The Role and Consequences of Strikes by Public Employees*

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Reason is the life of the law.
Sir Edward Coke

The life of the law has not been logic: it has been experience.
Oliver Wendell Holmes

The vexing problem of strikes by public employees has generated a number of assertions based largely on logical analysis. One common theme is that strikes fulfill a useful function in the private sector, but are inappropriate in the public sector, because they distort the political decision-making process. Another is that strikes in nonessential government services should not be permitted because it is administratively infeasible to distinguish among the various government services on the basis of their essentiality. The present article attempts to evaluate these assertions in terms of labor relations experience at the local level of government.

The assertions concerning strikes by public employees which we shall discuss have been drawn mainly from *The Taylor Report*, a report on public employee labor relations submitted to the Governor of New York State,¹ and "The Limits of Collective Bargaining in Public Employment," a recent article by Harry Wellington and Ralph Winter.² Most of the evidence used to evaluate these assertions has been gathered in connection with the Brookings Institution *Study of Unionism and*

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1. GOVERNOR'S COMMITTEE ON PUBLIC EMPLOYEE RELATIONS, FINAL REPORT (State of New York, 1966) [hereinafter cited as TAYLOR COMMITTEE REPORT]. The committee chairman was George W. Taylor.

2. Wellington and Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107 (1969) [hereinafter cited as Wellington and Winter].

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*Collective Bargaining in the Public Sector.*³ Statistical information on all local public employee strikes which have occurred between 1965 and 1968 has been provided by the Bureau of Labor Statistics.⁴ Because education is outside the scope of our portion of the Brookings study, the data used in this article primarily relate to strikes by groups other than teachers.

I. The Role of Strikes in the Private Sector

Wellington and Winter have catalogued four claims which are made to justify collective bargaining in the private sector.⁵ First, collective bargaining is a way to achieve industrial peace. Second, it is a way of achieving industrial democracy. Third, unions that bargain collectively with employers also represent workers in the political arena. Fourth, and in their view the most important reason, collective bargaining compensates for the unequal bargaining power which is believed to result from individual bargaining. Wellington and Winter recognize that the gains to employees from collective bargaining, such as protection from monopsony power, are to be balanced against the social costs resulting from the resort to collectivism, such as distortion of the wage structure. While noting that considerable disagreement exists among economists concerning the extent of the benefits and costs, they stress the fact that costs are limited by economic constraints. Unions can displace their members from jobs by ignoring the discipline of the market. These four justifications for private sector collective bargaining are presumably relevant to some degree whether or not strikes are permitted. Nonetheless, one can conceptualize two models of collective bargaining—the Strike Model, which would normally treat strikes as legal, and the No-Strike Model, which would make all strikes illegal—and evaluate whether, in terms of the above justifications, society benefits from permitting strikes.

Most scholars of industrial relations accept the view that the right to strike is desirable in the private sector. Chamberlain and Kuhn assert, “[T]he possibility or ultimate threat of strikes is a necessary condition for collective bargaining.”⁶ The distinguished scholars who comprised

3. Some fifty cities, counties, and special districts were visited during 1968-69, and numerous interviews were conducted. Specific references to these interviews are not included because of our guaranty of anonymity to those we interviewed.

4. We would like to express our appreciation to the Bureau of Labor Statistics for making this unpublished data available to us.

5. Wellington and Winter, *supra* note 2, at 1112-13.

6. N. CHAMBERLAIN and J. KUHN, *COLLECTIVE BARGAINING* 391 (2d ed. 1965).

the Taylor Committee asserted similarly, "[T]he right to strike remains an integral part of the collective bargaining process in the private enterprise sector and this will unquestionably continue to be the case."⁷ One reason for this endorsement of the strike is that its availability is often essential to the union in its bid for recognition by the employer.⁸ In addition, once the bargaining relationship is established, the possibility that work may be interrupted forces the parties to bargain seriously.⁹ The possibility of a strike thus increases the likelihood that the parties will reach an agreement without third-party intervention. More important, the ability to strike increases the bargaining power of employees and their union so that, unlike the No-Strike Model, the employer cannot dominate the employer-employee relationship.

Use of the Strike Model instead of the No-Strike Model appears to enhance all but the third of the four claims for private sector collective bargaining offered by Wellington and Winter.¹⁰ While they do not provide a claim by claim analysis of the consequences of permitting strikes, their endorsement of strikes in the private sector must indicate that they believe the Strike Model preferable to the No-Strike Model.

II. The Role of Strikes in the Public Sector

What are the virtues of collective bargaining in the public sector, and what are the consequences of permitting strikes by public employees?

The advocates of one view presumably assume that the four reasons offered by Wellington and Winter to justify collective bargaining in the private sector have equal relevance in the public sector. They also

7. TAYLOR COMMITTEE REPORT, *supra* note 1, at 15.

8. Private sector unions subject to the Labor Management Relations Act (Taft-Hartley Act), 29 U.S.C. §§ 141-97 (1947), have little need for recognition strikes because the right of self-organization is protected by statute.

9. "Since a strike hurts management by stopping production and workers by cutting off their wages, neither party is apt to reject terms proposed by the other without serious consideration. . . . Without such a threat they may continue to disagree indefinitely and never bargain seriously, each simply refusing to give ground in an effort to reach a settlement acceptable to both." CHAMBERLAIN AND KUHN, *supra* note 6, at 391.

