

Chicago-Kent College of Law

From the Selected Works of Martin H. Malin

February, 1993

Public Employees' Rights to Strike: Law and Experience

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PUBLIC EMPLOYEES' RIGHT TO STRIKE: LAW AND EXPERIENCE

Martin H. Malin*

A very popular former United States president who won his office in an Electoral College landslide once stated:

[M]ilitant tactics have no place in the functions of any organization of Government employees. . . . [A] strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of Government until their demands are satisfied. Such action, looking toward the paralysis of Government by those who have sworn to support it, is unthinkable and intolerable.¹

That was not Ronald Reagan firing striking air traffic controllers in 1981. It was Franklin Delano Roosevelt, the same president who signed the Wagner Act² declaring the federal policy of promoting collective bargaining and providing a statutory right to strike in the private sector.

Although most states adhere to Roosevelt's philosophy and prohibit public employee strikes, times have changed. In 1970, Hawaii and Pennsylvania became the first states in the nation to grant their public employees a statutory right to strike.³ Since then, courts in several jurisdictions have interpreted state public employee collective bargaining statutes to provide for

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I am grateful to the following individuals for their helpful comments on various drafts of this Article: Randi Abramsky, Gerald Berendt, Peter Feuille, Julie Hughes, Claire Manning, Tom Worley, Michael Yelnosky, and Jacalyn Zimmerman. I am especially grateful to Kevin Smith, Carol Johnson, and Andre Adler for their assistance with the statistical computations. Kathleen Blood, Stan Gosch, and Siobhan Murphy provided extremely valuable research assistance. Financial support was provided by the Marshall Ewell Research Fund and the Norman and Edna Freehling Endowment at the Chicago-Kent College of Law.

1. Letter from Franklin Roosevelt to the president, National Federation of Federal Employees (August 16, 1937), *quoted in* *Norwalk Teachers' Ass'n v. Board of Educ.*, 83 A.2d 482, 484 (Conn. 1951) (alteration in original).

2. 29 U.S.C. §§ 151-168 (1988).

3. HAW. REV. STAT. §§ 89-1 to -20 (1985); PA. STAT. ANN. tit. 43, §§ 1101.101-.2301 (1991).

public employee strike rights.⁴ Two of the three most recent jurisdictions to adopt comprehensive public employee collective bargaining statutes, Illinois and Ohio, have granted public employees the right to strike.⁵ In 1990, Alaska granted its teachers a right to strike for a two-year experimental period.⁶ In 1992, the Alaska Legislature overrode the Governor's veto and made that right permanent.⁷ Even a number of public employers have voiced support for the right to strike as the principal method of resolving impasses in public sector collective bargaining.⁸

Nevertheless, the right to strike for public employees remains highly controversial, even in those jurisdictions that recognize it. In Pennsylvania, for example, opponents of the public employees' right to strike have attacked the teachers' right to strike as violative of the state constitution's guarantee of a thorough and efficient system of public education.⁹ Pennsylvania recently amended its statute, substantially restricting the right of public school teachers to strike.¹⁰

Furthermore, no consensus exists among the jurisdictions that recognize a right to strike over how closely to regulate the right. One significant issue is whether to require exhaustion of a nonbinding fact-finding procedure as a precondition to a lawful

4. See *County Sanitation Dist. No. 2 v. Los Angeles County Employees Ass'n*, Local 660, 699 P.2d 835, 849 (Cal.), *cert. denied*, 474 U.S. 995 (1985); *Firefighters Local 1494 v. City of Coeur d'Alene*, 586 P.2d 1346, 1358 (Idaho 1978); *Davis v. Henry*, 555 So. 2d 457, 459 (La. 1990); *Montana v. Public Employees Craft Council*, 529 P.2d 785, 787-88 (Mont. 1974).

5. 5 ILL. COMP. STAT. act 315, § 17 (1992); 115 ILL. COMP. STAT. act 5, § 13 (1992); OHIO REV. CODE ANN. § 4117 (Anderson 1991). The third state, New Mexico, does not provide either a right to strike or a right to binding interest arbitration. The last step in the New Mexico impasse resolution procedures is nonbinding fact-finding. N.M. STAT. ANN. §§ 10-7D-18, -21 (Michie 1992). As developed at *infra* notes 56-62 and accompanying text, reliance on nonbinding fact-finding is likely to lead to *de facto* reliance on strikes and strike threats as the primary impasse resolution device.

6. ALASKA STAT. § 180 (Temporary & Special Acts 1990).

7. *Alaska Legislature Overrides Veto of School Employee Right to Strike*, 30 Gov't Empl. Rel. Rep. (BNA) No. 1458, at 454 (Mar. 30, 1992).

8. See, e.g., CRAIG A. OLSON ET AL., *STRIKES AND STRIKE PENALTIES IN THE PUBLIC SECTOR: FINAL REPORT PREPARED FOR U.S. DEPT. OF LABOR* 392-93 (1981) (reporting that employers generally preferred the right to strike over interest arbitration); Peter Feuille, *Selected Benefits and Costs of Compulsory Arbitration*, 33 INDUS. & LAB. REL. REV. 64, 68 & n.21 (1979) (collecting statements of employer sentiment preferring strikes to interest arbitration); *Job Sharing, Teacher Strikes Top Agenda at NSBA Convention*, 1982 Gov't Empl. Rel. Rep. (BNA) No. 960, at 17 (Apr. 26, 1982) (reporting that speakers at the National School Boards Association convention advocated strikes over interest arbitration).

9. See *Gulnac v. South Butler County Sch. Dist.*, 587 A.2d 699 (Pa. 1991).

10. See *infra* notes 263-71 and accompanying text.

strike. Where prestrike fact-finding is required, the parties must present their positions regarding unresolved issues to a neutral fact finder who holds a hearing and makes recommendations for final settlement. The parties remain free to accept or reject the recommendations.¹¹

Another significant issue that concerns public sector strikes is whether, and under what conditions, to enjoin a lawful strike. Some jurisdictions require a showing of a clear and present danger to the public health and safety for an injunction to issue. Others permit an injunction to issue upon a showing of a clear and present danger to the public health, safety, or welfare.¹² The addition of strikes endangering the public welfare under the latter standard greatly expands the number and types of lawful strikes that are subject to injunction.

This Article analyzes the law of and experience with the statutory right to strike in the public sector. Part I examines the policy debate over whether public employees should have a right to strike and concludes that reliance on the right to strike is superior to other forms of collective-bargaining dispute resolution in the public sector. The remainder of the Article focuses in detail on the experiences in Illinois and Ohio since those states legalized public employee strikes. The analysis is supplemented with an examination of the experiences with legalized strikes in Oregon and Pennsylvania. Part II compares and contrasts the laws of these four jurisdictions regarding the right to strike. Part III examines these states' experiences with the right to strike, focusing on whether legalizing public employee strikes leads to increased strike activity and on the effects of requiring fact-finding as a precondition to a lawful strike. Part IV considers the question of enjoining a lawful public employee strike. The Article concludes that public employees should have a statutory right to strike, that there

11. The public sector experience with prestrike fact-finding also may prove to be significant in the private sector. During debates in the United States Senate over a bill to prohibit the permanent replacement of private sector strikers, proponents of the bill endorsed an amendment proposed by Senator Packwood which would have allowed either party to request nonbinding fact-finding. An employer that refused a union request for fact-finding or refused to comply with the fact finder's recommended settlement would have been precluded from permanently replacing workers who subsequently struck. Although the amendment failed to end the opposing senators' filibuster, it likely will be resurrected in subsequent efforts to pass legislation prohibiting permanent replacement of strikers. *See Senate Fails to Invoke Cloture on Striker Replacement Bills*, Daily Lab. Rep. (BNA) No. 114, at A-10 (June 12, 1992).

12. *See infra* notes 211-13, 245-47 and accompanying text.

should be no requirement of fact-finding as a precondition to a lawful strike, and that injunctions should be issued rarely, if ever.

I. PUBLIC POLICY AND PUBLIC EMPLOYEE STRIKES

Although arguments have been made to the contrary, this Article begins with the assumption that public policy favors collective bargaining by public employees when a majority of employees in an appropriate bargaining unit opt for union representation.¹³ Impasses in collective bargaining are inevitable. Accordingly, jurisdictions that provide for public employee collective bargaining have developed three approaches to resolving such impasses. The first approach relies on the threat or actual use of economic weapons, primarily the strike or lockout, to motivate the parties to reach agreement.¹⁴ The second approach prohibits strikes, but provides for fact-finding in the event of impasse. Under this approach, the parties

13. For conflicting views about the desirability of collective bargaining for public employees, compare Clyde W. Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156 (1974) [hereinafter Summers, *Public Employee Bargaining*], with Robert S. Summers, *Public Sector Collective Bargaining Substantially Diminishes Democracy*, GOV'T UNION REV., Winter 1980, at 5. The law in the United States reflects a clear policy choice favoring public employee collective bargaining. Most jurisdictions grant collective bargaining rights by statute to at least some of their public employees. The largest number of such jurisdictions do so through comprehensive public employee labor relations acts. These include jurisdictions as diverse as California, CAL. GOV'T CODE §§ 3500-3510 (West 1980); the District of Columbia, D.C. CODE ANN. § 1-601.2(a)(6) (1987); Florida, FLA. STAT. ANN. § 447.201 (Harrison 1981); Iowa, IOWA CODE ANN. § 20.1 (West 1989); New Mexico, N.M. STAT. ANN. §§ 10-7D-1 to -26 (Michie 1992); and New York, N.Y. CIV. SERV. LAW § 200 (McKinney 1983). Others grant specific groups of employees, such as police, firefighters, or teachers, statutory bargaining rights. See, e.g., GA. CODE ANN. § 25-5-3(b) (1982) (firefighters); IDAHO CODE § 33-1271 (1981) (teachers) & § 44-1802 (1977) (firefighters); IND. CODE § 20-7.5-1-3 (1976) (teachers); TEX. REV. CIV. STAT. ANN. art. 5154c-1 (West 1987) (police and firefighters). In many jurisdictions without public employee collective bargaining laws, collective bargaining is permissive at the option of the employer. See, e.g., *Freeman v. Local 1802*, 569 A.2d 1244 (Md. 1990); 1977 Ark. Att'y Gen. Op. 231 (No. 77-99). Only in a small minority of jurisdictions is collective bargaining by public employers illegal. See, e.g., N.C. GEN. STAT. § 95-98 (1989); *Commonwealth v. County Bd.*, 232 S.E.2d 30, 40 (Va. 1977).

14. See, e.g., ALASKA STAT. § 23.40.080 (1990); HAW. REV. STAT. § 89-12 (1985); 5 ILL. COMP. STAT. act 315, § 17 (1992); 115 ILL. COMP. STAT. act 5, § 13 (1992); MINN. STAT. ANN. § 179A.18 (West Supp. 1992); MONT. CODE ANN. § 39-31-201 (1992); OR. REV. STAT. § 243.726(2) (1991); PA. STAT. ANN. tit. 43, § 1101.1003 (1991); VT. STAT. ANN. tit. 21, § 1730 (1987). Ohio grants public employees the right to strike, OHIO REV. CODE ANN. § 4117.03 (Anderson 1991), but prohibits lockouts. *Id.* § 4117.11(7).

present their positions to a neutral fact finder who makes findings and recommends a settlement, which the parties are free to accept or reject as they see fit.¹⁵ The third approach provides that the parties submit unresolved impasses to binding arbitration.¹⁶

A. Strikes

In the private sector, each party's ability to resort to economic weapons provides the primary motivation for avoiding and resolving bargaining impasses. The National Labor Relations Act¹⁷ expressly permits strikes by private sector employees.¹⁸ The Supreme Court has interpreted the statute to empower private employers to defend against strikes by permanently replacing the strikers¹⁹ or to take the offensive by locking out bargaining-unit employees.²⁰ Although there is an ongoing debate over whether the current regulation of economic weapons has advantaged private sector employers inappropriately,²¹ the debate's focus on the balance of economic power illustrates the overwhelming acceptance of economic weapons as the bargaining motivator of choice in the private sector.

The strike in the public sector differs markedly from its private sector counterpart. Whereas the private sector strike

15. See, e.g., DEL. CODE ANN. tit. 14, § 4015 (Supp. 1992) (public school employees); *id.* tit. 19, § 1615 (police and firefighters); FLA. STAT. ANN. ch. 447.403 (Harrison 1991); IND. CODE § 20-7.5-1-13 (1976) (teachers).

16. See, e.g., CONN. GEN. STAT. ANN. § 5-276a (West 1988 & Supp. 1992) (state employees); *id.* § 7-473c (West 1989) (municipal employees); *id.* § 10-153f (West 1986 & Supp. 1992) (teachers); IOWA CODE ANN. § 20.22 (West 1989) (public employees); ME. REV. STAT. ANN. tit. 26, § 965 (West 1988 & Supp. 1991) (public employees).

17. 29 U.S.C. §§ 151-168 (1988).

18. *Id.* §§ 157, 163.

19. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).

20. American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965).

21. See, e.g., George M. Cohen & Michael L. Wachter, *Replacing Striking Workers: The Law and Economics Approach*, PROC. N.Y.U. 43RD ANN. NAT'L CONF. ON LAB. 109 (1990); Samuel Estreicher, *Strikers and Replacements*, 3 LAB. LAW. 897 (1987); Matthew W. Finkin, *Labor Policy and the Enervation of the Economic Strike*, 1990 U. ILL. L. REV. 547; Walter Kamiat, *Strikers and Replacements: A Labor Union Perspective*, PROC. N.Y.U. 43RD ANN. NAT'L CONF. ON LAB. 23 (1990); Katherine Van Wezel Stone, *Legal Regulation of Economic Weapons: A Comparative Perspective*, PROC. N.Y.U. 43RD ANN. NAT'L CONF. ON LAB. 79 (1990); Paul C. Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351 (1984); William C. Zifchak, *Strikers, Replacements, and S. 2112: Full Employment Law for Organized Labor?*, PROC. N.Y.U. 43RD ANN. NAT'L CONF. ON LAB. 53 (1990).

is an economic weapon, the public sector strike is primarily a political one.²² During a strike, the public employer continues to collect taxes and other revenues and saves the wages it would have paid to striking workers. Thus, unlike the private sector, loss of revenue does not motivate a public employer to settle a strike.²³ The union's goal is to make the strike's interruption of government services of sufficient political cost to motivate the employer to settle on more favorable terms.

Because of the political nature of the public employee strike, some have argued that a right to strike in public employment distorts the political process.²⁴ In their view, public employees' wages and other terms and conditions of employment involve

22. For a leading public employee unionist's discussion of the strike as a political weapon, see Albert L. Shanker, *Why Teachers Need the Right to Strike*, 96 MONTHLY LAB. REV., Sept. 1973, at 48.

23. OLSON ET AL., *supra* note 8, at 76. This may not be the case with school districts whose states require them to offer a minimum number of days of pupil instruction to gain state aid. In such cases, the district will lose revenues if it does not make up the days lost to a strike; if it does make up the days, it will not save teacher salaries. When state aid comprises a small portion of a district's revenue, however, the district can profit financially from a strike by not making up lost days, because the wage savings will more than offset the loss of state aid. OTTO A. DAVIS & BEN FISCHER, *TEACHER LABOR RELATIONS IN PENNSYLVANIA PUBLIC SCHOOLS: A RESEARCH STUDY* 54-57 (1987); OLSON ET AL., *supra* note 8, at 170.

Many have observed that when school districts make up days lost to a strike, striking employees, usually teachers, suffer little or no monetary loss as a result of the strike. This encourages teachers to strike and explains why teacher strikes constitute the largest proportion of public sector strikes. See, e.g., DAVIS & FISCHER, *supra*, at 51-57; PAUL F. GERHART & JOHN E. DROTNING, *A SIX STATE STUDY OF IMPASSE PROCEDURES IN THE PUBLIC SECTOR*, FINAL REPORT 181-83 (1980); OLSON ET AL., *supra* note 8, at 160-67 (analyzing the experience in Pennsylvania); *id.* at 380-88 (studying the impact of a state aid formula generally); R. Theodore Clark, Jr., *A Discussion*, 33 LAB. L.J. 508, 511 (1982); Edward Montgomery & Mary Ellen Benedict, *The Impact of Bargainer Experience on Teacher Strikes*, 42 INDUS. & LAB. REL. REV. 380, 386 (1989); Craig A. Olson, *The Role of Rescheduled School Days in Teacher Strikes*, 37 INDUS. & LAB. REL. REV. 515 (1984). But see Robert E. Doherty, *Public Policy and the Right to Strike*, in *PORTRAIT OF A PROCESS—COLLECTIVE NEGOTIATIONS IN PUBLIC EMPLOYMENT* 251, 256 (Muriel K. Gibbons et al. eds., 1979) (attributing the dominance of teacher strikes to a greater number of noneconomic policy issues, a larger number of teacher bargaining units, and a more frequent turnover of chief negotiators than in other public employee bargaining units). The policy issues involved in the question of rescheduling strike days in public education are beyond the scope of this Article.

