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PUBLIC EMPLOYEE STRIKES IN OHIO: 
THE FERGUSON ACT RECONSIDERED

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At the present as well as at any other time, the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself.1

I. INTRODUCTION

As society changes through normal evolutionary processes, the laws by which that society elects to be governed must also be changed.2 The diminution of the rationale for a given law tends to render that law vacuous. Impossibility of effective enforcement of the law will often render a law impotent. Failure by the appropriate legislative body to revise or repeal such laws to more accurately accommodate the current consensus results in a general deterioration of society's respect for law.3 An example is the Ferguson Act, which unequivocally prohibits any public employee in Ohio from striking.4 It has become clear that the proscription has lost its legitimacy.

Employment in the public sector has increased quite dramatically during the past 23 years. In 1947 for example, public employment constituted 11 per cent of all non-agricultural employment. By 1970, this proportion had risen to 17 per cent.5 The increase has been considerably

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1 Foreword to E. EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW (W. Moll transl. 1936).
2 This assumes a Hobbesian notion of sovereignty. "The obligation of subjects to the sovereign is understood to last as long and no longer than the power lasts by which he is able to protect them. For the right men have by nature to protect themselves when none else can protect them can by no covenant be relinquished." T. HOBSES, LEVIAIiichi 179 (H. Schneider ed. 1958). In addition, a democratic system of government is presupposed whereby once the individual gives up part of his liberty to the sovereign he may subsequently regain it. As Professor Lon Fuller has stated: "Good order is law that corresponds to the demands of justice, or morality, or men's notions of what ought to be." Fuller, Positivism and Fidelity to Law, in SOCIETY, LAW AND MORALITY 471, 480 (F. Olafson ed. 1961).
4 OHIO REV. CODE. §§ 4117.01-05 (1947).
5 These percentages include both federal and state and local employment and are based on figures contained in Current Labor Statistics, 94 MONTHLY LAB. REV. 95 (Oct. 1971).
greater at the state and local level as compared to the federal level. During the same period state and local government employment increased by 274 per cent while the federal government was experiencing a 143 per cent increase. This increase in the composition of the governmental work force is related to the population increase that has occurred during those years. As the population increases, so also does the need for governmental services. There is some indication that the general need for industry will diminish as we move in the direction of a service oriented economy.

A corollary to the rise in public employment has been the growth of unionism in this sector. At the state and local level in 1960, public union membership stood at one million. By 1969 that figure had increased two and one-half times. Approximately one-half of these employees are teachers, and the next largest group is municipal employees. Studies have indicated that larger cities tend to have higher percentages of organized employees. The recent trend toward official recognition of public employee labor organizations suggests that both the percentages and gross numbers of organized public employees will continue to rise.

The rise in public employment and public employee unionism has been accompanied by an increased militancy among public employees. Work stoppages by state and local government employees have risen from a total of 15 in 1958, to 409 in 1969. The interesting aspect of these figures is that most of these work stoppages were in open defiance of the laws, since thirty-eight states have expressly prohibited

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6 Id.
7 Cordtz, City Hall Discovers Productivity, FORTUNE, OCT., 1971 at 92.
8 See The Plain Dealer (Cleveland, Ohio), Nov. 25, 1971, § AA, at 2, col. 1.
11 Id. at 2.
13 Edwards, supra note 9, at 11.01-02.
15 The Council of State Governments, supra note 10, at 3; Bureau of Labor Statistics, Statistical Abstract 321, table 148 (1970). In terms of the number of workers involved, the 15 strikes in 1958 covered 1,720 employees. Id. at 318. The 409 strikes in 1969 involved 159,500 employees. Id. at 321. It might be noted that the actual work time lost is fairly insignificant when contrasted to the total hours worked. See Edwards, supra note 9, at 11.12-13. See also Benodin, supra note 14, at 40.
16 The Council of State Governments, supra note 10, at 3.
strikes by public employees. The impracticality of these no strike sanctions is readily apparent.

The utter disregard of the law in this area has several explanations. One is that the public employee has become painfully cognizant of his counterpart in the private sector who has been given legal protection of his right to join labor organizations and to withhold his services under appropriate conditions. When a situation becomes intolerable, the assault on human dignity too grievous, an employee's only recourse is to leave the job. That the law makes such conduct illegal when engaged in by the public servant while it permits such conduct for workers in the private sector only exacerbates public employer-employee disputes. Another factor to be considered is that the penalties for engaging in strikes are rarely imposed by the public employer. The mightiest weapon in the public employer's arsenal is the right to discharge employees who strike, but the obvious impracticality of replacement dictates its infrequent use. Finally, the public employee has learned that through striking he can be heard.

All of the above generalizations concerning public employment apply with equal force in Ohio. Officially, public employee strikes are prohibited by the Ferguson Act. Actually, during 1967 and 1968, Ohio saw 28 and 24 public employee strikes respectively to rank second only to Michigan. The tension between law and society is evident. This article will consider various suggestions that have been made to facilitate impasse resolution. In addition, four bills pertaining to public

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17 Murphy, The State and Local Experience in Employee Relations, in The Crisis in Public Employee Relations in the Decade of the Seventies 15, 17 (R. Murphy & M. Sackman eds. 1970).
21 Note, Teachers' Strikes—A New Militancy, 43 NOTRE DAME LAW. 367, 382-83 (1968).
22 See, e.g., The First Legal Teacher Strike Under Pennsylvania's New Law, 12 MUNICIPAL ATTY 29, 30 (1971).
23 OHIO REV. CODE. § 4117.02 provides that: "No public employee shall strike. No person exercising any authority, supervision, or direction over any public employee shall have the power to authorize, approve, or consent to a strike by one or more public employees, and such person shall not authorize, approve, or consent to such strike."
25 The majority of strikes in the public sector have occurred when an impasse has been reached during contract negotiations. Consequently the inquiry is directed only to "interest" disputes (occurring during contract negotiation) as opposed to "grievance" disputes (occurring during the term of the contract). Presumably, grievance disputes will be settled as they are in the private sector, namely, through voluntary arbitration.
employee relations which are currently before the Ohio General Assembly will be analyzed and finally, recommendations regarding the creation of a right to strike will be made.

II. THE BASES OF ANTI-STRIKE LEGISLATION

Numerous theories have been advanced in support of the prohibition of strikes by public employees. Advocates prohibiting such strikes have argued that the right to strike is inappropriate in the public sector because of the fundamental economic differences between the public and private sectors. Several factors are advanced to support this theory. First, the prohibition advocates point to the lack of available or feasible substitutes for many of the services offered by government. The resultant inelasticity of the demand for these services produces a situation where strikes will often be successful, simply because unions are in no danger of bidding themselves out of a competitive market. The prohibitionists also point to the essential nature of many governmental services as a basis for distinction from the private sector. The essential nature of a service is directly related to the success of a strike causing its discontinuance—a fact which may also fail to provide a check on union demands. A third difference often cited is the lack of a profit motive in the public sector. Because the public employer is not protecting its personal profits, strikers will encounter only minimal resistance to their demands and strikes will, therefore, always be successful. In addition, the prohibitionists argue that the public employer lacks methods of applying countervailing pressure, namely the use of strike breakers and lockouts, that are readily available to his private counterpart in combatting strikes. A final economic distinction urged is one grounded in law. Because of the constitutional restriction of legislative delegation of authority, it has been held invalid to delegate authority to a single person to contractually bind a governmental entity. This results in a situation in which strike settling negotiations are difficult, if not impossible, to structure.