10. The first reason offered—it is a way to achieve industrial peace—appears to be inconsistent with the notion of permitting strikes as a method of increasing the employees' bargaining power. One possible resolution of this apparent contradiction is that the enhanced bargaining power of the employees will enable them to work out mutually satisfactory terms with their employer without having to resort to the strike, while workers with limited bargaining power will often engage in strikes as an expression of their futility. This explanation is not totally compelling, however, and one may therefore have to justify collective bargaining among parties with equal power on grounds other than the diminution of strikes. The favorable consequences of the last three claims offered by Wellington and Winter for private sector collective bargaining presumably offset any possible increase in strikes.

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assert that strikes play the same role in the public and private sectors, and that our private sector strike policy should be replicated in the public sector. Strikes would not be banned *ab initio* in any function, but could be dealt with *ex post facto* by injunction if an emergency occurred.

This approach has been argued by Theodore W. Kheel, a noted labor arbitrator. He asserts that it is now "evident that collective bargaining is the best way of composing differences between workers and their employers in a democratic society . . ." The only alternatives to collective bargaining are two: "either the employer makes the final determination or it is made by a third party, an arbitrator." While collective bargaining is the superior type of industrial relations, "collective bargaining cannot exist if employees may not withdraw their services or employers discontinue them."

[However, this does not mean] that the right to strike is sacrosanct. On the contrary, it is a right like all other rights that must be weighed against the larger public interest, and it must be subordinated where necessary to the superior right of the public to protection against injury to health or safety . . .

These principles, in my judgment, apply to the private sector as well as to the public sector. Moreover, their application cannot be determined in advance.¹¹

Instead, Kheel believes, a procedure should be developed which would halt a strike only after it could be demonstrated that the public health and safety were endangered.

Proponents of the opposing view of public sector strikes argue that such strikes are invariably inappropriate. The Taylor Committee concluded that in the public services, "the strike cannot be a part of the negotiating process."¹² And Wellington and Winter clearly believe that overall the four claims for collective bargaining are valid in the public sector only if strikes are illegal. Their primary concern is the fourth reason offered for collective bargaining—collective activity is needed as a substitute for individual activity because individuals are weak.¹³ This reason is always troublesome because increased bargaining power in-

11. All quotations are from Kheel, *Resolving Deadlocks Without Banning Strikes*, 92 MONTHLY LAB. REV. 62-63 (July 1969).

12. TAYLOR COMMITTEE REPORT, *supra* note 1, at 16.

13. "In the area of public employment the claims upon public policy made by the need for industrial peace, industrial democracy and effective political representation point toward collective bargaining." Wellington and Winter, *supra* note 2, at 1115. "Much less clearly analogous to the private model, however, is the unequal bargaining power argument." *Id.* at 1116.

volves costs as well as benefits. They do not endorse the Strike Model in the public sector because the costs which result from increasing employee bargaining power by permitting strikes are higher and the benefits are less in the public sector than in the private sector.

The benefits of collective action are less in the public sector for several reasons. The problem of employer monopsony is not as consequential, not only because employer monopsony is less likely to occur, but also because existing monopsony power is less likely to be utilized. In addition, the low pay given to certain groups in the public sector, such as teachers, may reflect society's view about the best uses of its resources, while low pay in the private sector for a particular occupation presumably reflects a misallocation of resources.

The costs of substituting collective for individual bargaining are also likely to be higher in the public sector. According to Wellington and Winter, the market restraints on trade union activity are weak, reflecting the inelastic demand for public services, a lack of substitutes for these services, and the fact that many public services are essential. Second, strikes in the public sector lead to public pressure on officials which compels quick settlements. Further, there are no other pressure groups competing for public resources which have weapons comparable to the strike, and, thus, unions have a more advantageous arsenal of weapons. The net result of the lack of market restraints, the pressure on public officials to settle strikes quickly, and the absence of comparable weaponry by other pressure groups is that strikes in the public sector impose high costs by distorting the normal political process.

Because the cost-benefit ratio which results from the substitution of collective action, including strikes, for individual action is so high in the public sector, Wellington and Winter argue that public employee strikes should be illegal. Their argument is based on their notion of sovereignty. This is not the traditional doctrine of sovereignty, which they specifically reject,¹⁴ but a new version of sovereignty which asserts that the government has the right, through its laws, "to ensure the survival of the 'normal' American political process."¹⁵ This rationale for sovereignty, fully articulated in Wellington and Winter and implicit in the Taylor Report analysis, deserves a careful scrutiny in terms of empirical evidence.

14. See *id.* at 1125-26.

15. *Id.*

III. Consequences of Strikes in the Public Sector

The best procedure for evaluating public sector strikes would be to investigate the respective impacts of the Strike Model and the No-Strike Model on each of the claims made for collective bargaining. Such an analysis should consider the economic, political, and social effects produced. An inquiry into these effects is particularly important since several authors who have implicitly endorsed the Strike Model in the private sector have done so more on the basis of noneconomic reasons than economic reasons.¹⁶ Nonetheless, the attack on the Strike Model in the *public* sector has been based largely on the evaluation of the fourth claim for collective bargaining, that relating to unequal bargaining power. We will attempt to meet this attack by confining our discussion to the economic consequences of collective bargaining with and without strikes.

Even an examination confined to economic consequences is difficult. The most desirable economic data, which would measure the impact of unions on wages and other benefits, is unavailable. A major examination of the relative wage impact of public sector unions is now being conducted by Paul Hartman,¹⁷ but pending the outcome of his study we have to base our evaluation on less direct evidence. Our approach will be to review carefully the various steps in the analytical model developed by Wellington and Winter by which they arrive at the notion of sovereignty. If we find that the evidence available on public sector strikes contradicts this model, we shall conclude that the differential assessment they provide for public and private strikes is unwarranted.