24. The most forceful argument from this perspective is provided in HARRY H. WELLINGTON & RALPH K. WINTER, JR., *THE UNIONS AND THE CITIES* (1971). See also Arvid Anderson, *Strikes and Impasse Resolution in Public Employment*, 67 MICH. L. REV. 943, 956-59 (1969); T. Merritt Bumpass, Jr. & Keith A. Ashmus, *Public Sector Bargaining in a Democracy—An Assessment of the Ohio Public Employee Collective Bargaining Law*, 33 CLEV. ST. L. REV. 593 (1984); NEW YORK GOVERNOR'S COMMITTEE ON PUBLIC EMPLOYEE RELATIONS, FINAL REPORT (1966), quoted in Kurt L. Hanslowe & John L. Acierno, *The Law and Theory of Strikes by Government Employees*, 67 CORNELL L. REV. 1055, 1063 (1982).

political questions.²⁵ Working conditions, such as class size, school curriculum, and whether civilian boards will review allegations of police misconduct, also raise questions of public policy. Even basic bargainable issues such as wages raise questions about the allocation of scarce public resources. Public employees comprise only one of the interest groups seeking to influence official action. Collective bargaining, however, provides public employees an avenue of access to public officials that is not available to other interest groups. A right to strike distorts the political process by enabling public employees to exploit their exclusive avenue of access with a weapon that greatly magnifies their political power. When such employees strike, a large segment of the elected officials' constituency will clamor for a quick settlement and often force the officials to cave in to union demands without sufficient regard for the costs of the settlement.²⁶ This danger is greatest when the services which the public employees provide are essential and their interruption will impose great costs on the public, but it also is present when service interruptions will result in only major inconvenience. In summary, the right to strike distorts the political process by excessively empowering public employee unions in a decision-making arena from which other interest groups have been excluded.²⁷

The scenario that politically spineless officials cower to the strike threats of overly powerful public employee unions is only one theoretical vision. Other commentators have disputed some of the premises of this theory. They have observed that the public is capable of forgoing many governmental services temporarily²⁸ and that substitutes may be available to provide even the most essential services during

25. See WELLINGTON & WINTER, *supra* note 24, at 24-29, 167-70, 202.

26. *Id.* at 25.

27. See Donald A. Dripps, *New Directions for the Regulation of Public Employee Strikes*, 60 N.Y.U. L. REV. 590 (1985). Professor Donald Dripps has updated these political process concerns. He has rejected the traditional view of how public employee strikes distort the democratic process and has applied public choice theory to suggest that the structure of public sector bargaining and the strike weapon be regulated to counterbalance what otherwise would be excessive union influence upon public officials. *Id.*

28. See, e.g., John F. Burton, Jr. & Charles Krider, *The Role and Consequences of Strikes by Public Employees*, 79 YALE L.J. 418, 426 (1970); Bernard D. Meltzer & Cass R. Sunstein, *Public Employee Strikes, Executive Discretion, and the Air Traffic Controllers*, 50 U. CHI. L. REV. 731, 737 (1983); Clyde W. Summers, *Bargaining in the Government's Business: Principles and Politics*, 18 U. TOL. L. REV. 265, 277-78 (1987).

a strike.²⁹ They also have questioned whether the assertion of economic power in a political dispute truly is inconsistent with the democratic process.³⁰

An equally credible theory views public employees as inherently disadvantaged in the political process with respect to issues that affect them more directly than other interest groups. Members of the public are users or purchasers of the employees' services. As users, they desire greater quantity and quality; as purchasers, they desire lower costs. The users and purchasers outnumber the employees and accordingly have greater combined political clout. Because labor costs are the dominant part of most governmental budgets, public employees demanding pay raises or other concessions which would raise labor costs are at a disadvantage *vis-à-vis* all other interest groups in the political budget-making process. Consequently, they need the special avenue of access to public officials that collective bargaining provides.³¹

29. See Dripps, *supra* note 27, at 597-98. The Illinois Legislature recognized the distinction between the essentiality of the service and the essentiality of the strikers for providing the service. The Illinois statutes permit the enjoining of lawful strikes that pose a clear and present danger to the public health and safety, *see infra* notes 123-128 and accompanying text, but their legislative histories make it clear that in deciding whether such a danger exists, the labor boards and the courts must consider the availability of alternatives to ordering the strikers back to work, such as temporarily subcontracting the "essential" service. See Martin H. Malin, *Implementing the Illinois Educational Labor Relations Act*, 61 CHI.-KENT L. REV. 101, 132 & n.124 (1985) (citing and discussing Illinois legislative history). But see HPERB v. United Pub. Workers, Local 646, 667 P.2d 783 (Haw. 1983) (affirming an HPERB finding that the availability of private contractors or striker replacements was limited in light of strike pressures and tensions).

30. See, e.g., Burton & Krider, *supra* note 28, at 428-31; Hanslowe & Acierno, *supra* note 24, at 1055, 1072-73; Summers, *supra* note 28, at 275.

31. See generally Summers, *Public Employee Bargaining*, *supra* note 13. T. Merritt Bumpass, Jr. and Keith A. Ashmus provide an example of how collective bargaining responds to public employees' inherent political disadvantages:

Assume that a city has a practice of using two police officers per patrol car. A crime wave leads to a public outcry for a more visible police presence. In the absence of any bargaining impediment, one possible response of the city would be the deployment of a number of one-officer patrol cars. While the police would perhaps object, the citizenry would have the ability to urge this approach on their elected officials as being preferable to raising taxes for new police officers. . . .

... This example illustrates why bargaining is needed, as well as why it is undemocratic. The choice of one-person patrols maximizes police presence and minimizes costs to taxpayers; it may also have an adverse impact on the safety of police officers. The voting public may "undervalue" police safety and thus be willing to yield it in exchange for more police visibility and no new taxes

Bumpass & Ashmus, *supra* note 24, at 637 & n.202.

Viewed in this light, public employee strikes do not distort the political process. Rather, public employees strike against the very interest groups—the users and purchasers of their services—against whom they must compete in the political process. Moreover, if public officials make it clear that the levels of services and taxes are at stake in a strike, public employee unions will not retain an undue advantage because the taxpayers and service users outnumber them at the polls.³²

The true test of all theories of the effects of public employee strikes on the democratic process lies in the actual experience with such work stoppages. Measured by this standard, the theory that public employee strikes distort the democratic process does not fare well. Public employers frequently resist public employee demands, even when those demands are backed by work stoppages. Such resistance is quite common in small conservative communities where a homogeneous population reacts negatively to a public employee strike.³³ Stiff resistance also is common in large urban areas.³⁴

32. Summers, *supra* note 28, at 278–79. It is important to note that Professors Wellington and Winter, who are cited universally for the view that public sector strikes distort the democratic process, did not advocate the total ban of such job actions. They expressly cautioned against drawing such a conclusion from their stated concerns:

All this may seem to suggest that it is the strike weapon . . . that cannot be transplanted to the public sector. This is an oversimplification, however. It is the combination of the strike and the typical municipal political process, including the usual methods for raising revenue. One solution, of course, might well be a ban on strikes, if it could be made effective. But that is not the sole alternative, for there may be ways in which municipal political structures can be changed so as to make cities less vulnerable to strikes and to reduce the potential power of public employee unions to tolerable levels.

WELLINGTON & WINTER, *supra* note 24, at 31–32. Their recommendations for reconciling public employee strikes with the democratic process included strike contingency planning by public officials, provisions for partial strikes rather than the complete suspension of certain services, and reforming the revenue process to make the costs of a labor settlement and their relationship to taxes and budgeting more visible. *Id.* at 196–201.

33. See Thomas A. Kochan, *Dynamics of Dispute Resolution in the Public Sector*, in PUBLIC-SECTOR BARGAINING 150, 167 (Benjamin Aaron et al. eds., 1979). Professors Wellington and Winter acknowledged that the strike weapon would not necessarily threaten the democratic process in such communities. See WELLINGTON & WINTER, *supra* note 24, at 32.

34. See Kochan, *supra* note 33, at 167–68 (discussing examples from Buffalo, Yonkers, San Francisco, Atlanta, and Chicago); Craig A. Olson, *The Use of the Legal Right to Strike in the Public Sector*, 33 LAB. L.J. 494, 495 (1982) (observing the overall level of resistance by public sector managers to union work stoppages and describing such resistance in Philadelphia and Minnesota).

For several reasons, public officials do not cave in automatically to fears of strike-induced political fallout. First, experience demonstrates that avoiding or ending the strike at any cost may be politically expedient in the short term, but politically costly in the long run. During the 1970s, for example, several school districts in Ohio agreed to contracts with wage scales that exceeded the districts' revenues, only to have them backfire when voters refused to approve the property taxes needed to fund the agreements. As a result, the school districts were forced to close schools prior to the end of the fall semester because they ran out of money.³⁵ The officials who conceded to union demands may have incurred greater political wrath from the early school closings than they would have faced in a teacher strike. Many public officials have learned this lesson well. When teacher strikes force schools to close, it is common for the local community to demand that management solve the problem so that schools can reopen while showing little concern for the substance of the underlying labor dispute.³⁶ Nevertheless, management has been willing to withstand the political heat and resist the temptation to settle at any cost.³⁷

Public employers have become quite resourceful at resisting strikes.³⁸ For example, they have procured short-term substitutes for interrupted services.³⁹ On rare occasions, they also have permanently replaced striking employees.⁴⁰ They have

35. OLSON ET AL., *supra* note 8, at 301.

36. See Charles R. Perry, *Teacher Bargaining: The Experience in Nine Systems*, 33 INDUS. & LAB. REL. REV. 3, 10 (1979).

37. *Id.* Perry also found that although there was a tendency by state and city officials to enter negotiations in the early years of collective bargaining and to broker settlements by promising the school district more revenues, such activity declined markedly after 1970. *Id.*

38. For a discussion by an elected official of how a municipal government successfully resisted a strike, see Mary W. Henderson, *How to Deal with a Strike as an Elected Official*, in LABOR MANAGEMENT RELATIONS AMONG GOVERNMENT EMPLOYEES 68 (Harry Kershen ed., 1983).

39. Feuille, *supra* note 8, at 67.

40. See *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482 (1976); *Rockwell v. Board of Educ.*, 227 N.W.2d 736 (Mich. 1975), *appeal dismissed*, 427 U.S. 901 (1976). The most visible example of this was President Reagan's dismissal and replacement of striking air traffic controllers in 1981. The experience with the air traffic controllers' strike undercuts the fear of strikes even by employees considered essential to the public health and safety. See Hanslowe & Acierno, *supra* note 24, at 1069-71 (noting that not all public services necessarily are essential). For a discussion of the legal issues involving the replacement of striking public employees in states

resorted to less traditional measures in order to pressure striking employees to return to work.⁴¹

The political effects of a public employee strike also may deter some unions from striking. For example, the frequency of teacher strikes declined in Wisconsin while the legislature was considering a bill that would provide interest arbitration, in part because the unions feared the potential political backlash from a rash of strikes.⁴² Similarly, few strikes occurred in Indiana while that state's supreme court was considering the constitutionality of the state public sector bargaining law.⁴³ In Iowa, when a local teachers' union threatened to strike after an unfavorable interest arbitration award, the union's state affiliate intervened and convinced the local not to strike because the state affiliate feared political backlash directed at the arbitration statute.⁴⁴

Experience shows that unions are not benefitting inordinately from an excessively powerful strike weapon. For example, a study of teacher strikes found that, generally, "strike use affects salary changes but not salary levels."⁴⁵ This finding led to the conclusion that teacher strikes generally are defensive in nature.⁴⁶ Another study found that noneducation local government employees tended to strike when their salaries were above average, but that their strikes tended to last longer than other groups of public employees, thereby indicating strong employer

where strikes are legal, see Rona Pietrzak, *Some Reflections on Mackay's Application to Legal Economic Strikes in the Public Sector: An Analysis of State Collective Bargaining Statutes*, 68 OR. L. REV. 87 (1989).

41. During the 1967 New York City teachers' strike, for example, draft boards even began reviewing the male strikers' draft-exempt status. See Boyd Hight, *Teachers, Bargaining and Strikes: Perspective from the Swedish Experience*, 15 UCLA L. REV. 840, 851-52 (1968). The final settlement gave the union very little beyond the employer's final prestrike offer. *Id.* at 852.

42. OLSON ET AL., *supra* note 8, at 244.

43. *Id.* at 352.

44. GERHART & DROTNING, *supra* note 23, at 174. The strike also may affect the internal politics of the union. For example, a prepared employer may take a strike to bring a militant faction within the union back to reality. See *id.* at 143.

45. John T. Delaney, *Strikes, Arbitration, and Teacher Salaries: A Behavioral Analysis*, 36 INDUS. & LAB. REL. REV. 431, 442 (1983) (finding "[t]he use of the strike leads to salary increases that are significantly above those in nonstriking districts, but [that] strike use does not cause the resulting salary levels to be higher than those voluntarily negotiated in other districts").

46. *Id.*

resistance.⁴⁷ A significant number of public employee strikes end without any agreement at all.⁴⁸

Moreover, the union wage effect—the impact that unions have on wage increases—is less in the public sector than it is in the private sector.⁴⁹ There is also reason to believe that the union wage effect in the public sector results more from the availability of interest arbitration than from the strike weapon. In Canada, for example, where the right to strike is more prevalent in the public sector, unions achieve greater wage increases through interest arbitration than through threatened and actual strikes.⁵⁰ Perhaps this is because public officials find interest arbitration more politically expedient than operating under a strike threat. An employer that loses in arbitration can avoid accountability by blaming the arbitrator. Despite this advantage, many public employers prefer to take the heat of a strike rather than to operate under interest arbitration.⁵¹ This preference suggests that they do not believe that political pressure will cause them to cave in to excessive union demands.

To the extent that public employee strikes may distort the democratic process, legalizing them actually may reduce the distortion. When public employees strike illegally, employers may seek injunctions.⁵² Two reasons typically motivate employers to do so. First, seeking an injunction responds to the political clamor to “do something.” Second, the injunction petition usually brings the judge in to mediate the dispute.⁵³ Mediation, backed by the court’s power, may succeed in resolving the impasse.⁵⁴

47. James L. Perry, *Public Policy and Public Employee Strikes*, 16 INDUS. REL. 273, 277 (1977).

48. Kochan, *supra* note 33, at 168.

49. Feuille, *supra* note 8, at 66.

50. Janet Currie & Sheena McConnell, *Collective Bargaining in the Public Sector: The Effect of Legal Structure on Dispute Costs and Wages*, 81 AM. ECON. REV. 693 (1991).

51. See OLSON ET AL., *supra* note 8, at 388.

52. See, e.g., *United States v. Professional Air Traffic Controllers Org.*, 653 F.2d 1134 (7th Cir.), *cert. denied*, 454 U.S. 1083 (1981); *Anderson Fed’n of Teachers Local 519 v. School City*, 251 N.E.2d 15 (Ind.), *cert. denied*, 399 U.S. 928 (1969); *City of Dover v. International Ass’n of Firefighters, Local 1312*, 322 A.2d 918 (N.H. 1974); *Board of Educ. v. New Jersey Educ. Ass’n*, 247 A.2d 867 (N.J. 1968). *But see* *School Dist. v. Holland Educ. Ass’n*, 157 N.W.2d 206 (Mich. 1968).

53. See *infra* notes 333–39 and accompanying text.

54. GERHART & DROTNING, *supra* note 23, at 138–39.

If, however, the judge is unable to resolve the dispute, or the judge surprises the parties and issues the injunction without first mediating, the union may respond by defying the court's back-to-work order. The ensuing fining or incarceration of otherwise law-abiding civil servants raises the political stakes considerably.