On a broader scale, prohibitionists argue that strikes by public employees are contrary to public policy, which states that there is no right in any single group to impede the governmental function and

26 For a detailed comparison of the economic conditions in the private and public sectors see Governor's Committee on Public Employee Relations, State of New York, Interim Report (1968) [hereinafter cited as Interim Report].
31 City of Cleveland v Division 268, 41 Ohio Op 236, 90 N.E. 2d 711 (1949).
deny essential services to the public.\textsuperscript{33} The peculiar nature of public employment itself has been asserted as a reason for denying the right to strike. The argument, simply stated, is that government employment has many benefits and much greater security than private employment. Hence, the acceptance of these emoluments is the quid pro quo for giving up the right to strike.\textsuperscript{34}

The concept of sovereignty is the foundation of several prohibitionist arguments. The first and most direct argument is that the sovereign cannot be struck.\textsuperscript{35} Another suggestion is that a public employee is an agent of the sovereign and as such owes a higher duty to the public which the existence of the very sovereignty he exercised by striking.\textsuperscript{38} A recent employs him.\textsuperscript{36} The application of this theory has led some courts to equate striking in the public sector with treason.\textsuperscript{37} A closely related argument maintains that as an agent of the sovereign the public employee exercises some of its sovereignty, and that an employee cannot then deny


\textsuperscript{34} See Wellington & Winter, \textit{supra} note 27. An analogy can be made to \textit{Textile Workers Union v Lincoln Mills}, 353 U.S. 448 (1957) wherein Justice Douglas stated: "Plainly the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike." Id. at 455.

\textsuperscript{35} Bloch, \textit{supra} note 32.

\textsuperscript{36} It has been asserted that public employment creates a fiduciary relationship between the employee and the public. The public employee is thus the trustee responsible for the continuance of governmental services. It has been stated: "Employment in the public service frequently ... entails a necessary surrender of certain civil rights to a limited extent because of the dominant public interest in the unimpeded and uninterrupted performance of the functions of government." Los Angeles v. Building & Constr. Council, 94 Cal. App. 2d, 36, 49, 210 P. 2d 305, 318 (1949). \textit{See also} Moberly, \textit{The Strike and Its Alternatives in Public Employment}, 1966 Wis. L. Rev. 549 (1966).

\textsuperscript{37} In a famous decision dealing with the right of public employees to strike, the Supreme Court of Connecticut discussed the duty of the public employee to the sovereign and concluded:

\textit{In the American system, sovereignty is inherent in the people. They can delegate it to a government which they create and operate by law. They can give to that government the power and authority to perform certain duties and furnish certain services. The government so created and empowered must employ people to carry on its task. These people are agents of the government. They exercise some part of the sovereignty entrusted to it. ... They serve the public welfare and not a private purpose. To say that they can strike is the equivalent of saying that they can deny the authority of government and contravene the public welfare.}

\textit{Norwalk Teachers, Ass'n v. Board of Educ. 138 Conn. 269, 276, 83 A. 2d 482, 490 (1951).} Ohio courts have long held a similar view. In a frequently quoted passage Judge Artl stated:

\textit{I think it is clear that in our system of government, the government is a servant of all the people. And a strike against the public, a strike of public employees, has been denounced in the decisions cited above, as a rebellion against government. The right to strike, if accorded to public employees, I say, is one means of destroying government. And if they destroy government, we have anarchy, we have chaos.}

\textit{City of Cleveland v. Division 268, 41 Ohio Op. 236, 239, 90 N.E. 2d 711, 715 (C.P. 1949).}

\textsuperscript{38} Rains, \textit{supra} note 33.
argument has been put forth which abandons the classical concept of sovereignty and incorporates the aforementioned economic distinctions between the public and private sectors to circumscribe a duty of the sovereign to prohibit strikes by public employees. The argument, in brief, is that market restraints are weak in the public sector due to the essential nature of public services. The public, when faced with the withdrawal of these essential services, exerts great pressure upon elected officials to settle the dispute promptly. Public employees are, at times, able to obtain a greater share of the public funds as a result of the disproportionate pressure they are able to exert through the leverage of a strike. Thus strikes by public employees clearly introduce an alien force into the political process thereby distorting it. The argument concludes that it is the duty of the sovereign to maintain the purity of the political process as we know it by barring this potentially devastating weapon from the political arena.

The arguments for prohibiting strikes by public employees have been met in every case by those arguing for the right to strike. The arguments in favor of the right to strike appear to be more persuasive largely because they are the more empirically supportable.

The main argument raised by those advocating a right to strike is that it is a prerequisite to meaningful collective bargaining. Collective bargaining is, after all, no more than a process by which two parties convince each other that each has more to gain by agreeing to a specific proposal than by refusing to do so. If public employees cannot strike then the public employer has little to lose by refusing to agree or even to bargain at all. It has also been asserted that denying public employees the right to strike is tantamount to the imposition of involuntary servitude.

The argument which seeks to distinguish the public from the private sector based upon the lack of profit motive in the former has also been countered. Advocates of the right to strike have pointed out that each governmental unit is under pressure to meet a budget. This administrative burden will create sufficient countervailing pressure to resist union demands and coercion.

39 See Wellington & Winter, supra note 27.
40 Id.
42 In the absence of any statutorily imposed duty, a public employer is not required either to recognize or bargain with employee unions. See Seasongood & Barrow, UNIONIZATION OF PUBLIC EMPLOYEES, 21 U. CIN. L. REV. 327 (1952).
44 Hoffman, supra note 29, at 155.
The argument that public employee strikes will endanger the public welfare has also been refuted. Advocates of the right to strike have pointed out that, in reality, very few public services are so absolutely essential that they could not be interrupted temporarily. Moreover, some private sector employees are engaged in activity far more crucial than many public employees. The recent strike of fuel truck drivers in New York City was said to be responsible for the deaths of several persons while numerous teachers' strikes have produced considerably less harm. Advocates of the right to strike for public employees have promulgated two proposals for deciding which public employees should be allowed to strike and which should be prohibited from striking. The first proposal distinguishes between so-called proprietary functions and governmental functions in the public sector. Those public employees who perform tasks in areas which could be subcontracted to private enterprise, such as sanitation workers, would be allowed to strike while those public employees performing functions peculiar to sovereignty, such as police and prison guards, would not be allowed to strike. The second proposal for deciding which of the public employees should be given the right to strike is based upon a more amorphous distinction—that of essentiality. The proponents of this theory advocate a distinction based upon whether a strike endangers the public health, safety or welfare.

The prohibitionist arguments based upon the concept of sovereignty have also been refuted. In reply to the argument that the sovereign cannot be struck, advocates of the right to strike assert that the sovereignty concept is an outmoded fiction which has existed far longer than the...
factors responsible for its creation. The argument that public employees, as agents of the sovereign, owe a higher duty of loyalty to their employer has been met by the pragmatic assertion that a public employee will never continue his reticence out of loyalty while watching his private sector counterpart benefit substantially through the exercise of strike privileges. Furthermore, job security is no longer absolute in view of the many recent layoffs and cutbacks by metropolitan employers.

The argument that it is the duty of the sovereign to purge the political process of the potentially destructive force of public employee strikes has undergone refutation at each step of its analysis. The lack of market restraints in the public sector due to the essential nature of public services has been questioned for several reasons. First it is pointed out that there is an inherent restraint in the strike mechanism itself. Wages lost during a strike are equally important to a public employee as they are to a private employee. In addition, public concern over municipal tax rates is higher now than ever before. The public is just as likely to resist a strike which will directly affect its tax rates as it is to clamor for an expensive settlement. Another possible source of countervailing economic pressure lies in the alternative of subcontracting. To the extent that a municipality is able to subcontract to a private party the particular task which is the subject of a dispute it will be able to withstand a prolonged strike or even abolish the public department involved. In order to preserve this option at the bargaining table it has been urged that legislation prohibiting the relinquishment of the subcontracting right be enacted. The existence of public pressure to settle all public employee strikes has been questioned. From the empirical evidence available it appears that the degree of public pressure upon government officials to settle a strike is directly proportional to the essentiality of the services withheld. The essential nature of a service is related to the number of feasible alternatives available, the number of alternatives being greater

50 Bloch, supra note 32, at 399.
51 Hoffman, supra note 29, at 154.
52 In Detroit more than 500 city employees have been dropped from the payroll and 2,179 budgeted positions are unfilled. Cleveland has fired 1,725 workers and many others have been put on shorter work weeks (with less pay). See Cordtz, City Hall Discoverers Productivity, FORTUNE, Oct., 1971, at 95.
53 See Burton & Krider, supra note 45.
54 Id. at 425.
55 Id. at 427.
56 The City of Warren, Michigan, resolved a bargaining impasse with the American Federation of State, County and Municipal Employees (AFSCME) by subcontracting out its entire sanitation service. Id. at 425.
57 Burton & Krider, supra note 45, at 426.
58 Statistics on the duration of strikes which occurred in the public sector between 1965 and 1968 show that strikes in essential services, such as police and fire lasted an average of 4.7 days while strikes in other areas last an average of 10.5 days. Id. at 427.
as population decreases. Thus, it is possible to identify those services which are highly essential and take proper precautions to curtail or prohibit strikes in these areas. The conclusion that unions have a much stronger arsenal than public employers, who lack countervailing weapons, has also been refuted. Advocates of the right to strike point out that there is no reason for not legalizing the lockout and the strike simultaneously. This would provide the public employer with an equal weapon, the existence of which would diminish the power of the union gained through the use of a strike.