A. *Benefits of Collective Bargaining*

Wellington and Winter believe the benefits of collective action, including strikes, are less in the public sector than in the private sector since (1) the problem of employer monopsony is less serious, and (2) any use of monopsony power in the public sector which results in certain groups, such as teachers, receiving low pay may reflect, not a misallocation of resources, but rather a political determination of the desired use of resources.

16. A. REES, *THE ECONOMICS OF TRADE UNIONS 194-97* (1962).

17. Paul Hartman of the University of Illinois is examining the impact of public sector unions on wages as part of the Brookings Institution's *STUDY OF UNIONISM AND COLLECTIVE BARGAINING IN THE PUBLIC SECTOR*.

Wellington and Winter assert that employer monopsony is less likely to exist or be used in the public than in the private sector.¹⁸ But as they concede,¹⁹ referring to Bunting, monopsony is not widespread in the private sector and, except in a few instances, cannot be used as a rationale for trade unions. They provide no evidence that monopsony is less prevalent in the public than in the private sector. Moreover, other labor market inefficiencies, common to the public and private sectors, are probably more important than monopsony in providing an economic justification for unions. For example, the deficiencies of labor market information are to some extent overcome by union activities,²⁰ and there is no reason to assume that this benefit differs between the public and private sectors.

Assuming there is monopsony power, Wellington and Winter believe that collective bargaining in the private sector can eliminate unfair wages "which are less than they would be if the market were more nearly perfect."²¹ They assert, however, that low pay for an occupation in the public sector may reflect a political judgment which ought not to be countered by pressures resulting from a strike. To say, however, that the pay for an occupation would be higher if the employees had the right to strike than if they did not is not independent proof that strikes are inappropriate. The same criticism could be made of any activity by a public employee group which affects its pay. An independent rationale must be provided to explain why some means which are effective in raising wages (strikes) are inappropriate while other means which are also effective (lobbying) are appropriate. Whether the Wellington and Winter discussion of the politically based decision-making model for the public sector provides this rationale will be discussed in more detail subsequently.

B. *Costs of Collective Bargaining*

Wellington and Winter's discussion of the cost of substituting collective for individual bargaining in the public sector includes a chain

18. Wellington and Winter, *supra* note 2, at 1120.

19. *Id.* at 1113.

20. "Under purely competitive conditions, it is assumed that perfect knowledge of existing wage rates in other firms, regions, and occupations, and mobility of both labor and capital would tend to eradicate unnecessary wage differentials (i.e., differentials which did not truly reflect the marginal productivity of labor). Both knowledge and mobility, however, are very imperfect in the real market. The existence of trade unions to a large extent compensates for the lack of knowledge and represents a force tending toward wage standardization for similar work." A. CARTER AND F. MARSHALL, *LABOR ECONOMICS: WAGES, EMPLOYMENT, AND TRADE UNIONISM* 324-25 (1967).

21. Wellington and Winter, *supra* note 2, at 1116.

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of causation which runs from (1) an allegation that market restraints are weak in the public sector, largely because the services are essential; to (2) an assertion that the public puts pressure on civic officials to arrive at a quick settlement; to (3) a statement that other pressure groups have no weapons comparable to a strike; to (4) a conclusion that the strike thus imposes a high cost since the political process is distorted.

Let us discuss these steps in order:

(1) *Market Restraints*: A key argument in the case for the inappropriateness of public sector strikes is that economic constraints are not present to any meaningful degree in the public sector.²² This argument is not entirely convincing. First, wages lost due to strikes are as important to public employees as they are to employees in the private sector. Second, the public's concern over increasing tax rates may prevent the decision-making process from being dominated by political instead of economic considerations. The development of multilateral bargaining in the public sector is an example of how the concern over taxes may result in a close substitute for market constraints.²³ In San Francisco, for example, the Chamber of Commerce has participated in negotiations between the city and public employee unions and has had some success in limiting the economic gains of the unions. A third and related economic constraint arises for such services as water, sewage and, in some instances, sanitation, where explicit prices are charged. Even if representatives of groups other than employees and the employer do not enter the bargaining process, both union and local government are aware of the economic implications of bargaining which leads to higher prices which are clearly visible to the public. A fourth economic constraint on employees exists in those services where subcontracting to the private sector is a realistic alternative.²⁴ Warren, Michigan, resolved a bargaining impasse with an American Federation of State, County and Municipal Employees (AFSCME) local by subcontracting its entire sanitation service; Santa Monica, California, ended a strike of

22. "It further seems to us that, to the extent union power is delimited by market or other forces in the public sector, these constraints do not come into play nearly as quickly as in the private." Wellington and Winter, *supra* note 2, at 1117.

23. McLennan and Moskow, *Multilateral Bargaining in the Public Sector*, 21 IND. REL. RES. ASSN. PROCEEDINGS 31 (1968).

24. The subcontracting option is realistic in functions such as sanitation and street or highway repairs, and some white collar occupations. Several other functions, including hospitals and education, may be transferred entirely to the private sector. The ultimate response by government is to terminate the service, at least temporarily. In late 1968, Youngstown, Ohio, closed its schools for five weeks due to a taxpayer's revolt. 231 Gov. EMP. REL. REP. B-6 (1969). In late 1969, 10 Ohio school districts ran out of money and were closed down. Wall Street Journal, Dec. 19, 1969, at 1, col. 1.

city employees by threatening to subcontract its sanitation operations. If the subcontracting option is preserved, wages in the public sector need not exceed the rate at which subcontracting becomes a realistic alternative.