On the other hand, legalizing public employee strikes deprives employers of the quick fix of seeking an injunction. This may lead to public recognition and acceptance of occasional interruptions of governmental services as a cost of the collective bargaining system, just as such interruptions are accepted in the private sector. Such recognition helps to counterbalance union power, encourages meaningful bargaining, and discourages strikes.⁵⁵

The theory that a right to strike in the public sector distorts democratic processes remains just that—a theory. It does not justify rejection of the right to strike. Before concluding that reliance on the right to strike is an appropriate policy, however, it is necessary to evaluate the two alternatives: fact-finding and interest arbitration.

B. Fact-Finding and Strike Prohibitions

Jurisdictions which prohibit strikes may provide for fact-finding in the event of a bargaining impasse. Fact-finding may take many forms along a continuum from fact finder as supermediator to fact finder as pure adjudicator. Under the supermediator model, fact finders wield their power to adjudicate the dispute in order to move the parties toward settlement. The goal is to have the parties resolve the dispute by an agreement which then may be embodied either in a bilateral agreement or, for political reasons, may be issued as the fact finder's recommendations. Under the pure adjudicator model, the fact finder holds a formal hearing and issues findings of fact and recommendations for settlement.⁵⁶

55. Such a potential scenario is suggested in Charles B. Craver, *Public Sector Impasse Resolution Procedures*, 60 CHI.-KENT L. REV. 779, 805 (1984).

56. For further discussion of these two models, see GERHART & DROTNING, *supra* note 23, at 108–12. See also R.L. JACKSON, *FACT-FINDING UNDER THE SCHOOL BOARDS AND TEACHERS COLLECTIVE NEGOTIATIONS ACT OF ONTARIO* 28–38 (1988).

In theory, fact-finding can settle bargaining disputes that the parties could not resolve through bilateral agreement. The fact finder's neutrality ensures that the recommendations are credible and public pressure prods recalcitrant parties to accept the recommendations.⁵⁷ Fact-finding, however, lacks finality. By its nature, fact-finding is nonbinding and either side may reject the fact finder's recommendations with impunity. When rejection occurs, statutes that rely on fact-finding⁵⁸ leave the parties without any method to settle the dispute. The logical tactic to which these parties will turn is the use of economic weapons.⁵⁹

Experience with fact-finding has demonstrated that it functions poorly as an impasse-resolution device. The absence of finality greatly reduces the risk of proceeding to fact-finding. Consequently, it is common for parties not to engage in much meaningful bargaining prior to the fact-finding hearing.⁶⁰

When fact-finding is first introduced in a state, experience with it tends to be positive. After a few years, however, fact-finding tends to be replaced by illegal strikes to resolve bargaining impasses. Even when the parties settle or accept the fact finder's recommendations, their motivation to do so is more likely to be fear of an illegal strike than pressure from public opinion.⁶¹ Thus, fact-finding appears to suffer from a

57. Harold R. Newman, *Mediation and Fact-Finding*, in *PORTRAIT OF A PROCESS—COLLECTIVE NEGOTIATIONS IN PUBLIC EMPLOYMENT*, *supra* note 23, at 204.

58. *See supra* note 15.

59. *See* Theodore W. Kheel, *Strikes and Public Employment*, 67 MICH. L. REV. 931, 934 (1969); Jean T. McKelvey, *Fact-Finding in Public Employment Disputes: Promise or Illusion?*, 22 INDUS. & LAB. REL. REV. 528, 531 (1969).

60. *See, e.g.*, JACKSON, *supra* note 56, at 54-62; William R. Word, *Implications for Fact Finding: The New Jersey Experience*, in *IMPASSE AND GRIEVANCE RESOLUTION* 9 (Harry Kershen ed., 1977) [hereinafter Word, *Implications for Fact Finding*]; William R. Word, *Factfinding in Public Employee Negotiations*, 95 MONTHLY LAB. REV., Feb. 1972, at 60, 61 [hereinafter Word, *Factfinding in Public Employee Negotiations*] (conducting a survey of negotiating parties and fact finders in New York and Wisconsin which revealed that, in most cases, progress prior to the initiation of fact-finding was insubstantial and that two-thirds of the parties did not regard the initiation of fact-finding as risky); *see also* GERHART & DROTNING, *supra* note 23, at 112 (observing that fact-finding may inhibit progress in negotiations because it chills the mediator rather than the parties).

61. *See* OLSON ET AL., *supra* note 8, at 128 (noting that interviews with parties in New York revealed that fact-finding was not effective in resolving disputes); Karen S. Gallagher & Donald L. Robson, *Fact-Finding in Indiana: A Study of Fact-Finding Frequency and Acceptance as an Impasse Resolution Procedure in Public School Negotiations*, 12 J. COLLECTIVE NEGOTIATIONS IN PUB. SECTOR 153, 163-64 (1983) (finding that between 1975 and 1978, fact-finding use and acceptance declined markedly, with

"half-life effect." As the parties use it, they become disenchanted with it and increasingly ignore it, relying instead on strikes and strike threats. As one commentator concludes, the "half life" of fact-finding in the public sector appears to be "rather short."⁶²

Unions do not refrain from striking merely because the strike is illegal. Prohibitions on public employee strikes also raise the potential costs of striking to unions and employees. The increased costs often lead the union to reduce its final prestrike offer below what it would have been had the strike been legal. If the increased costs bring the union's offer from a point above the maximum level that the employer finds acceptable to a point below it, the strike prohibition will have prevented a strike.⁶³

Strike prohibitions, however, also affect employer calculations. Each side's final offer is affected directly not only by its estimate of its own strike costs, but also by its estimate of its opponent's strike costs. Recognizing this, parties frequently misrepresent their strike costs as lower than what they actually are.⁶⁴ Opposing parties, recognizing the probability of such misrepresentations, often discount the information they receive from the other side.⁶⁵

In jurisdictions where strikes are illegal, employers will value the union's strike costs higher than if the strikes were legal and will reduce their final offers accordingly. Thus, the strike prohibition may reduce the employer's final offer to the same extent that it reduced the union's final offer, leaving the parties as far apart as they would have been had strikes been legal. When this happens, the strike prohibition has not narrowed the differences between the parties' positions and does not reduce the likelihood of a strike.

a corresponding increase in strikes); Word, *Implications for Fact Finding*, *supra* note 60, at 9 (concluding that in New Jersey, there was a high rate of rejection of fact-finder recommendations, but that strike threats produced bilateral agreements); Word, *Factfinding in Public Employee Negotiations*, *supra* note 60, at 60, 63-64 (noting that a survey of parties and fact finders in New York and Wisconsin revealed that in 80% of the cases, public opinion had no or only a slight effect on the parties' positions); see also McKelvey, *supra* note 59, at 540 (reviewing fact-finding experiences in Connecticut, Michigan, New York, and Wisconsin and suggesting that employers' fears of a strike motivated concessions and acceptance of fact-finder recommendations).

62. THOMAS A. KOCHAN, *COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS* 293 (1980).

63. OLSON ET AL., *supra* note 8, at 87-88.

64. *Id.* at 84-87.

65. *Id.*

The combination of misrepresentations of strike costs and discounting the other side's representations may lead employers to overvalue the strike prohibition's effect on the union's strike costs. Under these circumstances, because the employer will reduce its final offer to a greater extent than the union, the strike prohibition will have the ironic effect of exacerbating the parties' differences and increasing the probability of a strike.⁶⁶

Most studies of the effect of legal policy on strike activity compare aggregate strike data by state, categorizing the states by legal policy. Their results are inconsistent.⁶⁷ The most comprehensive study of the impact of legal policy on public sector strike activity covered experiences in seven states during the 1970s.⁶⁸ The study found that the differences in the probabilities of strikes occurring in Pennsylvania, where they were legal, and Ohio and Illinois, where they were illegal at the time, were insignificant.⁶⁹

The one state where a strike prohibition appeared to deter strikes significantly was New York.⁷⁰ New York's Taylor Law⁷¹ provides for several strike penalties, including suspension of the union's dues checkoff and a penalty of two days' pay for each day an employee is on strike. The employer collects the two-for-one penalties,⁷² which are imposed in the overwhelming

66. *Id.* at 89-90.

67. See, e.g., Antone Aboud & Sanford F. Schram, *Public Policy and Public Sector Strike Behavior*, 13 J. COLLECTIVE NEGOTIATIONS IN PUB. SECTOR 109, 114 (1984) (finding that strikes typically lasted longer in right-to-strike states than elsewhere, and suggesting that shorter strike lengths in earlier years in right-to-strike states may be explained by the proximity in time to the passage of the right-to-strike legislation); John F. Burton, Jr. & Charles E. Krider, *The Incidence of Strikes in Public Employment*, in LABOR IN THE PUBLIC AND NONPROFIT SECTORS 135, 171 (Daniel S. Hamermesh ed., 1975) (finding no significant relationship between legal policy and strike incidence, but not testing for a relationship between strike legality and strike incidence); Dane M. Partridge, *The Effect of Public Policy on Strike Activity in the Public Sector*, 19 J. COLLECTIVE NEGOTIATIONS IN PUB. SECTOR 87, 95 (1990) (finding strikes to be significantly more probable in right-to-strike states than elsewhere); Perry, *supra* note 47, at 278 (finding strike legalization to be significantly related to strike incidence for some groups of public employees, but not for others); Andrew R. Weintraub & Robert F. Thornton, *Why Teachers Strike: The Economic and Legal Determinants*, 5 J. COLLECTIVE NEGOTIATIONS IN PUB. SECTOR 193, 204 (1976) (finding strikes to be more likely in states that have legislation encouraging collective bargaining).

68. OLSON ET AL., *supra* note 8.

69. *Id.* at 352.

70. *Id.* at 127, 352; Alan Balfour & Alexander B. Holmes, *The Effectiveness of No Strike Laws for Public School Teachers*, 10 J. COLLECTIVE NEGOTIATIONS IN PUB. SECTOR 133, 142 (1981).

71. N.Y. CIV. SERV. LAW § 210 (McKinney 1983).

72. *Id.* § 210(g).

majority of strikes.⁷³ The two-for-one penalty appears to be the most significant sanction in the New York law.⁷⁴ It not only raises the union's and employees' strike costs substantially, but it lowers the employer's strike costs as well through the receipt of the funds that the penalty generates.⁷⁵ This strike deterrence is achieved, however, at substantial cost to the bargaining process. The impact on the parties' strike costs creates a situation in which the union's bargaining power is eroded sufficiently that it has no choice but to concede to the employer because of the union's strong need to avoid a strike.⁷⁶

Thus, artificial strike prohibitions do not prevent strikes unless the penalties are designed in such a way as to distort the bargaining process, making it so one-sided that the union almost always concedes. Fact-finding, because of its lack of finality, does not provide a reliably effective device for resolving the inevitable bargaining impasses.⁷⁷ As it turns out, states that ostensibly rely on fact-finding actually rely on illegal strikes to settle bargaining impasses. Many of these states realize this, as evidenced by statutes that provide only fact-finding for most public employees, but that provide interest arbitration for police and firefighters, the two groups of public employees whose strikes would pose the greatest immediate danger to life and property.⁷⁸ Because interest arbitration contains the finality that fact-finding lacks, it has greater promise as a strike substitute.

73. OLSON ET AL., *supra* note 8, at 118-19.

74. *Id.* at 128-29.

75. *Id.*

76. *Id.* at 90, 129.

77. The Washington Supreme Court recently recognized the importance of finality in impasse resolution tools. In *Municipality of Metro. Seattle v. Public Employment Relations Comm'n*, 826 P.2d 158 (Wash. 1992), the court upheld the authority of the Washington Public Employment Relations Commission (PERC) to order interest arbitration as a remedy in extreme cases of employer refusals to bargain in good faith. The court observed that, because of the absence of finality in Washington's statutory impasse procedures, an employer could refuse to bargain in good faith with *de facto* impunity. *See id.* at 165-66. To avoid such a situation, the court reasoned, PERC must be able to impose interest arbitration to remedy extreme recidivist bad-faith bargaining. *Id.* at 166-67.

78. *See, e.g.*, MASS. ANN. LAWS ch. 150E, § 9 & note (Law. Co-op. 1989 & Supp. 1992) (providing fact-finding for most public employees and interest arbitration for police and firefighters); N.Y. CIV. SERV. LAW § 209(3), (4) (McKinney 1983 & Supp. 1993) (providing fact-finding for most public employees, with the ultimate determination to be made by the employer's legislative body in the event of a rejection of the fact finder's recommendations, and interest arbitration for police and firefighters); WASH. REV. CODE ANN. §§ 41.56.430-.450, 41.59.120 (West 1991) (providing fact-finding for teachers and interest arbitration for police and firefighters).

C. Interest Arbitration

Although fact-finding may be rejected because it fails to provide a practical alternative to strikes, the same cannot be done with interest arbitration. Interest arbitration almost completely eliminates strikes⁷⁹ and renders strike penalties irrelevant.⁸⁰ Thus, interest arbitration is the primary policy alternative to legalizing strikes in the public sector.

Unlike a strike, where employees lose wages and employers suffer service interruptions, the primary costs that the parties face in interest arbitration are likely to be legal fees. Moreover, union and public officials face few political risks in interest arbitration. Whereas their constituencies will hold them accountable for results reached in bargaining under a strike threat and for the consequences of a strike, officials on both sides of the bargaining table can avoid accountability for unfavorable results in interest arbitration simply by blaming the arbitrator.⁸¹ Most of the debate over interest arbitration, therefore, focuses on whether its reduced costs have a "chilling effect" or "narcotic effect" on the bargaining process.

79. The evidence is overwhelming that strikes are extremely rare when interest arbitration is provided. *See, e.g.,* OLSON ET AL., *supra* note 8, at 353–60 (comparing New York, Pennsylvania, and Wisconsin with Ohio, Illinois, and Indiana during 1975 and 1976 and finding that among police and firefighters, strikes were 3 to 15 times more likely in the absence of interest arbitration); Currie & McConnell, *supra* note 50, at 706, 714 (studying interest arbitration in Canada); Feuille, *supra* note 8, at 65 (noting that binding arbitration almost guaranteed the absence of strikes); Casey Ichniowski, *Arbitration and Police Bargaining: Prescriptions for the Blue Flu*, 21 INDUS. REL. 149, 158 (1982) (studying police strikes); Charles M. Rehmus, *Binding Arbitration in the Public Sector*, 98 MONTHLY LAB. REV., Apr. 1975, at 53, 54 [hereinafter Rehmus, *Binding Arbitration*] (noting the substantial reduction of strikes in Michigan, Minnesota, Nevada, Pennsylvania, and Wisconsin following the implementation of binding interest arbitration); Charles M. Rehmus, *Interest Arbitration*, in PORTRAIT OF A PROCESS—COLLECTIVE NEGOTIATIONS IN PUBLIC EMPLOYMENT, *supra* note 23, at 209, 214 [hereinafter Rehmus, *Interest Arbitration*]; Hoyt N. Wheeler, *An Analysis of Fire Fighter Strikes*, 26 LAB. L.J. 17, 18 (1975).

80. OLSON ET AL., *supra* note 8, at 360–62 (finding that strikes in units subject to interest arbitration were more frequent in New York than in comparable units in Pennsylvania, even though New York imposed tougher strike penalties, suggesting that penalties have no significant effect when interest arbitration is available).

81. Occasionally, a jurisdiction attempts to provide some measure of accountability by allowing the employer's governing body to reject an interest arbitration award by a supermajority vote. *See, e.g.,* 5 ILL. COMP. STAT. act 315, § 14(n) (1992). Substantial disincentives, such as a requirement that the employer assume the full costs of subsequent arbitration proceedings, often accompany the rejection option. *Id.* § 14(o).