The ultimate conclusion that public employee strikes introduce an alien force into the political process has been seriously questioned for several reasons. The main answer to this conclusion has been that economic pressure in the political process is no less invidious than political pressure. All of the objections to economic pressure in the prohibitionist argument are applicable to the pressure exerted by petitioning and lobbying, so why not ban all forms of interest group pressure? Once more, economic pressure is in many cases indistinguishable from political pressure. Restricting unions solely to the use of political pressure to gain greater benefits for their membership appears unwise for three reasons. First, the availability of political power varies among groups of employees within a given city. This situation produces widely divergent benefits and unequal representation. Second, the range of issues pursued by unions relying on political power tends to be narrow. This tendency would preclude union action on many significant issues of employment. Third, a labor relations system built on political power is unstable because many employees are left out of the system. Local unions or crafts which are composed largely of minorities or who may have endorsed a candidate that was politically embarrassing to the union leadership have been victims of union discrimination in the past.

A final argument which is perhaps the most effective of all those made by advocates for the right to strike is based upon the problems caused by the existence of the statutory prohibition itself. Faced with the illegality of a strike, public employees must not only make up their minds to abandon their employment thereby depriving themselves of all income, but in addition must make a deliberate decision to violate the law which forbids them from striking. The decision to defy the law and, in some instances, the courts is one generated by the most vitriolic militancy and rancor. This attitude of the workers serves only

59 Id. at 427.
60 Id. at 438.
61 Id. at 428.
62 Id. at 429.
63 Id. at 431.
64 Id.
to exacerbate the dispute. To the extent that any law is violated on a widespread basis, respect for the particular law violated diminishes.\(^ {65} \)

A strike is, of course, the only method of resolving an impasse in collective bargaining. Several alternatives do exist.

III. ALTERNATIVES FOR IMPASSE RESOLUTION

A. Mediation

When collective bargaining reaches an impasse or becomes stalled for any reason the parties first resort to mediation. It has been said that: "The mediator provides a channel of communication for the parties. Sometimes he carries messages between the parties; at other times he helps to clarify arguments. He makes recommendations only when he is confident that they will be accepted by both parties."\(^ {66} \) Mediators are basically talkers who enter into a stalled negotiation and serve a lubricating function which eliminates antagonisms between parties.\(^ {67} \) These antagonisms are part of any collective bargaining process arising inevitably from the irrationality and emotionalism of the parties. A mediator will usually begin by talking to each group separately to discover each side's view of why the other is impairing negotiations. This process provides an emotional release for both sides through the venting of their antagonisms. Once these antagonisms have been vented, negotiations may continue.

The mediator then assesses each side's position on the various issues. The skilled mediator, sensitized by his experience, can detect exactly how far each side is willing to go on a particular issue thereby enabling him to reconstitute bargaining on an issue by issue basis, beginning with those issues on which agreement is most likely to be reached. As agreement is reached on the preliminary issues, momentum gradually builds to the point necessary to overcome the more difficult obstacles. Progress is thus attained on a step by step basis and is usually accompanied by a gradual change in the attitude of the parties from antagonistic pessimism to the conciliatory optimism necessary to produce agreement.\(^ {68} \)

\(^{65} \) Kerman, supra note 43, at 33.


\(^{67} \) In 1947 Congress created the Federal Mediation and Conciliation Service as part of the Taft-Hartley Act. See 29 U.S.C. §§ 171-74 (1970). This service, composed of experienced labor mediators has been highly successful despite the absence of any legal compulsion over the parties.

B. Fact Finding

One procedure which has found increased acceptance in the public sector is called fact finding.69 This procedure must be resorted to when parties to the dispute, or the public agency with supervision powers over all aspects of public employee relations, become aware that mediation techniques are insufficient to bring about agreement.70 Mediation techniques are inadequate when the parties' self-interest in the issue precludes them from interpreting the facts in dispute objectively. It is at this stage of the negotiations that a fact finder will be consulted.71

The role of the fact finder is to objectively inquire into matters pertinent to the dispute and then submit his recommendations to the parties.72 The presumption is that objective fact finding will show one party's interpretation of the evidence to be more credible than the other's and hopefully the compelling force of this credibility will induce the adverse party to accept the fact finder's recommendations. This compulsion is reinforced when the recommendations are made available to the public.73 Public availability may be conditioned, however, on whether the parties accept or reject the recommendations—if they are accepted then the recommendations may remain private.74

When the parties are obliged to accept the recommendations the procedure is no different than compulsory arbitration. Likewise, when the parties are free to reject the recommendations, the procedure is

69 See Howlett, Comment, Fact-Finding: Its Values and Limitations, in Arbitration and the Expanding Role of Neutrals 176 n. 2 (G. Somers & B. Dennis eds. 1970), for a listing of 20 state statutes which have adopted fact finding as the terminal point in public employee relations.

70 The Labor Mediation Board of Michigan has promulgated the rule that the parties must have engaged in mediation before they can apply for fact finding. See Roumell, The Role of the Fact Finder in Collective Bargaining for Public Employees 85, 86 (Practising Law Institute ed. 1968). In addition, the public employer must have agreed at the start of mediation to resort to fact finding when and if mediation fails. Krimsky, Public Employment Fact-Finding in Fourteen States, in Collective Negotiation for Public and Professional Employees 211, 215 (R. Woodworth & R. Peterson eds. 1969).

71 The normal procedure is for the fact finder to be a single individual, however, tripartite panels might also be utilized. See Howlett, supra note 69, at 180-81.

72 Roumell, supra note 70, at 87. There is some discussion of fact finding without the making of subsequent recommendations by Simkin, Fact-Finding: Its Values and Limitations, in Arbitration and the Expanding Role of Neutrals, 165, 167-68 (G. Somers & B. Dennis eds. 1970). This type of procedure, however, is rarely used.


74 Id. at 100.
similar in nature to advisory arbitration. In either event, the fact finder operates essentially as an arbitrator.

If fact finding is the terminal point in negotiations, the union is normally not an equal party to the proceedings. This inequality occurs because the employer is normally granted the right to reject the fact finder's recommendations with relative impunity. The union however, being denied the right to strike, is left with no alternatives. A solution to this inequity is partially obtained when, instead of being the terminal point, fact finding is made only a step in the resolution process. Thus, upon receipt of the fact finder's recommendations, the parties may return to the bargaining table for further negotiations. It has been noted, however, that when fact finding is merely a preliminary procedure, there is an increasing tendency for both parties to reject the recommendations as the basis for their agreement.

C. Arbitration

Arbitration consists of two types—advisory and binding. As noted earlier, fact finding with nonbinding recommendations is in the nature of advisory arbitration. In fact, advisory arbitration is the logical conclusion of fact finding as the arbitrator renders a decision which the parties should accept. Under the guise of the arbitration label the loser is better able to rationalize the result to its constituency. However, advisory arbitration will represent an exercise in futility if the loser elects to reject the arbitrator's decision. Thus advisory arbitration can hardly be thought of as a true alternative to impasse resolution.