An aspect of the lack-of-market-restraints argument is that public services are essential. Even at the analytical level, Wellington and Winter's case for essentiality is not convincing. They argue:

The Services performed by a private transit authority are neither less nor more essential to the public than those that would be performed if the transit atuhority were owned by a municipality. A railroad or a dock strike may be much more damaging to a community than "job action" by teachers. This is not to say that government services are not essential. They are both because they may seriously injure a city's economy and occasionally the physical welfare of its citizens.²⁵

This is a troublesome passage. It ends with the implicit conclusion that all government services are essential. This conclusion is important in Wellington and Winter's analysis because it is a step in their demonstration that strikes are inappropriate in all governmental services. But the beginning of the passage, with its example of "job action" by teachers, suggests that essentiality is not an *inherent* characteristic of government services but depends on the specific service being evaluated. Furthermore the transit authority example suggests that many services are interchangeable between the public and private sectors. The view that various government services are not of equal essentiality and that there is considerable overlap between the kinds of services provided in the public and private sectors is reinforced by our field work and strike data from the Bureau of Labor Statistics. Examples include:

1. Where sanitation services are provided by a municipality, such as Cleveland, sanitationmen are prohibited from striking. Yet, sanitationmen in Philadelphia, Portland, and San Francisco are presumably free to strike since they are employed by private contractors rather than by the cities.

2. There were 25 local government strikes by the Teamsters in 1965-68, most involving truck drivers and all presumably illegal. Yet the Teamsters' strike involving fuel oil truck drivers in New York

25. Wellington and Winter, *supra* note 2, at 1123.

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City last winter was legal even though the interruption of fuel oil service was believed to have caused the death of several people.²⁶

(2) *Public Pressure*: The second argument in the Wellington and Winter analysis is that public pressure on city officials forces them to make quick settlements. The validity of this argument depends on whether the service is essential. Using as a criterion whether the service is essential in the short run, we believe a priori that services can be divided into three categories: (1) essential services—police and fire—where strikes immediately endanger public health and safety; (2) intermediate services—sanitation, hospitals, transit, water, and sewage—where strikes of a few days might be tolerated; (3) nonessential services—streets, parks, education, housing, welfare and general administration—where strikes of indefinite duration could be tolerated.²⁷ These categories are not exact since essentiality depends on the size of the city. Sanitation strikes will be critical in large cities such as New York but will not cause much inconvenience in smaller cities where there are meaningful alternatives to governmental operation of sanitation services.

Statistics on the duration of strikes which occurred in the public sector between 1965 and 1968 provide evidence not only that public services are of unequal essentially, but also that the a priori categories which we have used have some validity. As can be seen from Table 1, strikes in the essential services (police and fire) had an average duration of 4.7 days, while both the intermediate and the nonessential services had an average duration of approximately 10.5 days. It is true that the duration of strikes in the intermediate and nonessential services is only half the average duration of strikes in the private sector during these years.²⁸ However, this comparison is somewhat misleading since all of the public sector strikes were illegal, and many were ended by injunction, while presumably a vast majority of the private sector strikes did not suffer from these constraints. It would appear that with the exception of police and fire protection, public officials are, to some degree, able to accept long strikes. The ability of governments to so choose indicates that political pressures generated by strikes are not so strong as to undesirably distort the entire decision-making process

26. N.Y. Times, Dec. 26, 1968, at 1, col. 1, and Dec. 27, 1968, at 1, col. 5.

27. We consider education a nonessential service. However, because our portion of the Brookings Institution study excludes education, our analysis in this article will also largely exclude education.

28. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. No. 1611, ANALYSIS OF WORK STOPPAGES 1967, at 4 (1969).

of government. City officials in Kalamazoo, Michigan, were able to accept a forty-eight day strike by sanitationmen and laborers; Sacramento County, California, survived an eighty-seven day strike by welfare workers. A three month strike of hospital workers has occurred in Cuyahoga County (Cleveland), Ohio.

(3) *The Strike as a Unique Weapon*: The third objection to the strike is that it provides workers with a weapon unavailable to the employing agency or to other pressure groups. Thus, unions have a superior arsenal. The Taylor Committee Report opposes strikes for this reason, among others, arguing that "there can scarcely be a countervailing lockout."²⁹ Conceptually, we see no reason why lockouts are less feasible in the public than in the private sector. Legally, public sector lockouts are now forbidden, but so are strikes; presumably both could be legalized. Actually, public sector lockouts have occurred. The Social Service Employees Union (SSEU) of New York City sponsored a "work-in" in 1967 during which all of the caseworkers went to their office but refused to work. Instead, union-sponsored lectures were given by representatives of organizations such as CORE, and symposia were held on the problems of welfare workers and clients. The work-in lasted for one week, after which the City locked out the caseworkers.

A similar assertion is made by Wellington and Winter, who claim that no pressure group other than unions has a weapon comparable to the strike. But this argument raises a number of questions. Is the distinctive characteristic of an inappropriate method of influencing decisions by public officials that it is economic as opposed to political? If this is so, then presumably the threat of the New York Stock Exchange to move to New Jersey unless New York City taxes on stock transfers were lowered and similar devices should be outlawed along with the strike.

(4) *Distortion of the Political Process*: The ultimate concern of both the Taylor Committee and Wellington and Winter is that "a strike of government employees . . . introduces an alien force in the legislative process."³⁰ It is "alien" because, in the words of the Taylor Committee Report:

Careful thought about the matter shows conclusively, we believe, that while the right to strike normally performs a useful function in the private enterprise sector (where relative economic power

29. TAYLOR COMMITTEE REPORT, *supra* note 1, at 15.

30. *Id.*

is the final determinant in the making of private agreements), it is not compatible with the orderly functioning of our democratic form of representative government (in which relative political power is the final determinant).³¹

The essence of this analysis appears to be that certain means used to influence the decision-making process in the public sector—those which are political—are legitimate, while other—those which are economic—are not. For several reasons, we believe that such distinctions among means are tenuous.