The "chilling effect" refers to the alleged tendency of parties to avoid realistic bargaining and proceed to arbitration. Debate over the chilling effect focuses on statistics showing the percentage of negotiations resulting in arbitration awards.⁸² Interpreting this data is comparable to deciding whether a glass is half-full or half-empty. Those who see the glass as half-full observe that bilateral agreements are reached in a majority of cases and conclude that there is little or no chilling effect.⁸³ Those who see the glass as half-empty observe that arbitration usage rates are considerably higher than strike rates⁸⁴ and point to comparative studies which show that impasse is far more probable when bargaining under the threat of arbitration than when bargaining under the threat of a strike.⁸⁵

The "narcotic effect" refers to the alleged tendency of interest arbitration to be addictive. The debate over the narcotic effect focuses on the probability that negotiations which end in arbitration in a given year are likely to end in arbitration in

82. Several commentators have examined interest arbitration usage rates involving a variety of types of public employees and jurisdictions. See RICHARD A. LESTER, *LABOR ARBITRATION IN STATE AND LOCAL GOVERNMENT* (1984) (giving usage rates for various states and New York City); Peter Feuille, *Reconciling Interest[s] in Interest Arbitration: Facilitation and Adjudication*, ILL. PUB. EMPLOYEE REL. REP., Spring 1992, at 1, 2 (estimating that eight percent of Illinois police and firefighter negotiations in 1991 ended in arbitration awards); Rehmus, *Binding Arbitration*, *supra* note 79, at 54 (providing usage rates ranging from 30% of Pennsylvania public safety employees to 7.5% of employees in New York City and Nevada); Weiler, *supra* note 21, at 380-81 n.95. Weiler indicates usage rates ranging from four percent for all employees in Iowa over a two-year period to 36% for teachers in British Columbia over a 21-year period. The Iowa rate may be deceptively small, however, because under Iowa's scheme, the parties first must use fact-finding. IOWA CODE ANN. § 20.21 (West 1988). In the ensuing arbitration, the arbitrator must award the last offer of one of the parties or the settlement recommended by the fact finder. *Id.* § 20.22(11). Arbitrators overwhelmingly select the fact finder's recommendations. See Daniel C. Gallagher et al., *Who Wins at Fact-Finding: Union, Management or Fact-Finder?*, PROC. 34TH ANN. MTG., INDUS. REL. RES. ASS'N, at 273 (1979). Consequently, many impasse proceedings terminate with fact-finding, which becomes the *de facto* arbitration.

83. See, e.g., Robert G. Howlett, *Contract Negotiation Arbitration in the Public Sector*, 42 U. CIN. L. REV. 47, 57-61 (1973); Arlyne K. Liebeskind, *Compulsory Arbitration for Public Safety Services in New Jersey—The First Three Years*, 16 J. COLLECTIVE NEGOTIATIONS IN PUB. SECTOR 343, 357 (1987) (observing that usage in New Jersey public safety units declined from 53% of negotiations in 1978 to 32% in 1980 and concluding that arbitration has no chilling effect).

84. See, e.g., Rehmus, *Interest Arbitration*, *supra* note 79, at 221 (estimating a 10% chilling effect); Weiler, *supra* note 21, at 380-81 (citing several studies).

85. LESTER, *supra* note 82, at 65 (comparing the experiences of essential services units in Minnesota, which must rely on interest arbitration, with other units that have a choice of striking or engaging in interest arbitration); Currie & McConnell, *supra* note 50, at 713.

future years. The results of empirical studies vary, at times because different statistical techniques are applied to the same data.⁸⁶

The debate over whether arbitration chills bilateral agreements or is habit forming misses the point. Comparing the likelihood of bilateral agreement under arbitration to the likelihood of bilateral agreement under the threat of a strike is like comparing apples with oranges. Arbitration substitutes adjudication for economic and political power as the means of setting public employees' terms and conditions of employment. Parties negotiating under the threat of a strike take their positions in light of their political and economic power and the importance of the disputed issues to their constituents. Parties negotiating under the threat of arbitration base their positions on the adjudicatory strength of their arguments. Thus, it is not surprising that overall outcomes of bilateral agreements in arbitration states do not differ significantly from the outcomes imposed by arbitrators in those states.⁸⁷ It is the presence of arbitration rather than its use that is significant.

Accordingly, the key issue is whether adjudication is a preferable method for setting terms and conditions of employment in the public sector.⁸⁸ As the following analysis demonstrates, it is not.

86. For three different interpretations of the same data, see Richard J. Butler & Ronald G. Ehrenberg, *Estimating the Narcotic Effect of Public Sector Impasse Procedures*, 35 INDUS. & LAB. REL. REV. 3 (1981); James R. Chelius & Marian N. Extejt, *The Narcotic Effect of Impasse Resolution Procedures*, 38 INDUS. & LAB. REL. REV. 629 (1985); Thomas A. Kochan & Jean Baderschneider, *Dependence on Impasse Procedures: Police and Firefighters in New York State*, 31 INDUS. & LAB. REL. REV. 431 (1978). See also Janet Currie, *Who Uses Interest Arbitration? The Case of British Columbia's Teachers 1947-1981*, 42 INDUS. & LAB. REL. REV. 363, 377 (1989) (finding that units that went to arbitration in the previous round were 10% more likely to go to arbitration in the current round of negotiations, and concluding that this strongly suggests a narcotic effect).

87. See, e.g., Richard H. Bezdek & David W. Ripley, *Compulsory Arbitration Versus Negotiation for Public Safety Employees: The Michigan Experience*, in IMPASSE AND GRIEVANCE RESOLUTION, *supra* note 60, at 47 (finding no significant difference in wages negotiated by the parties or awarded by arbitrators in Michigan public safety bargaining units); Delaney, *supra* note 45, at 433 & nn.12, 13 (noting that the availability rather than the use of arbitration affects teachers' wages); Peter Feuille & John T. Delaney, *Collective Bargaining, Interest Arbitration and Police Salaries*, 39 INDUS. & LAB. REL. REV. 228, 234 (1986) (suggesting that the availability of arbitration has a modest effect on salaries, but that the use of arbitration has no significant effect on salaries).

88. Robert Howlett, a stalwart advocate of interest arbitration, expressed the issue well: "It is urged that legislated arbitration damages collective bargaining. If true, the postulate leads nowhere. If the public interest is better served by interest arbitration than by collective bargaining, damage to collective bargaining is immaterial." Howlett, *supra* note 83, at 57.

Arbitrators are inherently conservative as adjudicators. Arbitrators are called upon to write the contract for the parties because the parties' negotiation process has broken down. The arbitrator's function in these circumstances is to devise a contract that the parties likely would have reached had the process not broken down.⁸⁹ To do this, arbitrators rely primarily on two factors: what the parties have done in the past and what other parties have done recently.

Comparability is an important factor that arbitrators rely on, particularly with respect to wages and other economic issues.⁹⁰ This is understandable in light of the arbitrator's function. In deciding what agreement the parties would have reached had the process not broken down, the most logical proxies are the agreements reached by other parties in comparable communities.⁹¹ Although comparability is a factor in bargaining under the threat of a strike, it does not have as predominant an effect as it does under arbitration. Other factors, such as the employer's ability to pay, are more likely to have an impact where the threat of a strike is the impasse resolution device.⁹²

Arbitrators are strongly inclined against changing the status quo. They typically award across-the-board percentage pay increases rather than tinker with existing pay structures.⁹³ A party seeking to change perceived inequities in existing pay structures stands very little chance of doing so in arbitration.

89. This is the generally accepted view of the interest arbitrator's role. In an early interest award, Arbitrator Whitley McCoy forcefully described the role in a manner with which most parties and arbitrators would agree:

In submitting this case to arbitration, the parties have merely extended their negotiations—they have left it to this board to determine what they should, by negotiation, have agreed upon. We take it that the fundamental inquiry, as to each issue, is: what should the parties themselves, as reasonable men, have voluntarily agreed to?

Twin Cities Rapid Transit Co., 7 Lab. Arb. Rep. (BNA) 845, 848 (1947) (McCoy, Arb.).

90. See Currie & McConnell, *supra* note 50, at 713–14; Richard W. Laner & Julia W. Manning, *Interest Arbitration: A New Terminal Impasse Resolution Procedure for Illinois Public Sector Employees*, 60 CHI.-KENT L. REV. 839, 856–59 (1984).

91. See FRANK ELKOURI & EDNA A. ELKOURI, *HOW ARBITRATION WORKS* 804–05 (4th ed. 1985) (describing the “prevailing practice” standard).

92. See Currie & McConnell, *supra* note 50, at 714; Gregory G. Dell’Omo, *Wage Disputes in Interest Arbitration: Arbitrators Weigh the Criteria*, ARB. J., June 1989, at 4, 10; Laner & Manning, *supra* note 90, at 859–60; Charles J. Morris, *The Role of Interest Arbitration in a Collective Bargaining System*, 1 INDUS. REL. L.J. 427, 471–72 (1976).

93. See Max H. Bazerman, *Norms of Distributive Justice in Interest Arbitration*, 38 INDUS. & LAB. REL. REV. 558, 569 (1985); Dell’Omo, *supra* note 92, at 7.

In noneconomic areas, arbitrators rarely grant unilateral requests to change matters on which the parties had agreed in prior contracts.⁹⁴ This conservatism flows inherently from the arbitrator's task. The parties' agreements in prior contracts are a better proxy than the demands of one party for what the parties would have agreed to had the current round of negotiations not broken down.

In negotiations under the threat of a strike, a party perceiving a problem with an existing contract term may demand change, but must assess the importance of the change to its constituency. If the issue seems very important, the party can make it a strike issue. If the issue is not as important to the other side, there may well be a concession. Yet if the other side also views it as a strike issue, the parties will be forced to seek compromises that take into account the needs of both parties' constituencies.

In negotiations under interest arbitration, however, the importance of the proposed changes to the parties' constituencies plays a much weaker role in the ultimate result of the process. The dominant factor is the strength of their adjudication arguments. Invariably, the proponent of change will have the weaker argument from the arbitrator's perspective, and the party resisting change will have little incentive to compromise. Thus, arbitration stifles creativity and problem solving in bargaining.⁹⁵ Although arbitration is a

94. See, e.g., Arvid Anderson, *Lessons from Interest Arbitration in the Public Sector: The Experience of Four Jurisdictions*, in ARBITRATION—1974: PROCEEDINGS OF THE TWENTY-SEVENTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 59, 64–65 (Barbara D. Dennis & Gerald G. Sommers eds., 1974) (noting that interest arbitrators are reticent to innovate because the parties prefer them to be conservative and predictable); Michael Finch & Trevor W. Nagel, *Collective Bargaining in the Public Schools: Reassessing Labor Policy in an Era of Reform*, 1984 WIS. L. REV. 1573, 1648–52 (presenting a study of all teacher interest arbitration awards in Connecticut which showed that arbitrators overwhelmingly rejected union proposals for change, granting them only when they involved traditional union labor relations concerns, such as the use of seniority in reductions in force and union security provisions); Liebeskind, *supra* note 83, at 359 (finding that arbitrators in New Jersey “declined to disturb the *status quo* absent a demonstrated need”); Thomas Sonneborn, *Police and Fire Interest Arbitration in Illinois*, ILL. PUB. EMPLOYEE REL. REP., Spring 1990, at 1, 5 (noting that arbitrators in Illinois police and firefighter cases generally side with the party proposing to retain existing contract language).

95. This criticism of interest arbitration is voiced frequently by negotiators. See, e.g., William H. Clune III & Patrick Hyde, *Final Offer Interest Arbitration in Wisconsin: Legislative History, Participant Attitudes, Future Trends*, 64 MARQ. L. REV. 455, 474 (1981); *IRRA Meeting Told Mich., Wis., Ill. Dispute Resolution Laws Cut Strikes*, 26 Gov’t. Empl. Rel. Rep. (BNA) No. 1246, at 39 (Jan. 11, 1988) (reporting on a survey which found that 28.3% of union negotiators and 13.9% of management negotiators had

real strike substitute, it is an artificial method of setting terms and conditions of employment.

To summarize, granting public employees a right to strike will not distort the democratic process, but will encourage meaningful collective bargaining. Fact-finding does not provide a realistic alternative to public employee strikes. Although interest arbitration does provide a realistic alternative, it is not desirable because it tends to stifle creativity and problem solving at the bargaining table.

Recognizing that the right to strike is the better legal policy for resolving public sector bargaining impasses raises the question of what the strike right should look like. The remainder of this Article considers that question.

II. THE LAW OF STRIKES WHERE STRIKES ARE LEGAL

Although it may be trite to speak of the states as laboratories experimenting with different approaches to problems, that characterization aptly applies to public sector impasse resolution. Not only are the states divided over which impasse resolution device (strike, fact-finding, or interest arbitration) should be provided, but they also display considerable diversity of approach to each device. Those states which recognize a right to strike in public employment vary considerably in how they implement that right.

Illinois, Ohio, Oregon, and Pennsylvania provide a manageable sample of the different approaches to legalizing the public employee strike. These jurisdictions differ with respect to the type of prestrike impasse resolution procedures that they mandate. Illinois requires only mediation. Ohio and Oregon mandate prestrike fact-finding, while Pennsylvania, until a recent amendment governing teacher strikes, gave its labor board discretion to require prestrike fact-finding.

The laws of these jurisdictions also differ with respect to the standards that courts must employ when deciding whether to enjoin a lawful strike. Illinois and Ohio limit the issuance of injunctions to strikes that pose a clear and present danger to

dropped innovative demands during bargaining in Wisconsin to improve their chances if negotiations proceeded to arbitration); *id.* at 40 (quoting management negotiator Don O'Brien's view that interest arbitration chills innovation in bargaining).

public health and safety. Oregon and Pennsylvania provide for the enjoining of strikes which pose a clear and present danger to the public *welfare*.

A. *The Right to Strike in Illinois*

In Illinois, two statutes, administered by three agencies, regulate collective bargaining in the public sector. The Illinois Educational Labor Relations Act (IELRA),⁹⁶ administered by the Illinois Educational Labor Relations Board (IELRB), governs collective bargaining in public education. The Illinois Public Labor Relations Act (IPLRA),⁹⁷ administered by the Illinois State and Local Labor Relations Boards (ISLRB and ILLRB), governs the remainder of the public sector.

In public education, parties who have not reached an agreement ninety days before the scheduled start of the school year must so notify the labor board. Within forty-five days of the scheduled start of the school year, the board may, upon request by one party or on its own motion, invoke mediation if, after a reasonable period of negotiation, the parties have reached impasse. The board must invoke mediation if the parties have not reached an agreement fifteen days before the scheduled start of the school year.⁹⁸

The IELRB's rules place a significant administrative gloss on the statutory language. The rules provide for the board to invoke mediation beginning forty-five days before the scheduled start of the school year upon findings that the parties have not reached an agreement and that mediation would assist the parties.⁹⁹ The rules do not reiterate the statutory requirement of "impasse;" they recognize the confusing nature of the statute's use of that term. Traditionally, impasse refers to the point at which the parties, despite the best of faith, are so deadlocked that further negotiations under existing conditions would be futile.¹⁰⁰ At that point, the parties legally are entitled to act unilaterally with regard to mandatory subjects of

96. 115 ILL. COMP. STAT. act 5, §§ 1-21 (1992).

97. 5 ILL. COMP. STAT. act 315, §§ 1-27 (1992).

98. *Id.* § 12.

99. ILL. ADMIN. CODE tit. 80, § 130.30(e) (1992).

100. See Taft Broadcasting Co., 163 N.L.R.B. 475, 478 (1967).

bargaining.¹⁰¹ When the requirement of impasse for invoking mediation is read in the context of the entire statute, it is clear that the invocation of mediation is designed to further the negotiation process and does not declare the futility of that process.¹⁰²

The rules also permit the parties to defer selection of the mediator after the labor board's automatic invocation of mediation fifteen days before the scheduled start of the school year. To do so, the parties jointly must stipulate that they will not resort to economic weapons for at least ten days after a mediator is selected. At any time, either party may withdraw the stipulation and trigger the mediator-selection process.¹⁰³

The stipulated deferral of mediator selection was an administrative response to concerns voiced by both labor and management that mandating formal mediation fifteen days before the start of the school year would be counterproductive if the parties were making adequate progress on their own and the bargaining was not ripe for mediation.¹⁰⁴ Subsequently, the legislature amended the IELRA to authorize the rule expressly.¹⁰⁵

The law governing impasse resolution outside of education differs in several significant respects. First, certain employees—specifically, security employees (primarily prison guards), peace officers, firefighters, and fire department paramedics are denied the right to strike, but are granted the right to interest arbitration.¹⁰⁶ Second, parties granted the right to strike do not have bargaining notice timetables or provisions for labor board invocation of mediation.