Compulsory arbitration, on the other hand, has frequently been considered as such an alternative. In compulsory arbitration, when preliminary procedures such as mediation and fact finding have not been successful in resolving the dispute, the issue is submitted to an arbitrator whose decision is binding on the parties. The arbitrator selected may or may not be in the government service. If it is assumed that compulsory

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75 See Simkin, supra note 72, at 168.
76 The limitations of and objections to arbitration will be considered in the next section. See notes 80-91 infra and accompanying text.
77 Wurf, The Use of Factfinding in Dispute Settlement, in SORRY... NO GOVERNMENT TODAY 80, 87 (R. Walsh ed. 1969).
78 See notes 92-108 infra and accompanying text.
79 Sackman, supra note 73, at 100.
81 Sackman, supra note 73, at 100.
arbitration entails both mediation and fact finding, then it has superficial plausibility. However, a legion of objections have been raised against it. Historically, compulsory arbitration was considered illegal as an unauthorized delegation of governmental powers. However, since the decision in *Norwalk Teacher's Association v. Board of Education*, this argument has met with little success. The most pervasive argument against compulsory arbitration is that it distorts the concept of good faith bargaining. Since the party with an extremely weak bargaining position will never engage in serious negotiations, preferring instead to go to arbitration with the expectation that the arbitrator's decision will be a more favorable one than the party could have exacted through collective bargaining. Another contention is that compulsory arbitration infringes upon the employee's prerogative to reject proposals. In essence, both parties are deprived of freedom at the bargaining table. Finally, each party tends to view with suspicion an arbitrator's competence in the specific dispute, which thereby tends to render compliance with the award difficult if the dissatisfied party is the union.

While some commentators have viewed compulsory arbitration as a panacea, most have not. Yet, despite the obvious defects of compulsory arbitration, many still feel that when certain strikes, such as police or firemen are unthinkable, it is the only alternative.

D. **Limited Right to Strike**

Realization that an absolute prohibition of strikes is futile is not a new development. For many years, writers have been urging upon

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83 See Sackman, *supra* note 73, at 100-01.
84 See, e.g., Mann v. Richardson, 66 Ill. 481 (1873); City of Cleveland v. Division 268, Amalgamated Ass'n Ry. & Motor Coach Employees, 85 Ohio App. 153, 85 N.E. 2d 811 (1949).
85 138 Conn. 269, 83 A. 2d 482 (1951). The court concluded that arbitration was permissible under Connecticut law and further stated that arbitration deserved the "enthusiastic support" of the courts. See Griffin, *The Challenge of Public Employee Bargaining*, in *SORRY... NO GOVERNMENT TODAY*, 283, 288-89 (R. Walsh ed. 1969).
89 Id. at 38.
state legislators the concept of a limited right to strike. Under this concept, the right to strike is extended to a limited number of employees. The proposals have considered various methods to arrive at the limited groups of employees who may exercise this right. The most common method has been the functional approach—employees who serve an essential function are prohibited from striking while those serving in a nonessential function are not.

The arguments in favor of the essential-nonessential distinction are fairly obvious. Foremost is the fact that under every definition of essential services police and fire fighters are included. This tends to soothe the fears of those concerned with the health, safety and welfare of the public. Also with such a distinction, public officials could anticipate greater public support since the public remains apathetic until the essential services are disrupted. Finally, to date, there has been no large clamoring for the right to be extended to these two groups of employees.

The objections which have been raised against the limited right to strike for employees engaged in nonessential services are directed at the inherent definitional difficulties. One argument is that the apriori delineation of what services are essential and which are not defies legislative acumen. Another states that when an essential service is finally defined it will cut across to the private sector where employees can be found performing identical services as those described as essential. However,

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93 Kilberg, Labor Relations in the Municipal Service, 7 HARV. J. LEGIS. 1, 30-31 (1969). See THE COUNCIL OF STATE GOVERNMENTS, supra note 10, at 46-47. Burton & Krider, supra note 45, at 427, suggest that the services be broken down into the following 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.

94 THE COUNCIL OF STATE GOVERNMENTS, supra note 10, at 47.


96 This problem appeared so overwhelming to the Taylor Committee when it was preparing New York's current legislation on the matter, that the decision was made to continue the absolute prohibition of public employee strikes. See N.Y. CIV. SERV. LAW § 210 (McKinney Supp. 1971).

this argument contemplates a more expanded concept of "essential" than is normally promulgated. As will be seen, neither objection has presented obstacles to legislatures intent on providing some balance in the public collective bargaining setting.

Montana has provided that nurses may strike under a certain condition. The limiting condition is that there must be another health care facility available within a 150 mile radius of the facility being struck which has not simultaneously been shut down by a strike. Why that state has limited the right strictly to nurses is not clear.

The most commonly discussed concept of the limited right to strike is manifested in Pennsylvania's recently enacted legislation. Police and fire fighters are denied the right and instead must resort to compulsory arbitration for resolution of impasse disputes. In addition, guards at prisons and mental hospitals, along with all personnel necessary to the functioning of the state courts are absolutely prohibited from striking. All other personnel may exercise the right to strike but only after mediation and fact finding procedures "have been completely utilized and exhausted." A further restriction on the right is available to employers when, in their opinion, a strike may create a clear and present danger or threat to the public's health, safety, or welfare. The employer may seek injunctive relief as well as other equitable remedies which will be granted if the employer can prove his claim to the court. Resort to the courts for a determination of the clear and present danger to the health, safety, and welfare of the public is arguably an escape from a perplexing problem by the legislature. This criticism is more appropriately directed at a statute such as Vermont's where all public employees (except state employees) are granted the right to strike subject to the employer's right to obtain an injunction where the strike will "endanger" the health, safety, or welfare of the public. Conceivably, any strike could be considered to pose such a threat. This problem is not merely hypothetical. In Septa v. Transport Workers of Philadelphia, the

98 "A determination of essentiality might easily be made in advance with respect to police and fire services, but it would be difficult to categorize many other situations." Id. at 951.


100 PA. STAT. ANN. tit. 43, § 217.03 (Supp. 1971).


102 Id. at § 1101.1003 (Supp. 1971).

103 Id.

104 VT. STAT. ANN. tit. 21, § 1704 (Supp. 1968). While state employees are prohibited from striking, it appears that to enjoin a teacher strike, the state will have to meet the same burden of proving that the strike is a clear and present danger to the educational program. Edwards, supra note 9, at 11.16.

bus drivers had gone out on strike and the Transit Authority sought a preliminary injunction to curtail them. In issuing the injunction, the Pennsylvania court left little doubt that any strike by a public employee might be enjoined.106 Hence if the legislature does not provide the judiciary with some guidelines, the establishment of a limited right to strike may result in an absolute prohibition by the judiciary.

In this regard, it will be interesting to watch the development under Hawaii's new statute which provides every public employee the right to strike.107 This right of course is conditioned upon the employee's good faith compliance with statutory impasse procedures.108 This statute, however, creates a state board (Public Employee Relations Board) to supervise all conduct under the statute.109 The board is given the power to evaluate the threat which the strike poses to the community, and it may impose requirements on the strikers to protect the public. A board consisting of persons skilled in public employee relations would appear to be a much more appropriate solution to the problems of balancing community and employee interests than the method of giving the employer free access to the courts to secure injunctions.

At this point it will be worthwhile to consider proposals currently before the Ohio General Assembly dealing with the issue of public employee strikes.

IV. BILLS CURRENTLY BEFORE THE OHIO GENERAL ASSEMBLY

Numerous bills have recently been introduced for consideration by the Ohio General Assembly, though for only four is consideration expected to be serious.110 Two bills—the Administration's bill introduced by Senators Bowen and Mottle,111 and the Ohio Bar Association Labor Law Committee's bill (Labor bill) introduced by Senator Cook112—would repeal the Ferguson Act and incorporate the distinction between essential and

106 The court felt that the strike (1) caused traffic congestion to such a degree that it was a threat to safety and was a danger to (2) the aged, (3) the prison system, (4) a job training program, (5) those in need of medical attention, (6) the school system, and finally (7) the economic welfare. Certainly such concern can only be described as excessive paternalism.

107 HAWAII REV. LAWS § 89-12(c) (Supp. 1970).

108 Mediation and fact finding are mandatory preliminary procedures. HAWAII REV. LAWS § 89-11(b) (1) & (2), (Supp. 1970). If the parties agree, voluntary arbitration may be resorted to, but the results are binding. Id. § 89-11(b) (3) (Supp. 1970).


110 Five bills have been introduced into the Senate and ten bills have been introduced into the House of Representatives, according to Mr. Newburger, the Deputy Director for Policy Planning for the Ohio Department of Commerce.


nonessential services while authorizing a limited right to strike. Because these bills share many similarities they will be discussed concurrently.

