups, however, and too disruptive of the bargaining process. A structure might be created in which a member of the ratifying body, be it the board of aldermen, city council, or school board, can register his conditional dissent as to a particular non-monetary provision in a contract while voting to approve the whole. If a certain percentage, 20% for instance, register a dissent to a provision, then a referendum will be held on that particular issue but only if a certain number of voters petition for it within a fixed period of time. Otherwise, the contract *in toto* will go into effect. Such a structure creates a deterrent to the resolution of hotly contested political issues at the bargaining table without concern

for the interests of other groups in the society and encourages unions to seek out and bargain with these groups as third parties. A defeat in a referendum may be more damaging than a compromise worked out in advance. And, under this structure, the form of third party intervention and bargaining is left to the parties. The opposing interest groups, moreover, are compelled to work through the political process by exercising influence on their elected representatives. This permits the executive and the union to learn at a relatively early stage what groups are interested and to test the intensity and nature of that interest. And, finally, if agreement is not reached, the decision is left to the voters.

Our third proposal is sharply different. It does not create a bargaining procedure for resolving issues with political impact but rather looks to the strict monitoring of the scope of bargaining by governmental commissions. The model is this: 1) A state with a general and comprehensive statute covering public employment, but with a provision limiting collective bargaining to traditional subject matter. 2) The establishment of commissions of disinterested citizens, appointed by the Governor, with a continuing charter to hold hearings from time to time, and, where it seems in the public interest, to make proposals to the legislature for special enactments permitting bargaining with respect to specific matters, affecting the nature of the service performed by particular public employees. The model envisions a number of commissions, each with responsibility for particular professional and semi-professional employees. This model proceeds from the assumption that some bargaining over some aspects of the nature of the service performed by professional and semi-professional public employees is desirable but that the decision on this question should be the result of interactions and accommodations of competing interest groups. The model structures and institutionalizes that process, and it is a two-step process: before the specialized commission, and then before the legislature. Only after legislation would there be collective bargaining.

All proposals have drawbacks: three-party bargaining makes agreement difficult to achieve; commissions complicate an already cumbersome process. No proposal, quite apart from these drawbacks, can possibly *solve* the underlying problem. There is no solution to it any more than there is to the strike problem. But to look for solutions for these difficult social problems is profoundly to misunderstand their nature. The quest is not to solve but to diminish; not to cure but to manage. And it is this hard truth that makes so many so frustrated, for it takes great courage to surrender a belief in the existence of total solutions, without also surrendering the ability to care.

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