There are five general requirements for a lawful strike throughout the public sector in Illinois: (1) the employees must be represented by an exclusive bargaining representative; (2) the existing collective bargaining agreement, if any, must have expired; (3) the parties must not have agreed to use interest arbitration; (4) there must have been prior resort to mediation;

101. See *NLRB v. Katz*, 369 U.S. 736 (1962).

102. See Malin, *supra* note 29, at 124 n.99; *cf.* *City of Fostoria*, 3 Ohio Pub. Employee Rep. (Lab. Rel. Press) ¶ 3058, at VII-119 (Ohio St. Empl. Rel. Bd. 1986) (prohibiting unilateral changes in terms and conditions of employment before reaching the "ultimate impasse").

103. ILL. ADMIN. CODE tit. 80, § 1130.30(b)(2) (1992).

104. See Malin, *supra* note 29, at 125-26.

105. An Act in Relation to Labor, Pub. Act 86-412, 1989 Ill. Laws 2552 (codified as amended at 115 ILL. COMP. STAT. act 5, § 12 (1992)).

106. 5 ILL. COMP. STAT. act 315, § 14 (1992). Paramedics not employed by a fire department do have the right to strike, however. *County of Jackson*, 5 Ill. Pub. Employee Rep. (Lab. Rel. Press) ¶ 2037, at X-271 (Ill. St. Lab. Rel. Bd. 1989).

and (5) the union must have given at least five days' notice of its intent to strike.¹⁰⁷

The IELRA is silent concerning the consequences of an illegal strike. The IPLRA, however, expressly provides that an employer may discipline an employee who engages in an illegal strike.¹⁰⁸ The IPLRA does not state whether this is the only remedy available to the employer.

On their faces, both statutes therefore leave the parties to act at their peril when deciding whether to strike or how to respond to a strike. To illustrate this, consider the following hypothetical: The union has given notice of its intent to strike before any mediation sessions were held. The union also has set a strike deadline for Monday. After the union gives notice, a mediation session is held at which some progress is made. The parties nevertheless remain far apart, and the union asks for a Saturday meeting. The employer is willing, but the mediator is not available until Tuesday. The union proposes meeting on Saturday without the mediator, and the employer asks that the union put off the strike deadline until after the mediation session on Tuesday.

In Illinois, both parties in the hypothetical must deal with a considerable degree of legal uncertainty. If the union strikes on Tuesday, it faces claims that the strike is illegal both because the union did not engage in sufficient prestrike mediation and because it gave its strike notice before any mediation.¹⁰⁹ If the

107. 5 ILL. COMP. STAT. act 315, § 17(a) (1992); 115 ILL. COMP. STAT. act 5, § 13 (1992). There are subtle differences between the requirements in public education and the general public sector. First, in public education, the contract must have expired absolutely. *Id.* § 13(d). This reflects a statutory requirement that every contract in public education contain no-strike and binding grievance arbitration provisions. *Id.* § 10(c). In the general public sector, the parties have the option to agree not to have no-strike and binding arbitration provisions in their contracts. 5 ILL. COMP. STAT. act 315, § 8. Where they do so, the union need not await the contract's expiration before striking. *Id.* § 17(a)(2).

Second, in public education, the statute requires that "mediation has been used without success," 115 ILL. COMP. STAT. act 5, § 13(b), whereas in the general public sector, the requirement is that "mediation has been used," 5 ILL. COMP. STAT. act 315, § 17(a)(4). Third, the IELRA requires the union to serve its strike notice on the employer, the labor board, and, where relevant, the regional school superintendent. 115 ILL. COMP. STAT. act 5, § 13(c). The IPLRA requires only that the notice be served on the employer, *id.* § 17(a)(5), but ISLRB and ILLRB rules require that a copy be filed with the appropriate labor board. ILL. ADMIN. CODE tit. 80, § 1230.180(e) (1992).

108. 5 ILL. COMP. STAT. act 315, § 17(b) (1992).

109. See Chicago Board of Educ., 3 Ill. Pub. Employee Rep. (Lab. Rel. Press) ¶ 1111, at VII-349 (Ill. Educ. Lab. Rel. Bd. 1987) (raising, but not deciding, the issue of the sequence of strike notice and mediation).

strike is improper, it is not protected and the employer may discipline or discharge the strikers.¹¹⁰ The employer might also have remedies against the union.

The employer also faces numerous questions. May it lawfully refuse to meet on Saturday without the mediator? If the union strikes, should the employer discipline or discharge the strikers? If the employer does so, and the labor board later holds that the strike was protected, the employer will be liable for unfair labor practices.¹¹¹

Suppose the employer decides that self-help is too risky. Where does the employer go for relief? The employer might seek an injunction. Prior to the enactment of the statutes, the Illinois Supreme Court held that the state's anti-injunction act did not bar a court from enjoining a public sector strike.¹¹² The continuing validity of this ruling in light of the statutes is debatable, however. Moreover, an action for an injunction might be preempted by the labor boards' primary jurisdiction.¹¹³

Recognizing the doubts surrounding an injunction petition, the employer might file unfair labor practice charges. The statutes, however, do not make an improper strike an unfair labor practice expressly. It could be argued, by analogy to the law governing the private sector, that the strike, even if unprotected, is not an unfair labor practice.¹¹⁴

When left to their peril, it appears that the parties usually concentrate on negotiating rather than litigating. Indeed, there has been very little litigation in Illinois over the legality of strikes. It was not until 1992 that the IELRB held that an illegal strike was an unfair labor practice.¹¹⁵ In *Joliet Junior College*, the board held that a union's strike without first serving a five-day notice on the regional school superintendent constituted a refusal to bargain in good faith, in violation of section 14(b)(3) of the IELRA.¹¹⁶ The board also held that the

110. See *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1939); *Chrysler Corp.*, 232 N.L.R.B. 466 (1977), *aff'd*, 125 L.R.R.M. (BNA) 3063 (D.C. Cir. 1979).

111. See *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938).

112. *City of Pana v. Crowe*, 316 N.E.2d 513, 515 (Ill. 1974).

113. See Malin, *supra* note 29, at 133-43.

114. See *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477 (1960) (holding that the NLRB had exceeded its powers when it determined that a union, in sponsoring conduct designed to interfere with the employer's business during contract negotiations, was engaging in unfair labor practices).

115. See Board of Trustees of Joliet Junior College, Community College Dist. No. 525, 8 Ill. Pub. Employee Rep. (Lab. Rel. Press) ¶ 1011, at IX-39 (Ill. Educ. Lab. Rel. Bd. 1992).

116. *Id.* at IX-42.

illegal strike irreparably harmed the employer by skewing the bargaining process and directed its general counsel to seek a preliminary injunction in state court.¹¹⁷ The board cautioned, however, that parties should not assume that every illegal strike will automatically bring a board directive for preliminary injunctive relief.¹¹⁸

Joliet Junior College still leaves many parties to act at their peril. The decision applies only to the IELRA, and it is at least arguable that the IPLRA, by expressly sanctioning employer self-help for illegal strikes, has precluded unfair labor practice resolution of disputes regarding a strike's legality. Furthermore, many issues regarding job actions remain unresolved under both acts. For example, may a union engage in a concerted refusal to perform voluntary work (such as overtime, or, for teachers, supervision of extracurricular activities) to pressure an employer at the bargaining table, or are such actions subject to the statutes' strike requirements?¹¹⁹ There also have been no rulings even suggesting how a party should know if it has made sufficient use of mediation to enable it to strike lawfully.¹²⁰

The Illinois public sector bargaining laws also regulate the use of economic weapons by employers. The statutes appear to

117. *Id.* at IX-43.

118. *Id.* at IX-42.

119. In *Zion Elementary Sch. Dist. No. 6*, 6 Ill. Pub. Employee Rep. (Lab. Rel. Press) ¶ 1021, at IX-102 (Ill. Educ. Lab. Rel. Bd. 1990), the IELRB reversed its executive director's dismissal of an unfair labor practice charge that the union had engaged in a concerted refusal to perform extracurricular work without complying with the statute's strike requirements. *Id.* at IX-103. The board held that a complaint should issue because the charge raised an issue of law whether such a concerted refusal to perform voluntary work amounted to a strike. *Id.* The board did not indicate, however, how it might ultimately rule on the legal issue.

120. There is considerable controversy over the meaning of the IELRA's requirement that mediation be used "without success." Legislative history shows an intent to rely on mediation to prevent and shorten strikes. See Malin, *supra* note 29, at 127 n.106 (citing and discussing Illinois legislative history). It is clear that the statute does not require a mediator to give up before the union can strike.

In *Chicago Bd. of Educ.*, 3 Ill. Pub. Employee Rep. (Lab. Rel. Press) ¶ 1111, at VII-349 (Ill. Educ. Lab. Rel. Bd. 1987), the IELRB reversed its executive director's dismissal of an unfair labor practice charge that the union had violated the IELRA by issuing a notice of its intent to strike before engaging in mediation. The board held, however, only that the complaint raised a sufficiently tenable legal issue to warrant a hearing. *Id.* at VII-350. It also found that the employer's position did not have a sufficient probability of success on the merits and denied the employer's petition to seek a preliminary injunction. *Id.* The parties settled the complaint when they settled the strike. Telephone Interview with David Youngerman, Chief Hearing Officer, Illinois Educational Labor Relations Board (Mar. 25, 1993).

allow employers to lockout employees.¹²¹ The IELRB has analogized to private sector precedent and has held that, in responding to strikes, employer tactics that are inherently destructive of employee rights to engage in concerted activity are *per se* discriminatory and hence illegal, whereas employer tactics that are comparatively slight in discriminatory effect are presumed illegal, but will be considered lawful if the employer can show a legitimate justification for them.¹²²

Once a lawful strike is underway, the Illinois statutes make obtaining an injunction very difficult. Education employers may petition a circuit court to enjoin a strike that poses a clear and present danger to the public health and safety, but an unfair labor practice by the employer or other evidence of "a lack of clean hands" is a defense to the injunction.¹²³ Outside of public education, injunctions are available against strikes that pose a clear and present danger to the public health and safety, but not through immediate employer court action. Instead, employers must petition the labor board for a strike investigation, which the board must complete within seventy-two hours. The employer may sue for an injunction only if the labor board finds that a clear and present danger exists. Moreover, if an injunction issues, the parties are subject to the interest arbitration provisions which govern peace officers and firefighters.¹²⁴

The ISLRB has interpreted the clear and present danger standard narrowly. It has authorized injunctions against a

121. Section 14(m) of the IPLRA, 5 ILL. COMP. STAT. act 315, § 14(m) (1992), prohibits police officers and firefighters from striking and employers from locking them out, thereby impliedly recognizing that employers may lockout other employees.

122. Carmi Community Unit Sch. Dist. 5, 6 Ill. Pub. Employee Rep. (Lab. Rel. Press) ¶ 1020, at IX-93 (Ill. Educ. Lab. Rel. Bd. 1990) (relying on *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967) and *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963)). In *Carmi*, the IELRB held that the employer illegally discriminated against strikers when it closed its schools to students, but kept them open to nonstriking teachers, paying those teachers their regular per diem salaries while having them work shorter hours than the normal school day. *Id.* at IX-98 to IX-99. The board reasoned that the employer's actions conferred a benefit, i.e., regular pay for fewer hours, on nonstrikers that was not available to strikers and thereby discriminated against strikers without justification. *Id.* In *Minonk-Dana-Rutland Community Unit Sch. Dist.*, 6 Ill. Pub. Employee Rep. (Lab. Rel. Press) ¶ 1032, at IX-130 (Ill. Educ. Lab. Rel. Bd. 1990), the board's executive director interpreted *Carmi* to allow an employer to close schools to students, keep those schools open to nonstriking teachers, and pay the nonstrikers their regular per diem wages, as long as the nonstrikers were required to work their regular hours.

123. 115 ILL. COMP. STAT. act 5, § 13 (1992).

124. 5 ILL. COMP. STAT. act 315, § 18 (1992).

strike by water treatment workers which would have resulted in the deterioration of a city's water quality below acceptable levels¹²⁵ and a strike by employees of a municipal electric company which would have blacked out a city.¹²⁶ In both cases, the board limited the injunction authorization to a few employees whose presence on the job was essential to maintaining the services.¹²⁷ All other members of the bargaining unit remained free to strike.¹²⁸

Thus, the Illinois statutes rely primarily on the threat and use of economic weapons to settle bargaining impasses. The statutes minimize labor board and court intervention and place maximum control in the hands of the parties. Although both statutes require prestrike mediation, the parties control the timing of mediation and whether they will use any other third-party assistance. The parties also control the decision whether to challenge the legality of the use of economic weapons.¹²⁹ Considerable legal uncertainty concerning the meaning of statutory language encourages the parties to resolve differences about legal questions at the bargaining table rather than in labor board litigation. Furthermore, the requirement of a clear and present danger to public health and safety makes enjoining a strike in public education virtually impossible.¹³⁰ Outside of the education sector, employers seeking strike injunctions first must obtain authorization from the labor board and then convince a court that the back-to-work order is proper. If the employer succeeds, it likely will obtain an order limited to an essential skeleton crew, and the order will come at the cost of being forced into interest arbitration.

125. City of Edwardsville, 1 Ill. Pub. Employee Rep. (Lab. Rel. Press) ¶ 2015, at VIII-87 (Ill. St. Lab. Rel. Bd. 1985).

126. City of Naperville, 7 Ill. Pub. Employee Rep. (Lab. Rel. Press) ¶ 2033, at X-154 (Ill. St. Lab. Rel. Bd. 1991).

127. See *Naperville*, 7 Ill. Pub. Employee Rep. (Lab. Rel. Press) at X-155; *Edwardsville*, 1 Ill. Pub. Employee Rep. (Lab. Rel. Press) at VIII-88.

128. See *Naperville*, 7 Ill. Pub. Employee Rep. (Lab. Rel. Press) at X-155; *Edwardsville*, 1 Ill. Pub. Employee Rep. (Lab. Rel. Press) at VIII-88.

129. See *Elgin Teachers Ass'n*, 7 Ill. Pub. Employee Rep. (Lab. Rel. Press) ¶ 1115, at IX-465 (Ill. Educ. Lab. Rel. Bd. 1991) (holding that parents and taxpayers lack standing to file unfair labor practice charges challenging the legality of a strike).

130. See *Malin*, *supra* note 29, at 131-33. Even a strike by support staff which might render the buildings unsafe, such as a strike by boiler operators during the winter, should not be enjoined, because the employer can avoid the danger by closing the schools.

B. The Right to Strike in Ohio

The Ohio Public Employee Collective Bargaining Act (OPECBA)¹³¹ also grants public employees the right to strike, but differs from the Illinois statutes in many significant ways. First, it denies the right to strike to a broader class of employees: police, firefighters, deputy sheriffs, state highway patrol officers, dispatchers of police and firefighters, emergency medical and rescue units, nurses, employees of the state schools for the blind and deaf, public retirement system employees, correctional employees, penal and mental institution guards, psychiatric attendants, and youth leaders at correctional facilities, but gives them a right to interest arbitration.¹³²

The Ohio statute imposes a statutory time frame on the parties' negotiations regardless of whether the employees have the right to strike. Fifty days before the expiration of a collective-bargaining agreement, either party may petition the Ohio State Employment Relations Board (OSERB) to intervene.¹³³ Forty-five days prior to contract expiration, the OSERB must appoint a mediator.¹³⁴ Thirty-one days prior to contract expiration, the labor board must appoint up to three fact finders.¹³⁵ The fact finders must make their findings of fact and recommendations within fourteen days of appointment unless the parties agree to extend the time.¹³⁶ The parties then have seven days to reject the recommendations by a three-fifths vote of the union's membership or the employer's legislature.¹³⁷

The union's rejection must be by three-fifths of *all* its members in the bargaining unit; three-fifths of those voting will not suffice.¹³⁸ Moreover, to constitute a valid rejection, the vote must comply with OSERB rules.¹³⁹ These rules require a secret ballot election, with the ballots to be tallied upon the conclusion

131. OHIO REV. CODE ANN. §§ 4117.01-.23 (Anderson 1991).

132. *Id.* § 4117.14(D)(1).

133. *Id.* § 4117.14(C)(2).

134. *Id.*

135. *Id.* § 4117.14(C)(3).

136. *Id.* § 4117.14(C)(5).

137. *Id.* § 4117.14(C)(6).