An Employee Relations Board is established in both the Administration and the Labor bills. The structure and function of this Board is extremely similar to the National Labor Relations Board. The Board, as provided in either bill, would consist of five members to be appointed by the Governor for six-year staggered terms. The Labor bill contains the proviso that no more than three of the five members of the Board shall belong to the same political party. While it may be argued that such a proviso is no guarantee of balanced objectivity on the Board, nonetheless, the Administration bill, which contains no such limitation on the Governor's appointment power, would appear to be deficient in that matter. The political ramifications loom larger when it is noted that each bill authorizes the Board to appoint employees to positions deemed necessary to allow the Board to carry out its functions. These positions include mediators, fact finders, and arbitrators. As this article is concerned primarily with the problems of impasse resolution, however, the many other facets of these bills will not be discussed.

Impasse resolution procedures may be agreed upon by both parties and contained in their collective bargaining agreement under the Administration bill. When negotiations commence, the agreement as to impasse resolution procedures contained in the existing contract will prevail over the procedures provided for in the statute. Where the existing contract does not provide for voluntary binding arbitration of the dispute and the parties are unable to reach an agreement they may avail themselves of the Board's assistance by notifying the Board of the impasse. This notification, however, must be made sixty days prior to the termination date of the existing contract. The Labor bill, on the other hand, does not mention the possibility of impasse resolution procedures being contained in the existing contract but it does require the parties to notify the Board of the impasse thirty days prior to the termination of the contract.

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114 S.B. 194, enacting OHIO REV. CODE § 4119.05 (A) & (D) and S.B. 344, enacting OHIO REV. CODE § 4117.05(C).
115 Other aspects of both bills include the delineation of unfair labor practices, provisions for recognition of the appropriate unit, supervisory control over the Board by a citizen's advisory council, and even the election procedures. An interesting comparison can be made between the proposals contained in the bills and the National Labor Relations Act, 29 U.S.C. §§ 151 et seq. (1970).
117 Id. enacting OHIO REV. CODE § 4119.13(A) (1).
118 S.B. 344, enacting OHIO REV. CODE § 4117.13(B).
When an impasse in bargaining is reached, the Board is authorized under both bills to appoint a mediator to assist the parties. 119 If mediation is unsuccessful in enabling the parties to reach an agreement, the mediator will certify to the Board that the impasse still exists. Both bills provide for fact finding at this stage of the negotiations. The Labor bill requires the Board to impose fact finding on the parties, 120 whereas the Administration bill leaves the imposition up to the discretion of the Board. 121 A fact finding panel consisting of not more than three members is a common provision of the bills. Under the Administration bill, if the Board decides to impose fact finding on the parties, they must be in agreement as to the members appointed to the panel. 122

The emphasis placed on the fact finding procedure is quite disparate in the two bills. The Administration bill appears to place little emphasis on the procedure and to treat it in a rather cursory manner. The fact finding panel, speaking through its majority, is required to transmit its findings and recommendations to the parties involved in the dispute. 123 No mention is ever made as to the Board being able to make the findings and recommendations public at a later time. Thus the pressure of public opinion is not brought to bear on the parties as an aftermath of the procedure. If, within ten days after they have received the findings and recommendations, the parties are still unable to resolve the impasse, they may then resort to further procedures which are discussed subsequently. 124 The Labor bill, however, does not ignore the reality of public opinion. If the parties do not reach an agreement within ten days after they have received the panel's findings and recommendations the Board may, in its discretion, make public its recommendations. 125 Should either party refuse to accept in whole or in part the panel's recommendations, the chief legal officer of the public employer involved must, within five days after receipt of the findings and recommendations by the parties, submit them to the legislative body of the public employer. 126 Nonacceptance at this stage by either party will trigger the limited right to strike provisions

120 S.B. 344, enacting Ohio Rev. Code § 4117.13(D).
122 Id. S.B. 344 contains no such requirement.
123 This procedure is the same in both bills. Compare S.B. 194, enacting Ohio Rev. Code § 4119.13(A) (5) with S.B. 344, enacting Ohio Rev. Code § 4117.13(E).
124 See notes 128-33 infra and accompanying text.
125 S.B. 344, enacting Ohio Rev. Code § 4117.13(F) provides that the Board: "[M]ay take whatever steps it considers appropriate to resolve the dispute, including the making of public recommendations after giving due consideration to the findings of fact and recommendations of such fact-finding board."
126 S.B. 344, enacting Ohio Rev. Code § 4117.13(G).
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The Administration bill expressly prohibits police, firemen, and guards at penal or mental institutions from striking. Thus when an impasse still exists between these employees and a public employer ten days after they have received the fact finding panel's findings and recommendations, the matter must be submitted to final and binding arbitration. All other public employees are granted the right to strike. However, if the public employer is of the opinion that the strike represents a clear and present danger to the health and safety of the public, it may request from the Board authorization to enjoin the strike. If the Board concurs in the public employer's fear that the strike would constitute such a danger, it may authorize the employer to seek an injunction of the strike in the court of common pleas in the county where the parties to the dispute are situated. The court is precluded from issuing an injunction unless the employer has obtained authorization to seek it from the Board. If the authorization has been obtained the court, under its general equity jurisdiction, will determine whether or not to issue the injunction.

When the court issues an injunction, the Board is given a continuing duty to attempt to mediate the dispute. However, if the parties are unable to resolve the dispute within ten days after the injunction has been issued, the Board will appoint an arbitrator to make a determination which will be final and binding on both parties. Employees who are not subject to statutory or judicial prohibitions against striking have no limits placed on the period of time they may withhold their services, and no further procedures are imposed upon the parties in their attempt to resolve the impasse.

The Labor bill incorporates the essential-nonessential distinction also but provides for a much different method to determine which employees

127 S.B. 194, enacting Ohio Rev. Code § 4119.13(A) (6). For employees authorized to strike, the Labor bill requires that 45 days elapse after the parties have received the fact finding panel's recommendations, before the employees may strike. S.B. 344, enacting Ohio Rev. Code § 4117.15(D).
129 The selection of an arbitrator is left up to the parties. If the selection is not made within five days, however, the Board will appoint an arbitrator from the list of qualified persons which the Board maintains. Id.
130 S.B. 194, enacting Ohio Rev. Code § 4119.13(A) (6) (B). The Board may, at its discretion, attempt mediation of the dispute at any time during the negotiations. Id.
131 S.B. 194, enacting Ohio Rev. Code § 4119.14(A). This power apparently is intended to cover strikes by police, firemen, etc. also.
132 Id. enacting Ohio Rev. Code § 4119.14(B).
133 Id. enacting Ohio Rev. Code § 4119.14(C). Before the ten-day period has elapsed, however, the parties may select an arbitrator to make the determination. Id.
are essential, and, hence, may not strike. Essential employees are denominated as "excepted" in the bill. Excepted employees are those "whose duties are wholly or substantially necessary or essential to the safety or security of the public." The Board, at the request of the public employer or labor organization, determines which classes of employees are to be encompassed by the statutory description. While the Board's determination is quite likely to result in a stratification similar to that made legislatively in the Administration bill, such a result is not absolutely required. When either party applies to the Board for a determination as to whether the employees are excepted, both parties may submit written statements to the Board in support of their position. Conceivably the police or firemen in a small town might not be held by the Board to be excepted employees. In this respect the Labor bill appears to be more flexible than the Administration's bill. A further positive factor is that the determination will be made by specialists in the area of public employment.

If the determination is that a group of employees is to be considered excepted, then when an impasse extends ten days beyond receipt of the fact finding panel's recommendations, those recommendations become final and binding on the parties. However, employees not specifically prohibited from striking may do so if the parties have not reached an agreement within forty-five days following the receipt of the fact finding panel's recommendations. The strike may continue until an agreement is reached. While the employees are out on strike, the public employer has authority to engage the services of subcontractors or other employees to perform the work of the striking employees. This right is not authorized in the Administration bill and possibly with good reason. The Administration bill imposes an affirmative duty on the employer to bargain in good faith after the employees have gone out on strike whereas a good faith

134 In addition, employees who are not included in a bargaining unit for which a Labor organization has been certified by the Board are prohibited from engaging in a strike. S.B. 344, enacting Ohio Rev. Code § 4117.15(A).
135 Id. enacting Ohio Rev. Code § 4117.14(A).
136 Id. enacting Ohio Rev. Code §4117.14(B) & (C).
137 The Administration bill expressly prohibits policemen, firemen, and guards at penal or mental institutions from striking. S.B. 194, enacting Ohio Rev. Code § 4119.13(A) (6) (A).
139 Id. enacting Ohio Rev. Code § 4117.14(E).
140 Id. enacting Ohio Rev. Code § 4117.15(D). The Board determines when a strike violates the provisions of Section 4117.15. If it finds a violation after a full hearing, the Board shall order a cease and desist order and any other affirmative relief or action, including the award of damages to the affected employer. These orders are enforceable by the Court of Appeals, upon petition by the Board. Id. enacting Ohio Rev. Code § 4117.16(A)-(F).
141 Id.

http://ideaexchange.uakron.edu/akronlawreview/vol5/iss2/2
requirement is absent in the Labor bill. Thus, under the Labor bill, there is no compelling motivation for the public employer to engage in meaningful collective bargaining as the ire of the community will not be raised so long as the services are being performed. Consequently, the subcontracting provision could serve to undermine the union's efforts at the bargaining table unless a good faith criterion is read into the general duty to bargain.