First, any scheme which differentiates economic power from political power faces a perplexing definitional task. The *International Encyclopedia of the Social Sciences* defines the political process as "the activities of people in various groups as they struggle for—and use—power to achieve personal and group purposes."³² And what is power?

Power in use invariably involves a mixture of many different forms—sometimes mutually reinforcing—of persuasion and pressure

Persuasion takes place when A influences B to adopt a course of action without A's promising or threatening any reward or punishment. It may take the form of example, expectation, proposals, information, education, or propaganda

Pressure is applied by A upon B whenever A tries to make a course of action more desirable by promising or threatening contingent rewards or punishments. It may take the form of force, commands, manipulation, or bargaining

Physical force is a blunt instrument Besides, more flexible and reliable modes of pressure are available. Rewards, in the form of monetary payments, new positions, higher status, support, favorable votes, cooperation, approval, or the withdrawal of any anticipated punishment, may be bestowed or promised. Punishment, in the form of fines, firing, reduction in status, unfavorable votes, noncooperation, rejection, disapproval, or withdrawal of any anticipated reward, may be given or threatened

Bargaining is a still more fluid—and far more persuasive—form of using pressure. In bargaining, all sides exercise power upon each other through reciprocal promises or threats Indeed, force, command, and manipulation tend to become enveloped in the broader and more subtle processes of bargaining.³³

We have quoted at length from this discussion of the political process because we believe it illustrates the futility of attempting to distinguish

31. *Id.* at 18-19.

32. 12 INT'L ENCYC. SOCIAL SCIENCES 265 (1968).

33. *Id.* at 269-70.

between economic and political power. The former concept would seem to be encompassed by the latter. The degree of overlap is problematical since there can be economic aspects to many forms of persuasion and pressure. It may be possible to provide an operational distinction between economic power and political power, but we do not believe that those who would rely on this distinction have fulfilled their task.³⁴

Second, even assuming it is possible to operationally distinguish economic power and political power, a rationale for utilizing the distinction must be provided. Such a rationale would have to distinguish between the categories either on the basis of characteristics inherent in them as a means of action or on the basis of the ends to which the means are directed. Surely an analysis of ends does not provide a meaningful distinction. The objectives of groups using economic pressure are of the same character as those of groups using political pressure—both seek to influence executive and legislative determinations such as the allocation of funds and the tax rate. If it is impossible effectively to distinguish economic from political pressure groups in terms of their ends, and it is desirable to free the political process from the influence of all pressure groups, then effective lobbying and petitioning should be as illegal as strikes.

If the normative distinction between economic and political power is based, not on the ends desired, but on the nature of the means, our skepticism remains undiminished. Are all forms of political pressure legitimate? Then consider the range of political activity observed in the public sector. Is lobbying by public sector unions to be approved? Presumably it is. What then of participation in partisan political activity? On city time? Should we question the use of campaign contributions or kickbacks from public employees to public officials as a means of influencing public sector decisions? These questions suggest that political pressures, as opposed to economic pressures, cannot *as a class* be considered more desirable.

Our antagonism toward a distinction based on means does not rest solely on a condemnation of political pressures which violate statutory provisions. We believe that perfectly legal forms of political pressure

34. It is interesting to note that some who would differentiate between economic and political considerations apparently view public sector strikes as *political* activity. Stieber, *Collective Bargaining in the Public Sector*, in CHALLENGES TO COLLECTIVE BARGAINING 83 (L. Ulman ed. 1967): "The basic question is whether the strike, which in the United States has been viewed primarily as an economic weapon, is equally appropriate when used as a political weapon." If Stieber's characterization of public sector strikes is correct, then presumably the rationale of the Taylor Committee Report should make these strikes legal.

have no automatic superiority over economic pressure. In this regard, the evidence from our field work is particularly enlightening. First, we have found that the availability of political power varies among groups of employees within a given city. Most public administrators have respect for groups which can deliver votes at strategic times. Because of their links to private sector unions, craft unions are invariably in a better position to play this political role than a union confined to the public sector, such as AFSCME. In Chicago, Cleveland and San Francisco, the public sector craft unions are closely allied with the building trades council and play a key role in labor relations with the city. Prior to the passage of state collective bargaining laws such unions also played the key role in Detroit and New York City. In the No-Strike Model, craft unions clearly have the comparative advantage because of their superior political power.

Second, the range of issues pursued by unions relying on political power tends to be narrow. The unions which prosper by eschewing economic power and exercising political power are often found in cities, such as Chicago, with a flourishing patronage system. These unions gain much of their political power by cooperating with the political administration. This source of political power would vanish if the unions were assiduously to pursue a goal of providing job security for their members since this goal would undermine the patronage system. In Rochester, for example, a union made no effort to protect one of its members who was fired for political reasons. For the union to have opposed the city administration at that time on an issue of job security would substantially have reduced the union's influence on other issues. In Chicago, where public sector strikes are rare (except for education) but political considerations are not, the unions have made little effort to establish a grievance procedure to protect their members from arbitrary treatment.

Third, a labor relations system built on political power tends to be unstable since some groups of employees, often a substantial number, are invariably left out of the system. They receive no representation either through patronage or through the union. In Memphis, the craft unions had for many years enjoyed a "working relationship" with the city which assured the payment of the rates that prevailed in the private sector and some control over jobs. The sanitation laborers, however, were not part of the system and were able to obtain effective representation only after a violent confrontation with the city in 1968. Having been denied representation through the political process, they had no choice but to accept a subordinate position in the city or to

initiate a strike to change the system. Racial barriers were an important factor in the isolation of the Memphis sanitation laborers. Similar distinctions in racial balance among functions and occupations appear in most of the cities we visited.