138. Miami Univ., 3 Ohio Pub. Employee Rep. (Lab. Rel. Press) ¶ 3051, at VII-102 (Ohio St. Empl. Rel. Bd. 1986).

139. *Id.*

of the election.¹⁴⁰ A union or employer who rejects the fact-finding recommendations must serve written notice of the vote on the other party and on the OSERB. Failure to serve timely notice is fatal to the rejection.¹⁴¹

The OSERB must publicize the fact-finding report within seven days,¹⁴² which it does by posting a notice in its main office and mailing a copy of the report to the press.¹⁴³ The union may strike seven days after the OSERB publishes the fact-finding recommendations, or earlier if the contract has expired,¹⁴⁴ provided it has given the employer and the board ten days' prior written notice of its intent to strike.¹⁴⁵ OSERB rules require that the notice specify the date on which the strike will occur.¹⁴⁶ The OSERB, by decision, has held that the notice may not recite simply the statutory definition of "strike," but instead must specify the type of strike action that the union contemplates.¹⁴⁷ The notice is timely as of the date it is mailed; delays in the mail do not invalidate it.¹⁴⁸

The OPECBA expressly authorizes the parties to opt out of the statutory provisions by adopting a mutually agreed upon dispute settlement procedure (MAD). The statute authorizes: (1) conventional arbitration, (2) final offer, package arbitration, (3) final offer, issue-by-issue arbitration, or (4) final-offer-plus-fact-finder-recommendation arbitration, in addition to settlement by a citizens' conciliatory council and "[a]ny other

140. OHIO ADMIN. CODE § 4117-9-05(M) (1987). The rules do not define "secret ballot." It remains to be seen how closely the OSERB will police the elections. *Cf.* MARTIN H. MALIN, *INDIVIDUAL RIGHTS WITHIN THE UNION* 249-51 (1988) (discussing secret balloting under the Labor-Management Recording and Disclosure Act).

141. OHIO ADMIN. CODE § 4117-9-05(M)-(N) (1987). When the last day of the rejection period falls on a weekend, notice is timely if mailed on the following Monday. *Carlisle Local Bd. of Educ.*, 5 Ohio Pub. Employee Rep. (Lab. Rel. Press) ¶ 5019, at X-16 (Ohio St. Empl. Rel. Bd. 1987).

142. OHIO REV. CODE ANN. § 4117.14(C)(6) (Anderson 1991).

143. OHIO ADMIN. CODE § 4117-9-05(P) (1987).

144. *Ohio Council 8 v. Springfield Bd. of Parks Trustees*, 539 N.E.2d 175, 179 (Ohio Ct. App. 1988).

145. OHIO REV. CODE ANN. § 4117.14(D)(2) (Anderson 1991).

146. OHIO ADMIN. CODE § 4117-13-01(B)(1) (1987); *accord* *South Euclid-Lyndhurst City Sch. Dist. Bd. of Educ.*, 1 Ohio Pub. Employee Rep. (Lab. Rel. Press) ¶ 1205, at VII-157, VII-158 (Ohio St. Empl. Rel. Bd. 1984).

147. *Fort Frye Local Sch. Dist. Bd. of Educ.*, 5 Ohio Pub. Employee Rep. (Lab. Rel. Press) ¶ 5015, at X-11, X-12 (Ohio St. Empl. Rel. Bd. 1987). The OSERB did not apply its holding in the actual case, raising interesting questions of administrative law concerning whether it engaged in rulemaking or adjudication. *See generally* *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 770-75 (1969) (Black, J., concurring).

148. *Summit County Dep't of Human Servs.*, 2 Ohio Pub. Employee Rep. (Lab. Rel. Press) ¶ 2334, at VII-188, VII-189 (Ohio St. Empl. Rel. Bd. 1985).

dispute settlement procedure mutually agreed to by the parties.”¹⁴⁹ The Ohio act thus affords the parties the flexibility to design their own prestrike procedures to meet their needs more effectively.

OSERB rules and rulings, however, may have the effect of inhibiting party flexibility. The rules provide that any variation in the statutory timelines for mediation and fact-finding, except for extensions of time after appointment of the fact-finding panel, will be considered a MAD.¹⁵⁰ Thus, the board will not pay one-half of the cost of the fact-finding panel, which it pays under the statutory procedure.¹⁵¹ Furthermore, the OSERB has held that a MAD will not be sustained if it is contrary to a compelling public policy.¹⁵² This led to an ironic result in *Mad River-Green Local Board of Education*.¹⁵³ The parties had a two-year contract with a wage reopener for the second year. The contract provided that either party could declare impasse which would trigger a joint request for mediation. It further provided that mediation would continue until agreement or until the contract expired.¹⁵⁴

Upon the union's demand, the parties negotiated pursuant to the reopener.¹⁵⁵ They entered mediation and subsequently the union struck. The OSERB had held previously that a union may strike in the middle of a contract term where there is a wage reopener.¹⁵⁶ The OSERB held that the *Mad River-Green* MAD was invalid because it provided for mediation to continue interminably and, therefore, never allowed the union to strike.¹⁵⁷ The OSERB asserted that “there is no practical way to interpret the MAD provision to allow for the exercise of this right [to strike]; since if no settlement is reached, the parties . . . are supposed to continue mediation until the

149. OHIO REV. CODE ANN. § 4117.14(C)(1) (Anderson 1991).

150. OHIO ADMIN. CODE § 4117-9-03(F) (1987).

151. *Id.* § 4117-9-03(E).

152. *Mad River-Green Local Bd. of Educ.*, 5 Ohio Pub. Employee Rep. (Lab. Rel. Press) ¶ 5695, at X-540 (Ohio St. Empl. Rel. Bd. 1988) (finding a MAD to be faulty because it precluded the right to strike during the reopener period); *Vandalia-Butler City Sch. Dist.*, 3 Ohio Pub. Employee Rep. (Lab. Rel. Press) ¶ 3019, at VII-36 (Ohio St. Empl. Rel. Bd. 1986) (upholding a MAD because it established an alternate procedure for strike-permissive public employees).

153. 5 Ohio Pub. Employee Rep. (Lab. Rel. Press) ¶ 5695.

154. *Id.* at X-540.

155. *Id.* at X-540 to -541.

156. *Carlisle Local Bd. of Educ.*, 5 Ohio Pub. Employee Rep. (Lab. Rel. Press) ¶ 5019, at X-16 (Ohio St. Empl. Rel. Bd. 1987).

157. *Mad River-Green*, 5 Ohio Pub. Employee Rep. (Lab. Rel. Press) at X-541.

expiration of the Agreement.”¹⁵⁸ The board never explained why mediation and a strike could not occur simultaneously. Consequently, the union was required to exhaust the statutory procedures before it could strike.

Thus, parties seeking flexibility in their bargaining procedures sacrifice the state's contribution to the costs of fact-finding and run the risks both that the OSERB will invalidate their MAD and that any strike undertaken pursuant to the MAD may be declared illegal. This latter risk appears to be substantial. Although the OSERB has upheld MADs which bypassed mediation,¹⁵⁹ it has invalidated a MAD which bypassed the strike notice¹⁶⁰ and one which set a fifteen-day deadline for fact finder recommendations, but failed to specify what would happen if the fact finder failed to meet the deadline and the parties did not agree to an extension.¹⁶¹ The OSERB's ruling in *Mad River-Green* raises such questions as whether a MAD which liberalizes the strike notice or which bypasses employer or union votes on prestrike proposals or recommendations will survive board review.¹⁶²

Unlike the law in Illinois, the Ohio act expressly addresses the consequences of an illegal strike. An employer who believes that the union has not complied with the statutory requirements may petition the OSERB to determine whether the strike is unauthorized. The board must make a determination within seventy-two hours. If it finds the strike to be unauthorized, the employer may give the striking employees twenty-four hours' notice and then remove or suspend those who continue to strike. Unauthorized strikers who are not dismissed permanently are prohibited from receiving pay raises for one year and are docked two days' pay for each day that they strike.¹⁶³

The Ohio act authorizes injunction petitions in the court of common pleas against strikes by employees who do not have the right to strike or by strike-eligible employees prior to the

158. *Id.*

159. Niles City Bd. of Educ., 8 Ohio Pub. Employee Rep. (Lab. Rel. Press) ¶ 1976, at X-787 (Ohio St. Empl. Rel. Bd. 1991); Vandalia-Butler City Sch. Dist., 3 Ohio Pub. Employee Rep. (Lab. Rel. Press) ¶ 3019, at VII-35 (Ohio St. Empl. Rel. Bd. 1986).

160. Central Ohio Transit Auth., 1984-86 Ohio St. Empl. Rel. Bd. 345 (1986).

161. Weathersfield Local Bd. of Educ., 8 Ohio Pub. Employee Rep. (Lab. Rel. Press) ¶ 1775, at X-666 (Ohio St. Empl. Rel. Bd. 1991).

162. See Jack G. Day, *Report From Serbia*, 35 CASE W. RES. L. REV. 353, 360-61 (1985) (raising similar questions).

163. OHIO REV. CODE ANN. § 4117.23 (Anderson 1991).

exhaustion of the dispute settlement procedures. Unfair labor practices by the employer are not defenses to the injunction action.¹⁶⁴

Thus, in contrast to Illinois, a union risks very little by striking in Ohio with the propriety of such action in doubt. The primary risk is that the employer will sue for an injunction or will petition the OSERB to determine whether the strike is unauthorized. An employer also risks little because it can force an OSERB ruling within seventy-two hours. The employees risk nothing. Before they can be disciplined or discharged, the OSERB must find their strike to be unauthorized and their employer must give them a day's notice of the OSERB ruling and an opportunity to return to work.

The Ohio statute prohibits the employer from locking out or "otherwise prevent[ing] employees from performing their regularly assigned duties where an object thereof is to bring pressure on the employees or an employee organization to compromise or capitulate to the employer's terms regarding a labor relations dispute."¹⁶⁵ At least one management attorney has cautioned that this statutory language may prohibit employers from hiring permanent replacements and from subcontracting struck work.¹⁶⁶

Lawful strikes which pose a clear and present danger to the public health and safety are restrainable for seventy-two hours by employer petition in the court of common pleas. During this period, the OSERB must determine whether a clear and present danger exists. If the board so finds, the court may enjoin the strike for up to sixty days. During that period, the parties must resort to mediation, with the mediator determining whether the sessions will be public. Forty-five days into the process, the mediator may issue a public report on the status of negotiations.¹⁶⁷

Like Illinois, Ohio has interpreted the clear and present danger standard narrowly. In *Central Ohio Transit Authority*,¹⁶⁸ the OSERB refused to find that a strike by employees of the Central Ohio Transit Authority (COTA) posed a clear and present danger to public health and safety. The

164. *Id.* § 4117.15.

165. *Id.* § 4117.11(A)(7).

166. Robert J. Townsend, *Some Aspects of Ohio Public Sector Collective Bargaining from an Employer's Point of View*, in *FIRST ANNUAL LABOR AND EMPLOYMENT LAW INSTITUTE* 45-46 (William F. Dolson ed., 1985); cf. Charles E. Wilson, *The Replacement of Lawful Economic Strikers in the Public Sector in Ohio*, 46 OHIO ST. L.J. 639 (1985).

167. OHIO REV. CODE ANN. § 4117.16 (Anderson 1991).

168. 4 Ohio Pub. Employee Rep. (Lab. Rel. Press) ¶ 4040, at VII-58 (Ohio St. Empl. Rel. Bd. 1987).

board defined the injunction standard as “a powerful life, body or property threatening condition both obvious and imminent” that is “more than random individual hardship and more than mere inconvenience.”¹⁶⁹ The board held that COTA’s reliance on evidence of individual hardships and inconvenience in securing transportation to work, to medical facilities, to groceries, and to drug stores was not sufficient to enjoin the strike.¹⁷⁰ It faulted COTA for not showing that alternative transportation would be unavailable and for not introducing any studies of the strike’s systematic impact.¹⁷¹

In general, Ohio’s approach to public sector impasse resolution differs considerably from Illinois’ approach. Ohio places such substantial restraints on the parties’ use of economic weapons that it does not rely on the fear of economic warfare as the primary method of settling bargaining impasses. Rather, it relies primarily on fact-finding and on public pressure to bring the parties to an agreement. The extent of the reliance on fact-finding is evident from the requirement of fact-finding and the specific procedural detail required to reject fact-finder recommendations. A minor procedural error results in the recommendations being deemed accepted. The extent of the reliance on publicity is evident from the requirement that the OSERB publicize the fact finder’s recommendations, and from the authorization of public mediation sessions and public mediator reports following the enjoining of strikes which endanger public health and safety. This contrasts markedly with the Illinois labor boards’ rules, which provide for private negotiations and mandate mediator confidentiality.¹⁷²

C. The Right to Strike in Oregon

The Oregon Public Employee Collective Bargaining Act (OrPECBA)¹⁷³ prohibits police officers, firefighters, prison and mental health institution guards, and 9-1-1 operators from

169. *Id.* at VII-60.

170. *Id.*

171. *Id.* at VII-60 to -61.

172. ILL. ADMIN. CODE tit. 80, § 1130.30(g)-(h) (1992).

173. OR. REV. STAT. §§ 243.650-.782 (1991).

striking,¹⁷⁴ but provides them with a right to petition for interest arbitration.¹⁷⁵ The Oregon courts and the Oregon Employment Relations Board (OERB) interpret these categories narrowly to encompass only those employees whose job duties are such that it can be said without a case-by-case determination that a strike would threaten the public.¹⁷⁶ Thus, prison employees such as teachers, stewards, nurses, and skilled craft workers have the right to strike because maintaining prison security is not their primary responsibility.¹⁷⁷ Similarly, parole officers have the right to strike,¹⁷⁸ as do civilian employees of a police department, such as dispatchers, parking and animal control workers, and clerical workers.¹⁷⁹

In bargaining units that have the right to strike, either party may request mediation "after a reasonable period of negotiation."¹⁸⁰ The mediation request must state the issues in dispute and the number and length of the bargaining sessions that have been held.¹⁸¹ The number and length of meetings necessary to comprise a reasonable period of negotiation depends upon the number and complexity of the issues raised.¹⁸² Premature requests for mediation, however, do not constitute *per se* bad-faith bargaining.¹⁸³ A party may raise

174. *Id.* § 243.736.

175. *Id.* § 243.742(2). The OERB may initiate such arbitration on its own motion if deemed appropriate and in the public interest. *Id.*

176. See *AFSCME Local 2623-A v. State*, 628 P.2d 1228, 1239-41 (Or. Ct. App. 1981).

177. *Id.*

178. *Id.* at 1243-44.

179. See *City of Canby v. Canby Police Ass'n*, 680 P.2d 1033, 1034-35 (Or. Ct. App. 1984) (dispatchers); *City of McMinnville*, 7 Or. Pub. Employee Collective Bargaining Rep. 5924 (Or. Empl. Rel. Bd. 1983) (parking enforcement officers, animal control officers, and clerks); *Forest Grove Police Dep't*, 6 Or. Pub. Employee Collective Bargaining Rep. 5363, 5369 (Or. Empl. Rel. Bd. 1982) (dispatchers and parking enforcement officers).

180. OR. REV. STAT. § 243.712(1) (1991). The parties need not be at impasse to proceed to mediation. *Oregon City Sch. Dist. No. 62*, 5 Or. Pub. Employee Collective Bargaining Rep. 4246 (Or. Empl. Rel. Bd. 1981).

181. OR. ADMIN. R. 115-40-000 (1993).

182. *Jefferson Sch. Dist. No. 509J*, 12 Or. Pub. Employee Collective Bargaining Rep. 781, 786-87 (Or. Empl. Rel. Bd. 1991) (finding that two brief meetings during which the union did not have an opportunity to explain the reasons behind its extensive proposals did not constitute a reasonable period of negotiation).