A final and seemingly unnecessary provision of the Labor bill allows for the Governor, if he feels that a potential strike will imperil the health or safety of the public, to secure the recommendations of the fact finding panel and make them available to the public. He may then petition, through the Attorney General, any court of appeals having jurisdiction over the parties to enjoin the strike. The court may issue the restraining order if it is convinced of the Governor's fears. When an injunction is issued by a court of appeals, the parties remain under a continuing duty to negotiate. If they are unable to reach an agreement within sixty days the Board must submit a statement of each party's position and the public employer's last offer of settlement to the Governor, who may make them available to the public. During the next fifteen days the Board will take a secret ballot of the employees to see if they wish to accept the last offer of settlement made by the employer. The results of this ballot are certified by the Board to the Attorney General, who will then move to have the

142 Both bills provide that: "It shall be an unfair labor practice for a public employer to: ... (5) Refuse to bargain collective with the representative of his employees certified pursuant to Chapter 4119 of the Revised Code." S.B. 194, enacting OHIO REV. CODE § 4119.04(A) (5). See S.B. 344 enacting OHIO REV. CODE § 4117.04(A) (5) & (C). In this respect they contain essentially the same language as that found in the National Labor Relations Act 29 U.S.C. § 158 (1970). The requirement that the parties bargain collectively in good faith is limited in the NLRA to "wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d) (1970). The Administration bill goes beyond this to requiring good faith bargaining to "the negotiation of an agreement, or any question arising thereunder." S.B. 194, enacting OHIO REV. CODE § 4119.09(B).

143 S.B. 344, enacting OHIO REV. CODE § 4117.17(A). The precise language of the section is that the Governor "may direct the Ohio Public Employment Relations Board to submit a copy of the findings of fact and recommendations of the Board to him within such time as he prescribes." It is not entirely clear whether the reference is to the recommendations of the fact finding panel or those made by the Board—in its discretion, ten days after the parties have received the panel's recommendations and have still not resolved the impasse—which may be made public.

144 This section talks about "a threatened or actual strike or lockout affecting a public employer," however, it is the first time the term lock-out is used in the bill. In context, it would appear that the drafters are treating it as a weapon of the employees, but common knowledge instructs that the lock-out is an employer's counter to a strike threat. It might be inferred that the public employer has been given the lock-out weapon but the inference is quite weak when it is drawn from the section dealing with the Governor's emergency powers. Consideration of this point should certainly be made by the Ohio General Assembly.

145 S.B. 344, enacting OHIO REV. CODE § 4117.17(B).

146 Id. enacting OHIO REV. CODE § 4117.17(C).

147 Id.
injunction discharged.\textsuperscript{148} Upon the court's granting of the motion to discharge, the Governor will submit a comprehensive report to the General Assembly along with any recommendations he sees fit to make.\textsuperscript{149} All of the procedures related to the Governor's intervention serve to undermine both the Board and the Labor organization involved. The integrity of the Board suffers because the Governor, in an overseer function, is performing a function which the Board was created and is authorized to do. Such intervention is likely to be only a political act, but, it could generate a presumption of the Board's ineptitude. The Labor organization is undermined when the secret ballot is taken of its members. In the private sector, normal union politics tend to purge leadership whose interests become alienated from the membership's, and no reason exists to suppose that the same process would not occur in the public unions.

A third bill,\textsuperscript{150} sponsored by Senator Leedy, is novel in several respects. Unlike the other bills addressing this subject, it does not repeal the Ferguson Act. The bill operates in conjunction with the Ferguson Act to continue to prohibit public employee strikes with one exception. When a public employer refuses to abide by the result of binding arbitration, the bill's terminal procedure for impasse resolution, its employees are exempted from the Ferguson Act in that its sanctions no longer apply.\textsuperscript{151} This exception is sufficiently narrow so as to be tantamount to a continuance of the Ferguson Act prohibition per se and is the major shortcoming of the bill.

Although the Leedy bill also establishes a Public Employee Personnel Board similar to the National Labor Relations Board, the role of the Board differs substantially from that of the Administration and Labor bills. This Board, composed of three members appointed for staggered six-year terms, may act only when requested to do so by one of the parties involved in an impasse.\textsuperscript{152} If the parties elect to do so they may structure impasse resolution procedures culminating in binding arbitration in the complete absence of Board supervision and assistance. The procedural options available to unions and employers for impasse resolution are the most imaginative feature of the bill and, on that basis, merit serious consideration.

Under the Leedy bill, impasse resolution procedures may be the subject of a prior agreement or may be invoked by the parties at the time

\textsuperscript{148} \textit{Id. enacting Ohio Rev. Code \S 4117.17(D).}
\textsuperscript{149} \textit{Id.} Presumably the employees may resort to a strike upon the lifting of the injunction.
\textsuperscript{151} S.B. 340, \textit{enacting Ohio Rev. Code} \S 4119.13.
\textsuperscript{152} S.B. 340, \textit{enacting Ohio Rev. Code} \S\S 4119.14-20.
of impasse. Negotiations may begin at the request of either party at any time. Once begun, the negotiations must be completed within thirty days or an impasse situation is declared. If agreement is not reached within thirty days both parties have the option of requesting the intervention of a local fact finding committee and advising the Board that an impasse exists or continuing to negotiate under time limits set by prior agreement. The local fact finding committee is to be made up of three members, one selected by the union, the other selected by the public employer, and a chairman selected either by the first two members or by the Board if they cannot agree. The absence of restrictions on selection of committee members is sagacious insofar as it will allow locally prominent people to participate, thereby lending greater credence to committee findings. After selection, the fact finding committee may review matters under dispute, conduct hearings, and consider statements made either by the parties or others in reaching its conclusions. A report embodying these conclusions is then made available simultaneously to the parties and the public within ten days following selection. Publication of the report is a necessary corollary to the prominence of the local committee; the credibility attributed to its findings will serve to maximize public pressure for settlement.

If the impasse is resolved at this stage the public employer simply notifies the Board and the contract is ratified by both sides. If, however, the impasse persists, the parties are faced with yet another choice. They may either request intervention by the Board or allow the impasse to go to binding arbitration as required by the bill. If the parties allow the dispute to go to arbitration, they must select an arbitrator from a list provided by the American Arbitration Association. The arbitrator's decision is binding on both parties.

At this juncture the right to strike arises in its limited form. If the public employer does not accept the decision of the arbitrator, the penalties of the Ferguson Act are suspended with regard to the employees. If, on
the other hand, the union or the public employees refuse to accept the arbitrator's decision then the Ferguson Act penalties do apply. 165

If either party seeks intervention prior to binding arbitration, the Board invokes the somewhat standard steps of impasse resolution procedure beginning with mediation. The Board appoints the mediator from a list maintained by it. 166 If the mediation is unsuccessful, either the mediator or the parties may request the Board to empanel a state fact finding board. The three members of the state fact finding board are selected by the Board from a list of qualified persons maintained for this purpose. Within ten days the fact finding board makes its recommendations available to the parties and the Board, but regrettably does not make them available to the public. 167 The Board may modify the recommendations of the fact finding board and if the impasse still persists, it may require the parties to submit to binding arbitration under the same procedure imposed upon the parties if they had not requested Board intervention. 168

Overshadowing this entire area is the good faith bargaining requirement provided in the bill. The requirement is enforced by the Board which has the power to investigate breaches of good faith, make determinations of the meaning of any provision in an existing collective bargaining agreement, and to make such determinations and issue such orders as may be reasonable and necessary to effect any breach of good faith found to exist. 169 The Board may enforce its determinations and orders by applying to the court of common pleas for an injunction wherever the violation occurs or a violator is found. 170

A final factor of significance in the Leedy bill is its retention of individual negotiations throughout the public employee sector. These negotiations, termed "professional negotiations," are to remain wherever they preexisted the bill and may be created under it. 171 This provision would appear unwise because although it appeals to many professionals in public employment who may be able to bargain effectively alone, it nevertheless undercuts union power in bargaining. Bargaining strength
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is a function of the number and value of employees represented; to preclude a substantial number of valuable professional employees from collective bargaining will serve only to destroy the union bargaining strength already weakened by the retention of the Ferguson Act.