C. *Conclusions in Regard to Strikes and the Political Process*

Wellington and Winter and the Taylor Committee reject the use of the Strike Model in the public sector. They have endorsed the No-Strike Model in order "to ensure the survival of the 'normal' American political process."³⁵ Our field work suggests that unions which have actually helped their members either have made the strike threat a viable weapon despite its illegality or have intertwined themselves closely with their nominal employer through patronage-political support arrangements. If this assessment is correct, choice of the No-Strike Model is likely to lead to patterns of decision making which will subvert, if not the "normal" American political process, at least the political process which the Taylor Committee and Wellington and Winter meant to embrace. We would not argue that the misuse of political power will be eliminated by legalizing the strike; on balance, however, we believe that, in regard to most governmental functions, the Strike Model has more virtues than the No-Strike Model. Whether strikes are an appropriate weapon for all groups of public employees is our next topic.

IV. Differentiation Among Public Sector Functions

The most important union for local government employees, The American Federation of State, County, and Municipal Employees (AFSCME), issued a policy statement in 1966 claiming the right of public employees to strike:

AFSCME insists upon the right of public employees . . . to strike. To forestall this right is to handicap free collective bargaining process [sic]. Wherever legal barriers to the exercise of this right exist, it shall be our policy to seek the removal of such barriers. Where one party at the bargaining table possesses all the power and authority, the bargaining becomes no more than formalized petitioning.³⁶

35. Wellington and Winter, *supra* note 2, at 1125-26.

36. INTERNATIONAL EXECUTIVE BOARD AFSCME, POLICY STATEMENT ON PUBLIC EMPLOYEE UNIONS: RIGHTS AND RESPONSIBILITIES 2 (July 26, 1966).

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Significantly, AFSCME specifically excluded police and other law enforcement officers from this right. Any local of police officers that engages in a strike or other concerted refusal to perform duties will have its charter revoked.

Can a distinction among functions, such as is envisioned by AFSCME, be justified? In view of the high costs associated with the suppression of strikes, could each stoppage be dealt with, as Theodore Kheel suggests, only when and if it becomes an emergency?

Despite arguments to the contrary, we feel that strikes in some essential services, such as fire and police, would immediately endanger the public health and safety and should be presumed illegal. We have no evidence from our field work to support our fears that any disruption of essential services will quickly result in an emergency. But the events which occurred on September 9, 1919, during a strike by Boston policemen provide strong proof; those which occurred on October 7, 1969, following a strike by Montreal policemen would appear to make the argument conclusive. Contemporary accounts amply describe the holocausts:

Boston, 1919

About me milled a crowd of aimless men and women, just seeing what they could see There was an air of expectancy without knowing what was expected.

Then came the sound of two hard substances in sharp impact, followed a second later by a louder one and the thrilling crash of falling splintering glass. A plate show-window had been shattered. Instantly the window and its immediate vicinity were filled with struggling men, a mass of action, from which emerged from time to time bearers of shirts, neckties, collars, hats. In a few seconds the window was bare. Some with loot vanished; others lingered.

Lootless ones were attacking the next window. Nothing happened. That is, the fear of arrest abated after the first shock of the lawless acts. I saw men exchanging new shirts each with the other, to get their sizes . . . good-looking men, mature in years, bearing all the earmarks of a lifetime of sane observance of property rights.³⁷

Montreal, 1969

"You've never seen the city like this," said the owner of a big women's clothing store surveying his premises, strewn with dum-

37. C. WOOD, *REDS AND LOST WAGES* 9-10 (1930), as quoted in D. ZISKIND, *ONE THOUSAND STRIKES OF GOVERNMENT EMPLOYEES* 45 (1940).

mies from which the clothing had been torn. "It's like the war."³⁸

A taxi driver carrying a passenger up Sherbrooke Street in Montreal today blamed the police for "not knowing the effect their absence would have on people." He continued: "I don't mean hoodlums and habitual lawbreakers, I mean just plain people committed offenses they would not dream of trying if there was a policeman standing on the corner. I saw cars driven through red lights. Drivers shot up the wrong side of the street because they realized no one would catch them."³⁹

In the case of strikes by essential employees, such as policemen, the deterioration of public order occurs almost immediately. During the first few hours of the police walkout in Montreal, robberies occurred at eight banks, one finance company, two groceries, a jewelry store and a private bank.⁴⁰ In the case of the Boston police strike of 1919, outbreaks began within four hours after the strike had commenced. Such consequences require that strikes by police and other essential services be outlawed in advance. There is simply no time to seek an injunction.

Even if a distinction in the right to strike can be made among government functions on the basis of essentiality, is such a distinction possible to implement? The Taylor Committee based their argument against prohibiting strikes in essential functions but allowing them elsewhere on this difficulty:

We come to this conclusion [to prohibit all strikes] after a full consideration of the views . . . that public employees in non-essential government services, at least, should have the same right to strike as has been accorded to employees in private industry. We realize, moreover, that the work performed in both sectors is sometimes comparable or identical. Why, then, should an interruption of non-essential governmental services be prohibited?

To begin with, a differentiation between essential and non-essential governmental services would be the subject of such intense and never ending controversy as to be administratively impossible.⁴¹

Despite the conclusion of the Taylor Committee it appears that in practice a distinction is emerging between strikes in essential services and strikes in other services. Employee organizations and public officials do

38. N.Y. Times, Oct. 9, 1969, at 3, col. 1.

39. N.Y. Times, Oct. 10, 1969, at 2, col. 6.

40. N.Y. Times, Oct. 8, 1969, at 3, col. 1.

41. TAYLOR COMMITTEE REPORT, *supra* note 1, at 18.

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in fact treat some strikes as critical, while other strikes cause no undue concern.