183. *Id.* at 785-86.

permissive subjects of bargaining¹⁸⁴ in mediation, provided that it does not condition agreement on the permissive subjects.¹⁸⁵

Beginning fifteen days after the commencement of mediation, either party may request fact-finding.¹⁸⁶ Seven days prior to the fact-finding hearing, each party must submit a list of issues in dispute.¹⁸⁷ If one party has objected properly to an issue because it is a permissive subject of bargaining, the other party may not pursue the issue in fact-finding.¹⁸⁸ Usually, a party may not improve the position it submits to the fact finder over the offer it made to the other party. The Oregon board regards such improvements on significant issues as strong evidence of bad-faith bargaining unless the party can justify the new position by a change in circumstances that precluded an opportunity to bargain over the new position.¹⁸⁹ The fact-finding hearing is open to the public unless the parties agree otherwise.¹⁹⁰ The fact finder must make findings of fact and recommendations within thirty days following the close of the hearing.¹⁹¹

Within five working days following the recommendations, each party must notify the OERB whether it accepts or rejects the recommendations.¹⁹² Unlike Ohio, the Oregon statute does not impose a rejection procedure on the parties. Parties must accept or reject the fact finder's recommendations as a whole. A purported partial rejection is a rejection of the entire set of

184. The distinction between mandatory and permissive subjects of bargaining is well-established in labor law. Mandatory subjects are matters relating to wages, hours, and terms and conditions of employment. See *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958). Parties may insist on their positions on mandatory subjects to the point of impasse and may not act unilaterally until impasse is reached. See *NLRB v. Katz*, 369 U.S. 736 (1962). All matters that are neither mandatory nor illegal are permissive subjects of bargaining. Parties may, but are not required to, bargain on these matters. They may not insist on their positions to the point of impasse and may act unilaterally on these matters without bargaining. *Borg-Warner*, 356 U.S. at 349-50.

185. Oregon City Sch. Dist. No. 62, 5 Or. Pub. Employee Collective Bargaining Rep. 4246, 4255-56 (Or. Empl. Rel. Bd. 1981).

186. OR. REV. STAT. § 243.712(2)(b) (1991).

187. OR. ADMIN. R. 115-40-010(8) (1993).

188. Clackamas County, 9 Or. Pub. Employee Collective Bargaining Rep. 9298, 9301 (Or. Empl. Rel. Bd. 1987); Redmond Sch. Dist. 2J, 3 Or. Pub. Employee Collective Bargaining Rep. 1564, 1570-71 (Or. Empl. Rel. Bd. 1977).

189. McKenzie Sch. Dist. No. 68, 8 Or. Pub. Employee Collective Bargaining Rep. 8160, 8201 (Or. Empl. Rel. Bd. 1985).

190. OR. ADMIN. R. 115-40-010(10) (1993).

191. OR. REV. STAT. § 243.722(3) (1991).

192. *Id.*

recommendations.¹⁹³ The Oregon board publicizes rejections of recommendations.¹⁹⁴ Parties who unconditionally accept the fact finder's recommendations are bound by them, even if one of the parties misunderstood the recommendations.¹⁹⁵ If the parties are unable to agree on contract language implementing the recommendations, they must incorporate the fact finder's language in their agreement. Disputes over the meaning of that language then become disputes over contract interpretation, subject to contractual grievance and arbitration procedures.¹⁹⁶

Oregon has four requirements for a lawful strike: (1) the striking employees must be represented by an exclusive bargaining representative in a unit in which none of the employees are prohibited from striking;¹⁹⁷ (2) the parties must have exhausted the mediation and fact-finding procedures;¹⁹⁸ (3) a thirty-day cooling off period, running from the date that the Oregon board publicized the recommendations, must have expired;¹⁹⁹ and (4) the union must have given the board and the employer "10 days' notice . . . of its intent to strike and [have stated] the reasons for its intent to strike."²⁰⁰

The ten-day strike notice and thirty-day cooling off period may run concurrently.²⁰¹ Initially, the OERB interpreted the statute as not requiring that the notice specify the date on which the strike would begin, reasoning that it should not read into the act a specificity not expressly contained therein.²⁰²

193. Oregon City Sch. Dist. No. 62, 5 Or. Pub. Employee Collective Bargaining Rep. 4246, 4256 (Or. Empl. Rel. Bd. 1981).

194. OR. REV. STAT. § 243.722(3) (1991).

195. Molalla Union High Sch. Dist., 8 Or. Pub. Employee Collective Bargaining Rep. 6651 (Or. Empl. Rel. Bd. 1984).

196. Cascade Bargaining Council v. Jefferson County Sch. Dist. No. 509J, 732 P.2d 54, 57 (Or. Ct. App. 1987).

197. OR. REV. STAT. § 243.726(1) (1991).

198. *Id.* § 243.726(2)(a).

199. *Id.* § 243.726(2)(b).

200. *Id.* § 243.726(2)(c). On its face the statute does not require the collective bargaining agreement to have expired for a strike to be lawful, but does prohibit refusals to cross other bargaining units' picket lines. *Id.* § 243.732. Oregon board and court interpretations prohibit strikes during the term of a contract for the purpose of changing the contract, but leave open the legality of a mid-term strike to pressure bargaining over the terms of a successor contract. See Oregon State Employees Ass'n v. State, 535 P.2d 1385 (Or. Ct. App. 1975).

201. Oregon State Employees Ass'n v. State, 1 Or. Pub. Employee Collective Bargaining Rep. 324 (Or. Empl. Rel. Bd.), *aff'd on other grounds*, 535 P.2d 1385 (Or. Ct. App. 1975).

202. Albany Union High Sch. Dist. 8-J, 2 Or. Pub. Employee Collective Bargaining Rep. 730 (Or. Empl. Rel. Bd. 1976).

Subsequently, the board overruled this position and required the notice to give a date for the strike, justifying its position by citing the need for school districts and parents to know before transporting children to school whether the teachers will be at school or on strike.²⁰³ The strike notices also must specify the issues in dispute.²⁰⁴ A union may not strike over issues that were not submitted to mediation and fact-finding.²⁰⁵

Oregon restricts employer self-help comparably to the way it restricts the right to strike. An employer may not make unilateral changes in terms and conditions of employment prior to exhausting mediation and fact-finding.²⁰⁶ Before the employer may implement a unilateral change, the union must have rejected the proposed terms, and the employer must give the union adequate notice, usually five days, of its intent to do so.²⁰⁷

Generally, when a party has engaged in improper conduct during mediation or fact-finding, the OERB will order the parties to return to that stage of the impasse resolution process.²⁰⁸ The board, however, has not used this remedy to impose artificial strike prohibitions. For example, in *Redmond School District 2J*,²⁰⁹ the union had taken permissive subjects to fact-finding, but its strike notice disavowed those subjects and only economic issues remained in dispute. The OERB concluded that it would serve no purpose to return the parties to fact-finding and held that the strike would be lawful.²¹⁰

Lawful strikes may be enjoined when they pose a clear and present danger to the public health, safety, or welfare.²¹¹ Employers need not seek a declaration from the OERB before filing in court. The Oregon act cautions that a clear and

203. *Redmond Sch. Dist. 2J (Redmond I)*, 3 Or. Pub. Employee Collective Bargaining Rep. 1564, 1569 (Or. Empl. Rel. Bd. 1977).

204. *Id.* at 1570.

205. *See Roseburg Sch. Dist. No. 4*, 8 Or. Pub. Employee Collective Bargaining Rep. 7938, 7956 (Or. Empl. Rel. Bd. 1985).

206. *Wasco County v. AFSCME Local No. 2752*, 613 P.2d 1067 (Or. Ct. App. 1980), *aff'g* 4 Or. Pub. Employee Collective Bargaining Rep. 2397 (Or. Empl. Rel. Bd. 1979).

207. *Roseburg Sch. Dist. No. 4*, 8 Or. Pub. Employee Collective Bargaining Rep. at 7957.

208. *See Clackamas County*, 9 Or. Pub. Employee Collective Bargaining Rep. 9298, 9304 (Or. Empl. Rel. Bd. 1987); *Redmond Sch. Dist. 2J (Redmond II)*, 3 Or. Pub. Employee Collective Bargaining Rep. 1611 (Or. Empl. Rel. Bd. 1977).

209. 3 Or. Pub. Employee Collective Bargaining Rep. 1611.

210. *Id.* at 1615.

211. OR. REV. STAT. § 243.726(3)(a) (1991). There appear to be no reported decisions interpreting the clear and present danger standard since the statute was enacted in 1973.

present danger does not include "economic or financial inconvenience . . . that is normally incident to a strike."²¹² If an injunction issues, the parties must proceed to interest arbitration.²¹³

Oregon's right to strike is thus more restrictive than Illinois' due to Oregon's required exhaustion of fact-finding and required specification of strike issues. In several respects, however, Oregon's law is more liberal than Ohio's. Unlike Ohio, Oregon does not impose any method on the parties for rejecting the fact finder's recommendations. Deviations from the statutory procedures do not invalidate a strike where there is no useful purpose in doing so. Although parties accepting a fact finder's recommendations may not subsequently renege, Oregon does not seek to trap the unwary by imposing the recommendations on a party failing to dot every "i" and cross every "t." On the contrary, serious noncompliance with the impasse procedures results in returning the parties to fact-finding or mediation, not in imposing fact-finder recommendations.

In one respect, Oregon is more restrictive than Ohio. The waiting period between the publication of the fact-finding recommendations and a lawful strike is over four times longer in Oregon.²¹⁴

Because the Oregon statute provides for enjoining strikes that endanger the public welfare, strike injunctions, at least in theory, are easier to obtain than in Illinois and Ohio. Injunctions, however, are not without costs to the employer. As in Illinois, if a strike is enjoined, the parties are forced into interest arbitration.

D. The Right to Strike in Pennsylvania

The Pennsylvania Public Employee Relations Act,²¹⁵ also known as Act 195, grants the right to strike to almost all public employees except police and firefighters,²¹⁶ who are granted

212. *Id.* § 243.726(6).

213. *Id.* § 243.726(3)(c).

214. Compare OHIO REV. CODE ANN. § 4117.14(D)(2) (Anderson 1991) (seven day waiting period), with OR. REV. STAT. § 243.726(2)(b) (1991) (30 day waiting period).

215. PA. STAT. ANN. tit. 43, §§ 1101.101–2301 (1991 & Supp. 1992).

216. *Id.* § 1101.301(2) (excluding, for example, police and firefighters from the statutory definition of employee).

interest arbitration by another statute,²¹⁷ and prison and mental hospital guards and court personnel, who are granted interest arbitration by Act 195.²¹⁸ Prior to July 9, 1992, Act 195's only express requirement for a lawful strike was the completion of the statutory impasse resolution procedures.²¹⁹ Unlike Illinois, Ohio, and Oregon, Pennsylvania did not appear to require a notice of intent to strike.

Act 195 permits mediation if a "dispute or impasse" exists following "a reasonable period of negotiation."²²⁰ It further provides that if no agreement has been reached "twenty-one days after negotiations have commenced, but in no event later than one hundred fifty days prior to the 'budget submission date,' . . . both parties shall immediately" request the Pennsylvania Bureau of Mediation to intervene.²²¹ If the parties do not reach an agreement twenty days after the start of mediation "or in no event later than one hundred thirty days prior to the 'budget submission date,'" the Bureau of Mediation must so advise the Pennsylvania Labor Relations Board (PLRB), which has discretion to invoke fact-finding.²²² As a matter of policy, the PLRB has invoked fact-finding only when the parties jointly request it or when the mediator indicates that fact-finding would help to settle the dispute.²²³

The Pennsylvania board has distinguished between the prestrike mediation requirement and the duty to bargain in good faith. Although requesting mediation 150 days prior to the employer's budget submission date is a prerequisite for a legal strike, an employer is obligated to proceed to mediation even though the request comes at a later date.²²⁴ Similarly, an employer may not refuse to bargain when the first bargaining session would not occur until after the budget submission date.²²⁵

The Pennsylvania board and the courts have interpreted Act 195 to place upon the union the burden to take the initiative to

217. *Id.* § 217.3.

218. *Id.* § 1101.1001.

219. *Id.* § 1101.1003.

220. *Id.* § 1101.801.

221. *Id.*

222. *Id.* § 1101.802.

223. See DAVIS & FISCHER, *supra* note 23, at 45.

224. City of Williamsport, 1 Pa. Pub. Employee Rep. (Lab. Rel. Press) 1, 2 (Pa. Lab. Rel. Bd. 1971).

225. Ligonier Valley Sch. Dist., 2 Pa. Pub. Employee Rep. (Lab. Rel. Press) 159, 160 (Pa. Lab. Rel. Bd. 1972).

ensure that mediation is exhausted prior to a strike. If the employer refuses to join in a request for mediation, the union must seek it unilaterally.²²⁶ Even when the union pursues mediation unilaterally, mediation is not required 150 days before the budget submission date if the parties have yet to bargain without third-party assistance.²²⁷

Strikes which occur less than twenty days after the parties first meet with the mediator are illegal regardless of the length of time which passes between the mediator's appointment and the first meeting.²²⁸ The mandatory mediation period runs twenty calendar days following the first mediation session, however, regardless of whether any further mediation sessions are held during that period.²²⁹ If the PLRB fails to invoke fact-finding within twenty days after mediation began, the union may assume that the PLRB has decided that fact-finding would not be helpful and may lawfully strike.²³⁰ The board lacks authority to order fact-finding later than 130 days before the employer's budget submission date.²³¹ An employer may not make unilateral changes in terms and conditions of employment unless the union strikes.²³²

When the PLRB invokes fact-finding, it appoints the fact finder or fact-finding panel.²³³ Within five days following notice of appointment, the parties must submit written statements of the issues in dispute and their positions.²³⁴ Fact-finding hearings are private.²³⁵ Fact-finding recommendations are due forty days following notification of the board by the Bureau of Mediation that an agreement has not been reached.²³⁶ Thereafter, the parties have ten days to advise the PLRB whether they

226. See *North Clarion County Sch. Dist.*, 15 Pa. Pub. Employee Rep. (Lab. Rel. Press) ¶ 15,208, at 474 (Pa. Lab. Rel. Bd. 1984).

227. See *Centre County Area Vocational Sch.*, 3 Pa. Pub. Employee Rep. (Lab. Rel. Press) 130, 131-32 (Pa. Lab. Rel. Bd. 1973).

228. *Port Auth. v. Division 85, Amalgamated Transit Union*, 383 A.2d 954, 961 (Pa. Commw. Ct. 1978); *United Transp. Union v. Southeastern Pa. Transp. Auth.*, 347 A.2d 509, 513 (Pa. Commw. Ct. 1975).

229. *Peters Township Sch. Dist. v. Peters Township Fed'n of Teachers*, 501 A.2d 327, 330-31 (Pa. Commw. Ct. 1985).

230. *Bellefonte Area Educ. Ass'n v. Board of Educ.*, 304 A.2d 922, 925 (Pa. Commw. Ct. 1973).

231. *City of Philadelphia v. PLRB*, 614 A.2d 213, 214 (Pa. 1992).

232. *Philadelphia Hous. Auth. v. PLRB*, 620 A.2d 594, 600 (Pa. Commw. Ct. 1993).

233. 34 PA. CODE § 95.54 (1993).

234. *Id.* § 95.61.

235. *Id.* § 95.63.

236. PA. STAT. ANN. tit. 43, § 1101.802(1) (1991 & Supp. 1992).

accept the recommendations.²³⁷ Acceptance must be unequivocal; a conditional acceptance is equivalent to a rejection.²³⁸ If the parties do not accept the recommendations, the fact finder publishes them.²³⁹ The parties must again advise the PLRB whether they accept the recommendations not less than five days nor more than ten days following their publication.²⁴⁰

As in Ohio,²⁴¹ Pennsylvania does not leave parties to act at their peril when facing uncertainty concerning the legality of strike action. Act 195 provides that a public employer should seek an injunction in the court of common pleas against an illegal strike²⁴² and that employees who violate a strike injunction may be disciplined or discharged following an adjudication of contempt.²⁴³ The Pennsylvania Commonwealth Court has interpreted Act 195 to prohibit employers from engaging in self-help against illegal strikers without first obtaining a judicial declaration of the strike's legality.²⁴⁴

Act 195 provides for injunctions against lawful strikes that pose a clear and present danger or threat to the public health, safety, or welfare.²⁴⁵ Only the public employer has standing to seek such an injunction.²⁴⁶ Unlike its counterpart in Oregon, this potentially broad injunction provision has received frequent use. Prior to July 1992, its primary use was by school districts contending that teacher strikes endangered the public welfare.²⁴⁷

237. *Id.* § 1101.802(2).

238. *West Shore Sch. Dist.*, 20 Pa. Pub. Employee Rep. (Lab. Rel. Press) ¶ 20113, at 307 (Pa. Lab. Rel. Bd. 1989).