The final bill expected to receive consideration by the General Assembly is sponsored by Senator Turner. It repeals the Ferguson Act but, unlike the other bills, does not establish a Public Employee Relations Board. As a result the public employer plays the dual role of party to the collective bargaining and enforcer of the Act. The primary oddity of this bill is that, though it prohibits strikes, throughout it are provisions which anticipate public employee strikes.

Initially, the bill requires police, firemen, prison guards and all guards such as university police who enforce rules against other public employees to protect the safety of persons on the employer's premises, to be included in a separate bargaining unit. This distinction serves the dual purpose of maintaining essential services and protecting the employer's property in the event of a strike by a major public employee union.

Collective bargaining under the bill must commence at least 120 days before the end of the fiscal year if any item involved will require legislative appropriation. The bill provides the public employer with an instrument of countervailing pressure by reserving to it the right to maintain the efficiency of governmental operations. This presumably would allow the public employer to subcontract any services which may be interrupted by a strike. The bill further dictates that the collective bargaining agreement contain no strike and lockout provisions. This would allow for simple breach of contract actions for any breaches. Subsequent sections of the bill further implement this mandate by expressly prohibiting both strikes and lockouts.

The parties are given the opportunity to agree on impasse resolution procedures under the bill, but they are expressly precluded from resorting to binding arbitration unless they do so under the provisions of the bill. If the parties are unable to resolve the impasse, fact finding must be resorted to. Of course they may also agree upon fact finding as a resolution procedure. In either event, they may select their own facts.

173 S.B. 338, enacting Ohio Rev. Code § 4119.05(D).
175 S.B. 338, enacting Ohio Rev. Code § 4119.06(A).
177 Id.
finder, but in absence of agreement by the parties on a fact finder, one may be appointed by a judge of the local common pleas court. The fact finder is required to hold hearings and make written findings and recommendations for resolution of the dispute available to the parties within twenty days of his appointment. The fact finder may, at his option, make his report publicly available within five days after its submission to the parties. In any event, the Turner bill requires the report to be made public fifteen days after its submission to the parties. After fact finding the parties may submit to voluntary binding arbitration with the provision that the decisions of the arbitrator which would require legislative enactment in order to be effective shall be considered advisory only.

The provision of the bill which prohibits strikes is addressed specifically to the union as opposed to public employees per se. It expressly prohibits labor organizations or their agents from engaging in a strike or from encouraging public employees to engage in a strike. This phraseology is salutary only to the extent that it does not expressly designate striking employees as criminals.

When a labor organization calls a strike despite the bill's prohibition, the public employer then assumes the dual role of party and enforcer. If the union has not availed itself of the opportunities for mediation or fact finding in the bill, the public employer may immediately dismiss or discipline employees who engaged in the strike and suspend the union's checkoff privileges indefinitely. If, on the other hand, the union strikes after mediation and fact finding, the public employer must first petition the court of common pleas for a temporary restraining order. If the order is not forthcoming within three days or if striking employees refuse to obey the order, the public employer may then invoke the sanctions with the qualification of a two-year limit on the checkoff suspension. If on a hearing for a permanent injunction the court finds that the strike was the result of the employer's failure to bargain it must order the employer to take no action against either the striking employees or the union. In summary, the Turner bill's major shortcoming is its overburdening of the

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180 Id.
181 The bill provides that the fact finder may also attempt to mediate or resolve the dispute. Id.
182 Id.
183 Id.
184 Id.
185 S.B. 338, enacting OHIO REV. CODE § 4118.08(B).
186 S.B. 338, enacting OHIO REV. CODE § 4119.09.
189 Id.
public employer. Few public employers are sufficiently versed in labor law to be effective bargainers let alone to act as quasi-labor boards.

V. AN UNQUALIFIED RIGHT TO STRIKE

That an absolute prohibition against public employee strikes is ineffective is a proposition no longer disputed. Hardly a day goes by without some public employees deciding to withhold their services in an attempt to underscore the intensity of their position to both the public employer and the public.\(^{190}\) Imposition of the statutorily provided sanctions to punish such conduct is recognized to be unfeasible\(^ {191}\) due to both the inhibition on collective bargaining which exists when the strike leaders are in jail, and the impracticality of replacing all the strikers after discharging them. Tension reduction of the conflict between law and reality in this area is finally being attempted by a few states. This attempt is manifested by the legislation discussed earlier which grants public employees a limited right to strike.\(^ {192}\) While this legislation has been enacted in only a few states, it certainly appears that a trend toward a limited right to strike may have commenced. Legislative proposals currently before the Ohio General Assembly suggest the possibility that Ohio may follow this trend. The question to be answered is: Is a limited right to strike the most appropriate response?

Inherent in the usual concept of a limited right to strike is the countervailing notion that the withdrawal of certain services by public employees is unthinkable.\(^ {193}\) This notion centers on the premise that the government is responsible for the health, safety, and welfare of its constituency. The services which maintain the health, safety, and welfare of the community are usually termed essential.\(^ {194}\) It is the determination of

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\(^{190}\) Not surprisingly, almost half of the public employee strikes that occurred during 1968 emanated from the employees' desire to improve their condition such as through higher wages. See \textit{The Council of State Governments}, \textit{supra} note 11, at 43.

\(^{191}\) Were one to accept John Austin's notion that law is the command of the sovereign, the antistrike provisions would not even be considered as law because the sovereign has no intention of inflicting evil on the insubordinate subject. See \textit{Austin, Lectures on Jurisprudence}, in \textit{Society, Law and Morality} 400-04 (F. Olafson ed. 1961).

\(^{192}\) See notes 99-108 \textit{supra} and accompanying text.


\(^{194}\) Even the most vociferous proponents of the right to strike tend to agree that "essential" services may not be discontinued. For example, Theodore Kheel suggests that when a strike would endanger the safety and health of the community, the government should be given the power to seek an injunction. This allows for a cooling-off period similar to that provided for in the Taft-Hartley Act. Kheel, \textit{Strikes and Public Employment}, 67 Mich. L. Rev. 931, 941 (1969). The American Federation of State, County and Municipal Employees AFL-CIO insists upon the right of all public employees—except for police and other law enforcement officers—to strike. The charter of every local provides for immediate revocation if members who are police assist, in any way, in withdrawal of police services. \textit{Policy Statement on Public Employee Unions: Rights and Responsibilities}, in \textit{Sorry...No Government Today} 67, 68-69 (R. Walsh ed. 1969).
which services are essential that provides the major impediment to this approach.\textsuperscript{195} Problems arise in the determination because often services which are deemed essential are being performed by private sector employees.\textsuperscript{196} In addition, the essentiality of the particular service may vary from community to community. Thus, a legislative determination may be too inflexible to properly accommodate all public employees, while a deferral to the courts is likely to result in practically an absolute prohibition.\textsuperscript{197}

The creation of a State Board which would make the determination of which services are essential\textsuperscript{198} appears to overcome these objections, but it certainly is not a panacea. The employees who are classified as performing essential services are still prohibited from striking. Alternative impasse resolution procedures such as compulsory arbitration,\textsuperscript{199} or fact finding with binding recommendations, or even Board recommendations which have taken into account the fact finding recommendations\textsuperscript{200} are not likely to assuage employees who feel the resolution is inequitable. This will be especially true when a public employer has not completely bargained in good faith in hope that the arbitrator's or fact finder's award would be more generous than the employer's true bargaining position warranted. When these or comparable situations occur, the public employee must strike.\textsuperscript{201}

Recognition of the inevitability of strikes has led Professor Merton Bernstein to suggest a substitute for strikes which would alleviate some of

\textsuperscript{195} Former Secretary of Labor Willard Wirtz stated in an address delivered at the 16th International Convention of American Federation of State, County and Municipal Employees in April, 1966 the following:

I should like to suggest... that an attempt to distinguish between various kinds of governmental functions in terms of their essentiality seem to me fruitless and futile. Policemen and firemen are... no more essential than school teachers. The only difference is that the costs and losses from being without fire and police departments is [sic] more dramatic and more immediate, but... in terms of measure of the importance to the future... school children being without education, even for a week, is a matter of serious concern.