Our analysis of the Bureau of Labor Statistics strike data pertaining to the last four years suggests that it is possible to devise an operational definition of essential service. First, as we have indicated above, strike duration was considerably shorter in the essential services than in the intermediate or nonessential services [see Table 1]. These data suggest

TABLE 1*
DURATION OF STRIKES BY ESSENTIALITY OF FUNCTION

	Average Duration in Days	Standard Deviation** in Days
Essential	4.7	7.9
Intermediate	10.3	18.5
Nonessential	10.6	20.1
Education	7.2	8.9

* Based on data collected by the Bureau of Labor Statistics on strikes during 1965-68 involving employees of local government.

** Standard deviation is a measure of dispersion around the average or the mean.

that, except in police and fire services, public officials have some discretion in choosing to accept long strikes. Second, the statistics reveal that managers have been able to distinguish between essential and non-essential services in their use of counter sanctions. In strikes involving essential services, injunctions were sought more frequently and employees, because of their short run indispensability, were fired less frequently. Injunctions were granted in 35% of the essential strikes, and in 25% of the intermediate, but only in 19% of the nonessential strikes. Third, partial operation was attempted more frequently in essential services [see Table 2]. By using nonstrikers, supervisors, replacements or volunteers, local governments were able to continue partial operation during 92% of the essential strikes, but in only 80% of the intermediate, and 77% of the nonessential strikes. Such data suggest that it may be administratively feasible to differentiate among public services so as to permit some, but not all, public employees to strike. Indeed, public administrators already seem to be making such distinctions.

The idea that distinctions among functions are appropriate is also beginning to emerge among legislators. The first state to move in this direction has been Vermont, which apparently restricts municipal employee strikes only if they endanger the health, safety, or welfare of the public.⁴² Unfortunately—at least from the viewpoint of researchers—

42. VER. STAT. ANN. tit. 21, § 1704 (Supp. 1969).

TABLE 2*
PARTIAL OPERATION BY ESSENTIALITY OF FUNCTION
(NONEDUCATION)

	Essential			Intermediate			Nonessential			Total**	
	Number	Percentage	Number	Percentage	Number	Percentage	Number	Percentage	Number	Percentage	Percentage
Total Number of Strikes	37	100.0	221	100.0	43	100.0	301	100.0			100.0
Partial Operation***	34	91.9	175	79.2	33	76.7	242	80.4			80.4
Supervisors	(28)	(75.7)	(154)	(69.7)	(29)	(67.4)	(211)	(70.1)			(70.1)
Nonstrikers	(27)	(73.0)	(137)	(62.0)	(28)	(65.1)	(192)	(63.8)			(63.8)
Replacements	(3)	(9.1)	(34)	(15.4)	(4)	(9.3)	(41)	(13.6)			(13.6)
Volunteers	(5)	(13.5)	(16)	(7.2)	—	—	(21)	(7.0)			(7.0)
No Partial Operation	3	8.1	46	20.8	10	23.3	59	19.6			19.6

* Based on data collected by the Bureau of Labor Statistics on strikes during 1965-68 involving employees of local governments.
** Twenty-eight strikes in such miscellaneous functions as libraries, museums, and electric or gas utilities were not classified. There was partial operation in 18 (64.3%) of these strikes.
*** The sub-totals for partial operation do not add to 100% because more than one method may have been used in each strike.

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there has been no experience under the statute. Montana prohibits strikes in private or public hospitals only if there is another strike in effect in a hospital within a radius of 150 miles.⁴³ Study commissions in other states have accepted the distinction between essential and non-essential services. In 1968, the Governor's Commission in Pennsylvania recommended a limited right to strike for all public employees except police and firemen.⁴⁴ In 1969, the Labor Law Committee of the Ohio State Bar Association recommended repeal of the Ferguson Act, which prohibits strikes by public employees.⁴⁵ They proposed a Public Employment Relations Act which would permit strikes by recognized employee organizations in nonessential occupations following mandatory use of fact-finding procedures.⁴⁶ The proposed statute states:

[I]n the event a public employer and a certified labor organization are unable to reach an agreement within forty-five days following the date of the receipt of the recommendation of the fact-finding board, the public employees in the bargaining unit . . . and/or the labor organization shall not thereafter be prohibited from engaging in any strike until such time as the labor organization and the public employer reach agreement on a collective bargaining agreement.⁴⁷

V. Implications for Public Policy

We have expressed our views on the market restraints that exist in the public sector, the extent of the public pressure on public officials to reach quick settlements, the likely methods by which decisions would be made in the No-Strike Model, and the desirability and feasibility of differentiating among government services on the basis of essentiality. In this light, what public policy seems appropriate for strikes at the local government level?

In general, we believe that strikes in the public sector should be legalized for the same reasons they are legal in the private sector. For some public sector services, however—namely, police and fire protection—the probability that a strike will result in immediate danger to public health and safety is so substantial that strikes are almost invariably inappropriate. In these essential functions, the strike should be

43. REV. CODES OF MONTANA tit. 41, § 2209 (Supp. 1969).

44. THE GOVERNOR'S COMMISSION TO REVISE THE PUBLIC EMPLOYEE LAWS OF PENNSYLVANIA, REPORT AND RECOMMENDATIONS, in 251 GOV. EMP. REL. REP. E-1 (1968).

45. OHIO REV. CODE §§ 4117.01-4117.05 (1964).

46. 42 OHIO BAR 563 (1969).