\textsuperscript{197} See notes 105-06 supra and accompanying text. See also Norwalk Teachers Ass'n v. Board of Educ., 138 Conn. 269, 83 A. 2d 482 (1951). \textit{But see} City of Holland v. Holland Educ. Ass'n 380 Mich. 314, 157 N.W. 2d 206 (1968), where the court required that the public employer come into court with clean hands (had engaged in good faith bargaining) prior to seeking injunction of a teachers' strike.

\textsuperscript{198} This idea is found in S.B. 344, enacting OHIO REV. CODE § 4117.14.

\textsuperscript{199} See, e.g., S.B. 194, enacting OHIO REV. CODE § 4119.14(C).

\textsuperscript{200} S.B. 344, \textit{enacting} OHIO REV. CODE § 4117.14(E).

\textsuperscript{201} From a Freudian perspective, such behavior can certainly not be considered unnatural. S. FREUD, \textit{CIVILIZATION AND ITS DISCONTENTS} 43 (J. Strachey transl. & ed. 1961). \textit{See also} Kheel, \textit{supra} note 194 at 935.
the problems strikes pose.\(^{202}\) His substitute is called the non-stoppage strike, which attempts to force the economic realities of a strike upon the public employer. In a non-stoppage strike all work continues to be performed. The employees would give up part of their compensation for example, 10 per cent initially. The employer, on the other hand, would be required to pay out the normal compensation plus the amount given up by the employees. Obviously a surplusage of money immediately will come into being. The amounts foregone would be placed into a separate fund and devoted to otherwise unfunded public purposes. Professor Bernstein notes that while public purposes would be served, these funds would not enable local government to employ the extra amounts for ordinary governmental functions. The union would have the option of increasing the percentage during subsequent weeks if it felt bargaining was not proceeding satisfactorily. This option is clearly limited by the amount of compensation the membership is willing to give up.\(^{203}\)

The major thrust of the non-stoppage strike appears to be that it provides an alternative to the abrupt discontinuance of all services. It is admittedly geared to the economic aspects of the strike power but it neglects the political pressures which are created when the community is deprived of services.\(^{204}\) Thus, while the threat of a non-stoppage strike attempts to equalize the parties at the bargaining table, it still falls short.

In view of the shortcomings of providing public employees with a limited right to strike, it appears that the only viable alternative is to extend an unqualified right to strike to all public employees. The unqualified right would enable all public employees to strike regardless of the essentiality of the services they provide. Such a suggestion must deal with the threshold question: Should police and firemen be allowed to strike? If the unqualified right to strike can be shown to be feasible for police and firemen, the two categories highest on the essentiality scale, it will be feas-


\(^{203}\) Id. at 470.

\(^{204}\) Professor Bernstein also develops the concept of a graduated strike as a substitute. Under this proposal employees could call graduated strikes which would allow for the withholding of services of one-half day during the first week with the option of increasing the time during later weeks. This would allow the community to experience some discomfort on a graduated basis and would avoid the disruption caused by the total termination of the particular service. However, the concept of essentiality is incorporated into this proposal. Thus once it is determined that a further reduction of services would imperil the public health or safety, the employees are prohibited from increasing their graduated strike. Id. at 474.
ible throughout the public sector—our case hinges on whether the health, welfare and safety of the community will be endangered by these strikes.206

Initially it must be pointed out that there is a common fallacy inherent in virtually all the statutes either proposed or in existence dealing with public employee relations. This fallacy is the failure to distinguish between the essentiality of a service and the essentiality of the people who provide it.206 It has led the drafters of the statutes to prohibit employees from striking when in essence they really meant to prohibit the discontinuance of a service. While a particular service in a community, such as law enforcement, is essential, the people providing that service are not. And yet judicial inquiry throughout this area has largely been premised on the identity of a service to the people who provide it.207 Any inquiry based upon such a premise inevitably results in a finding that the employees in question are essential to the community and therefore may not strike.208

Substitutes for public employees do exist. For example, if the police of one town chose to strike, their duties may be fulfilled by police from neighboring communities, county and state police, private guards, and even the National Guard if necessary. Since most strikes may be foreseen well in advance, it is plausible to place replacement personnel on a standby alert thereby insuring that essential services will not be interrupted.209 Although the cost of some substitutes, such as the National Guard, may be quite high and their availability may vary between localities, this is a factor in the relative bargaining strength of the parties and nothing

206 These criteria, although amorphous, are probably the most specific capable of statutory codification to measure the essentiality of a governmental service. For criticism see Note, Recommendations of the Governor's Commission to Revise the Public Employment Law of Pennsylvania: A Preliminary Assessment, 30 U. PITT. L. REV. 170 (1968).


209 A classic example of the power of a public employer to assemble reserve manpower occurred in Chicago during the 1968 Democratic Convention. Mayor Richard J. Daley supervised the most massive security arrangements in the history of American politics: Chicago's twelve thousand policemen had been put on twelve-hour shifts; five thousand Illinois National Guardsmen had been mobilized and were standing by near the downtown area; six thousand specially trained army troops were flown in and were in combat readiness at Glenview Naval Air Station, just north of the city; several hundred state and county law enforcement officers were on call; and the largest number of secret service agents ever used at a political convention were in Chicago. Including the private security workers hired for the convention site, a security force of at least twenty-five thousand was in the city. Mayor Daley commanded an army larger than that commanded by George Washington. See M. ROYKO, BOSS: RICHARD J. DALEY OF CHICAGO 178 (1971).
more. In addition, the use of such substitutes by a public employer may well provide a strike deterrent for future years and for other localities.210

Another source of countervailing pressure against strikes by police and firemen inheres in the nature of the work itself. The success of enforcement and prevention efforts, and in many cases even the safety of the men lies in the cooperation and goodwill of the community.211 Those public employees who strike for excessive wages or petty grievances will soon encounter widespread approbation.212 Through the publication of fact finding reports the public may be appraised of the merits of a dispute and as wages in the public sector approach those in the private sector the latitude for strikes will narrow.213

A primary benefit of the unqualified right to strike will be the synthesis of law with reality for strikes by police, firemen and other such "essential" employees do occur and will continue to do so either overtly or covertly.214 To label one man a criminal for attempting to benefit his economic status in a manner readily available to his peers is wholly inconsistent with the basic philosophy of capitalism. If the valuable theory of allocating wages to services through collective bargaining and controlled economic competition is to be successfully engrafted from the private to the public employment sector, it cannot be diffused into sterile formalities.

210 In any event the mere threat of the use of a substantial strike breaking force would materially strengthen the public employers bargaining position.
212 Some commentators have postulated that the pressure of rising taxes may put the public in such a recalcitrant mood that it may be willing to endure the loss of even essential services. See Burton & Kreider, The Role and Consequence of Strikes by Public Employees, 79 YALE L.J. 418, 427 (1970).
213 The use of a locally prominent fact finding committee appears to be a very effective way of making such information available to the public. See note 157 supra and accompanying text.
214 An overt strike is a publicized formally announced walkout while a covert strike occurs when public employees absent themselves for legal excuses which are usually false. An example of a covert strike is what is popularly termed the "blue flu." It occurs when police engage in a work stoppage by calling in sick where they cannot legally strike. See Rains, New York Public Relations Laws, 20 LAB. L.J. 264 (1969). For an account of a recent sick call strike by firemen in Ashtabula, Ohio see The Plain Dealer (Cleveland, Ohio) Nov. 29, 1971 § A, at 8, col. 1.