47. *Id.* at 576.

presumed illegal; the state should not be burdened with the requirement of seeking an injunction. We would, however, permit employees in a service considered essential to strike if they could demonstrate to a court that a disruption of service would not endanger the public. Likewise, we would permit the government to obtain an injunction against a strike in a service presumed nonessential if a nontrivial danger to the public could be shown.⁴⁸

The decision to permit some, but not all, public employee strikes cannot, of course, take place *in vacuo publicum jus*. Mediation, fact finding, or advisory arbitration may be appropriate for those functions where strikes are permitted. Where strikes are illegal because of the essential nature of the service, it may be necessary to institute compulsory arbitration.⁴⁹ The choice of a proper role for third parties in the public sector is difficult, and we do not wish to leave the impression that we are unaware of the problem. In our portion of the Brookings Institution study, we will examine the experience which many cities have had in the use of neutral third parties. Our initial reaction is that such experience does not undermine the feasibility of a public policy which would permit some, but not all, public employees the right to strike, and include that decision in a comprehensive public policy for collective bargaining.

While we have indicated our support for the right of public employees to strike, we do not mean to suggest that all strikes are desirable. In particular, strikes which are necessary solely because the employer refuses to establish a bargaining relationship seem anachronous. The right of employees to deal with their employer through a representative of their choosing should be reflected in our public policy. The obligation on employers to recognize and to bargain with properly certified unions has eliminated many strikes in the private sector. The evidence in Table 3 suggests that, in the public sector, strikes on such issues can

48. The Labor Management Relations Act (Taft-Hartley Act) is a statute which presumes strikes are legal unless an emergency is involved. 29 U.S.C. §§ 176-180 (1969). The President may delay or suspend an actual or threatened strike which if permitted to occur or continue will constitute a threat to the national health or safety. The emergency procedures have been invoked 29 times since 1947. This experience should provide some guidance in formulating an operational version of our policy which would permit strikes in nonessential functions unless a nontrivial danger to the public could be shown. We realize that it may be more difficult to formulate an operational version of our policy for essential functions. We are not aware of any experience with a statute which permits the presumption of illegality for strikes to be rebutted under appropriate circumstances.

49. Michigan has recently enacted a statute applicable to public police and fire departments which imposes penalties on striking employees and establishes a binding arbitration procedure for negotiating disputes. Arbitration is available upon the request of either party in the dispute. MICH. COMP. LAWS §§ 423.232-247 (1948).

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TABLE 3
LOCAL GOVERNMENT STRIKES BY PUBLIC POLICY AND ISSUE*

	Noneducation Strikes		Education Strikes	
	Number	Duration in Days	Number	Duration in Days
<i>Mandatory Law</i>				
Strikes to establish bargaining relationship**	1	10.0	5	3.4
Other strikes	56	6.7	104	8.7
<i>Permissive Law</i>				
Strikes to establish bargaining relationship	20	19.6	2	7.0
Other strikes	34	10.4	16	6.5
<i>No Law</i>				
Strikes to establish bargaining relationship	68	21.6	29	5.9
Other strikes	150	5.8	93	6.2

* Based on data collected by the Bureau of Labor Statistics on strikes during 1965-68 involving employees of local governments.

** Includes strikes where union was demanding recognition as well as strikes where union was demanding bona fide collective bargaining.

be sharply reduced. In those states in which local governments are required to recognize and to bargain with unions representing a majority of their employees, strikes to establish the bargaining relationship have been virtually eliminated. States with permissive laws, which require minimal recognition of unions and which require only that employers "meet and confer," as opposed to "bargain," with these unions, have perhaps aggravated the strike problem.

Similarly, our general endorsement of public sector strikes does not mean that we are unconcerned about the circumstances under which such strikes take place. Public policy has an important role to play in shaping the structure and, hence, influencing the outcome of collective bargaining.⁵⁰ An example is the inclusion or exclusion of supervisors in the bargaining unit. As indicated in Table 2, supervisors are often used during strikes to provide partial operation. Presumably, this enhances the ability of local governments to resist union demands. Some states, such as Wisconsin,⁵¹ have wisely stipulated that supervisors are to be excluded from bargaining units, while other states, such as New York, have not. A supervisor who belongs to a striking union is likely

50. For a discussion of collective bargaining structure, see Weber, *Stability and Change in the Structure of Collective Bargaining*, in CHALLENGES TO COLLECTIVE BARGAINING 13 (L. Ulman ed. 1967).

51. WIS. STAT. ANN. § 111.81(12) (Supp. 1969), relates to state employees.

to be of limited usefulness to management in attempting to counteract the strike. Another way in which a state's public policy could enhance local government's ability to resist strikes would be to enact a statute prohibiting public employers from signing away their right to subcontract. The absolute right to subcontract operations would thereby be preserved. While it is unlikely that some services, such as police and fire protection, will ever be placed under private management, other services can be subcontracted if union demands raise the cost of a public service to a level at which private service becomes competitive. Excluding the education sector, subcontracting was threatened by management in 16 local government strikes and implemented in five between 1965 and 1968.

VI. Conclusions

This article has offered a policy to deal with public sector strikes. It has also examined several propositions concerning public sector strikes which have been based largely on logical analysis. The assertions that strikes by public employees inevitably distort the decision-making process in the public sector and that differential treatment of public employees in their right to strike would be infeasible have been found to be wanting when evaluated in the light of our actual experience with public sector strikes. This evaluation suggests that logic alone is an inadequate basis for public policy in this area. Yet we would not want to suggest that a literal interpretation of Holmes' view on the relative merits of logic and experience is appropriate. If we were forced to choose a mentor in any debate concerning the proper bases for law, we endorse Cardozo:

My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law.