239. PA. STAT. ANN. tit. 43, § 1101.802(2) (1991 & Supp. 1992).

240. *Id.* § 1101.802(3).

241. *See supra* text accompanying note 163.

242. PA. STAT. ANN. tit. 43, § 1101.1002 (1991 & Supp. 1992).

243. *Id.* § 1101.1005.

244. *City of Scranton v. PLRB*, 505 A.2d 1360, 1363 (Pa. Commw. Ct. 1986).

245. PA. STAT. ANN. tit. 43, § 1101.1003 (1991 & Supp. 1992).

246. *Alling v. Williamsport Area Sch. Dist.*, 67 Pa. D. & C.2d 624, 626 (C.P. 1974). *But see Masloff v. Port Auth.*, 613 A.2d 1186, 1188 (Pa. 1992) (finding that under the Pennsylvania Port Authority Act, the Mayor of Pittsburgh has standing to seek an injunction against a Port Authority transit strike).

247. *See, e.g., Wilkes-Barre Area Educ. Ass'n v. Wilkes-Barre Area Sch. Dist.*, 523 A.2d 1183 (Pa. Commw. Ct.), *appeal denied*, 533 A.2d 715 (Pa. 1987); *Bellefonte Area Educ. Ass'n v. Board of Educ.*, 304 A.2d 922 (Pa. Commw. Ct. 1973); *Armstrong Educ. Ass'n v. Armstrong Sch. Dist.*, 291 A.2d 120 (Pa. Commw. Ct. 1972). *But see Masloff*, 613 A.2d at 1191 (upholding an injunction against a transit strike); *Highland Sewer & Water Auth. v. Local 459*, 67 Pa. D. & C.2d 564 (C.P. 1973) (denying an injunction against a water and sewer treatment employees' strike because supervisors were able to maintain services).

Under Act 195, employers may file injunction petitions only after the strike has begun. Prestrike petitions are premature and the defect is not cured when the strike begins.²⁴⁸ The danger must actually be clear and present—fear of a danger developing in the future does not justify an injunction.²⁴⁹ Harassment of school officials by residents²⁵⁰ and the disruption of the employer's daily routine²⁵¹ do not endanger the public welfare sufficiently to justify an injunction, nor does the loss of a quality assessment program.²⁵²

Most of the controversy over Act 195's injunction standard focused on whether a strike sufficiently endangered the public welfare when it lasted so long that it would not be possible to make up sufficient school days to comply with the state's requirement of 180 instructional days.²⁵³ Under those circumstances, a school district would lose a proportionate amount of its state funding.

In *Jersey Shore Area School District v. Jersey Shore Education Association*,²⁵⁴ the Pennsylvania Supreme Court held that the loss of state subsidies alone would not warrant a strike injunction, but the court affirmed the issuance of an injunction where the subsidy loss was coupled with other detriments to the public.²⁵⁵ *Jersey Shore* appeared to approve a pattern of lower court decisions that enjoined teacher strikes when it became impossible to meet the 180-day requirement, based on findings that continuing the strike would lead to a loss of state aid, the inability of high school seniors to receive counselling for college aptitude exams and college applications, detrimental effects on special education students, detrimental effects of extending the school year on students' ability to find summer jobs, the denial of hot lunch programs to low income students, and a loss of earnings by employees outside the struck

248. *Commonwealth v. Ryan*, 327 A.2d 351, 354–56 (Pa. 1974).

249. *Wilkes-Barre Area Educ. Ass'n*, 523 A.2d at 1187; *Bellefonte Area Educ. Ass'n*, 304 A.2d at 924; *Armstrong Educ. Ass'n*, 291 A.2d at 123–24.

250. *Armstrong Educ. Ass'n*, 291 A.2d at 124.

251. *Wilkes-Barre Area Educ. Ass'n*, 523 A.2d at 1186; *Armstrong Educ. Ass'n*, 291 A.2d at 124.

252. *Bellefonte Area Educ. Ass'n*, 304 A.2d at 924.

253. PA. STAT. ANN. tit. 24, § 15-1501 (1992).

254. 548 A.2d 1202 (Pa. 1988).

255. *Id.* at 1207–08 & n.9.

bargaining unit.²⁵⁶ Thus, a *de facto* rule appears to have evolved that a teacher strike may be enjoined once it has gone on so long as to preclude completing 180 days of pupil instruction.²⁵⁷

Act 195 is silent concerning the procedures following a strike injunction. Although courts have the power to order strikers back to work under the terms of the expired collective bargaining agreement and any tentative agreements reached in negotiations²⁵⁸ and may order and specify conditions for further bargaining,²⁵⁹ they lack authority to impose terms not agreed to by the parties or to order interest arbitration.²⁶⁰

Injunctions based on the inability to make up lost school days would not be available in Illinois and Ohio as a clear and present danger to the public health and safety. Their availability in Pennsylvania as a clear and present danger to the public welfare makes it likely that when parties strike, a court will intervene before employees suffer a loss of salary and before employers suffer a loss of revenues and a loss of instructional service, that is, before the strike really hurts.²⁶¹

256. See, e.g., *id.*; *Bethel Park Sch. Dist. v. Bethel Park Fed'n of Teachers*, 420 A.2d 18 (Pa. Commw. Ct. 1980); *Bristol Township Educ. Ass'n v. School Dist.*, 322 A.2d 767 (Pa. Commw. Ct. 1974); *Butler Area Sch. Dist. v. Butler Educ. Ass'n*, 9 Pa. Pub. Employee Rep. (Lab. Rel. Press) ¶ 9039, at 75 (C.P. 1978); *Montour Sch. Dist. v. Montour Educ. Ass'n*, 7 Pa. Pub. Employee Rep. (Lab. Rel. Press) 322 (C.P. 1976); *School Dist. v. Pittsburgh Fed'n of Teachers, Local 400*, 7 Pa. Pub. Employee Rep. (Lab. Rel. Press) 93 (C.P. 1976).

257. This *de facto* rule was recognized, but opposed, by the dissent in *Jersey Shore*, 548 A.2d at 1208-10 (Larsen, J., dissenting). In higher education, the Pennsylvania courts also have enjoined a strike when its continuance would have made it impossible to make up enough instructional days to complete the semester. *Temple Ass'n of Univ. Professionals v. Temple Univ.*, 582 A.2d 63, 65 (Pa. Commw. Ct. 1990). The controversy over what constitutes a danger to the public welfare also has erupted in public transit. In *Masloff v. Port Auth.*, 613 A.2d 1186 (Pa. 1992), the court upheld an injunction against the Pittsburgh area transit strike, relying on what the dissent characterized as the "inherent inconveniences" of a transit strike. 613 A.2d at 1193 (Larsen, J., dissenting).

258. *Bristol Township Educ. Ass'n*, 322 A.2d at 767.

259. *Armstrong Sch. Dist. v. Armstrong Educ. Ass'n*, 595 A.2d 1139, 1142 (Pa. Commw. Ct. 1991).

260. *Bethel Park Sch. Dist.*, 420 A.2d at 19; *Armstrong Sch. Dist. v. Armstrong Educ. Ass'n*, 291 A.2d 125, 128 (Pa. Commw. Ct. 1972).

261. The importance of make-up days to striking teachers' avoidance of salary loss is evident from teacher unions' active pursuit of make-up days even against stiff employer resistance. See, e.g., *Upper Bucks County Area Vocational-Technical Sch. Joint Comm. v. Upper Bucks County Vocational-Technical Sch. Educ. Ass'n*, 497 A.2d 943 (Pa. Commw. Ct. 1985); *Upper Merion Area Sch. Dist. v. Upper Merion Educ. Ass'n*, 482 A.2d 274 (Pa. Commw. Ct. 1984); *Scanlon v. Mount Union Area Bd. of Sch. Directors*, 415 A.2d 96 (Pa. Commw. Ct. 1980), *aff'd*, 452 A.2d 1016 (Pa. 1982). In *Root v. North Cambria School District*, 309 A.2d 175 (Pa. Commw. Ct. 1973), *overruled by Pittenger v. Union Area Sch. Bd.*, 356 A.2d 886 (Pa. Commw. Ct. 1976), the parties agreed to the terms of the new contract after seven days of a strike, but the strike

Furthermore, the injunction comes at virtually no cost to the employer in terms of interest arbitration or other postinjunction proceedings.

On July 9, 1992, Pennsylvania substantially amended its law governing public school employee strikes.²⁶² The amendments require mediation forty-five days after negotiations commence, and in no event later than 126 days prior to the end of the employer's fiscal year.²⁶³ Forty-five days after mediation has commenced, and not later than eighty-one days before the end of the fiscal year, fact-finding shall be imposed upon request by either party. The fact finder or fact-finding panel must make findings and recommendations within forty days. Within ten days, the parties must notify the PLRB whether they accept the recommendations. If they do not accept the recommendations, they are publicized and within ten days the parties must again notify the PLRB whether they accept the recommendations.²⁶⁴

Once mediation and fact-finding, if invoked, have been completed, the union may strike.²⁶⁵ It must give the employer forty-eight hours' notice of its intent to strike and may not strike more than twice during a school year.²⁶⁶ During the strike, the employer may not employ a replacement who did not work for the employer in the preceding twelve months.²⁶⁷ If the strike reaches a point where the employer will be unable to provide the required 180 days of instruction by June 15 or the end of the employer's school year, whichever is later, the strike must cease and the parties must proceed to interest arbitration.²⁶⁸ If the strike reaches a point where sufficient days cannot be made up by June 30, the Pennsylvania Secretary of Education may seek an injunction.²⁶⁹

The interest arbitration must be on a final offer basis in accordance with one of several alternatives set forth in the statute. The parties must agree on the format, but if they are unable to do so, the mediator selects the format. Once the arbitration award is rendered, either party may reject it within

continued for another 23 days over the issue of make-up days.

262. Act of July 9, 1992, Act No. 1992-88, § 1, 1992 Pa. Legis. Serv. 301, 301-08 (Purdon) (to be codified at PA. STAT. ANN. tit. 24, §§ 11-1101-A to -1172-A).

263. *Id.* § 1121-A.

264. *Id.* § 1122-A.

265. *Id.* § 1131-A.

266. *Id.* § 1101-A.

267. *Id.* § 1172-A.

268. *Id.* § 1125-A(b).

269. *Id.* § 1161-A. See *Pennsylvania Seeks Injunction To End Penn Hills Teachers Strike*, 31 Gov't Emp. Rel. Rep. (BNA) No. 1504, at 287 (Mar. 1, 1993) (reporting on the first use of the statute by the Pennsylvania Secretary of Education).

ten days at a properly convened regular or special meeting. If a party rejects the award, the strike may resume, but without the restrictions on who may be hired as a replacement worker.²⁷⁰

The new Pennsylvania statute substantially restricts the right to strike and leans toward the Ohio approach of reliance upon fact-finding. The interest arbitration provisions are similar to the Ohio fact-finding provisions—the parties are bound by the third party's decision unless they affirmatively reject it. Moreover, the new statute guarantees that strikes will not persist once they begin to really hurt, that is, once employees begin to lose wages and employers begin to lose state revenues and have to face voters for failing to meet state instructional standards.

III. THE LESSONS OF EXPERIENCE

State legislatures that legalize strikes by public employees do not intend to encourage work stoppages. Rather, they believe that once strikes are legal, they can be regulated and procedures can be required which will reduce the incidence of strikes and shorten those strikes that do occur.²⁷¹ This Part focuses on the experiences in Illinois, Ohio, Oregon, and Pennsylvania with the lawful right to strike. Part III.A compares the strike incidence in Illinois and Ohio before and after legalization of public employee strikes. The analysis does not firmly establish that legalizing and regulating strikes decreases their frequency, but does firmly show that legalization does not result in increased strike frequency. Consequently, for the normative reasons set forth in Part I, public employees should be afforded a lawful right to strike. Part III.B examines the effects of requiring exhaustion of nonbinding fact-finding before a lawful strike, finds that such a requirement lengthens strikes, and concludes that it should not be imposed.

270. *Id.* § 1125-A.

271. See Malin, *supra* note 29, at 101, 127 n.106 (quoting from legislative debates on the IELRA).

A. *The Effect of Legalizing Public Employee
Strikes in Illinois and Ohio*

In 1984, public employees in Illinois and Ohio obtained the right to strike.²⁷² One could expect that such action would lead to an increase in public sector strikes in those jurisdictions for several reasons. First, it seems intuitive that legalizing an activity that was previously illegal would tend to encourage that activity. Second, the strike legalization accompanied each state's first comprehensive public employee collective bargaining act. Thus, along with the right to strike came procedures to compel employer recognition of and negotiation with unions representing their workers. By increasing the number of units engaged in collective bargaining, such legislation increased the opportunities for strikes. Third, the experience in states other than Illinois and Ohio suggests that, at least initially, increased strike activity may accompany the legalization of public employee strikes.²⁷³ Contrary to this expectation, however, strike activity actually has declined in both states since legalization.

Ohio's legislation of public employee strikes took effect on April 1, 1984. Over the eight years beginning April 1, 1984, through April 30, 1992, there have been 110 strikes in Ohio.²⁷⁴ Seven of the strikes were unauthorized, presumably because the union failed to comply with the statutory procedures. In three of the seven cases, the union apparently corrected its errors and struck shortly thereafter.²⁷⁵ Table 1 summarizes the number of strikes by year and type of employer. Table 2 details the unauthorized strikes followed by lawful strikes.

Table 3 shows the number of strikes by Ohio public employees from 1974 through 1980. Unfortunately, the U.S. Bureau of Labor Statistics stopped breaking down strikes by

272. Act of Dec. 27, 1983, Pub. Act 83-1012, 1983 Ill. Laws 6830 (codified at 5 ILL. COMP. STAT. act 315, §§ 1-27 (1992)); Act of Dec. 27, 1983, Pub. Act 83-1014, 1983 Ill. Laws 6870 (codified at 115 ILL. COMP. STAT. act 5, §§ 1-21 (1992)); Act of July 6, 1983, Am. Sub. S.B. No. 133, 1983 Ohio Laws 336 (codified at OHIO REV. CODE ANN. §§ 4117.01-.23 (Anderson 1991)).

273. LESTER, *supra* note 82, at 60 (reporting that the liberalization of the right to strike in Minnesota in 1980 led to a flood of strikes in 1981); OLSON ET AL., *supra* note 8, at 157-59 (noting that Pennsylvania strike activity increased substantially after the enactment of Act 195).

274. See *infra* Table 1.

275. See *infra* Table 2.

TABLE 1
OHIO STRIKES APRIL 1, 1984-APRIL 30, 1992*

Year	1984	1985	1986	1987	1988	1989	1990	1991	1992	Total
Education	3	4	9	14	10**	15	9	10	3	77
City	0	1	1	2	0	0	1	1	0	6
County	1	4	2	2	2**	2	3	6	1	23
Township	0	0	0	0	0	0	0	0	0	0
Transit Authority	0	0	2	0	2	0	0	0	0	4
Total	4	9	14	18	14	17	13	17	4	110

* Data supplied by Thomas Worley, Administrator, Bureau of Mediation, Ohio State Employment Relations Board.

** Adjusted figures.

TABLE 2
OHIO UNAUTHORIZED STRIKES FOLLOWED BY LAWFUL STRIKES*

Employer	Union	Bargaining Unit	Strike Dates & Status
COTA	TWU, Local 208	630 620	11/24/86 to 11/25/86; 2 days unauthorized 12/09/86 to 2/8/87; 63 days lawful
Clinton Reg. Transit Authority	AFSCME, Local 1880	59 Drivers 75 Drivers & Mechanics	09/23/87; 1 day unauthorized 10/17/88 to 12/30/88; 75 days lawful
Groveport Madison Local Board of Education	Groveport Madison Local Education Ass'n	350 350	01/18/89; 1 day unauthorized 01/31/89 to 02/20/89; 21 days lawful

* Derived from a list of all strikes, supplied by Thomas Worley, Administrator, Bureau of Mediation, Ohio State Employment Relations Board.

TABLE 3
WORK STOPPAGE IN GOVERNMENT IN OHIO BY FUNCTION, 1974-80*

Year	Law Enforcement and Corrections	Fire Protection	Sanitary Services	Education	Hospitals and Health Service	All Other	Total	Total Excluding Law Enforcement and Fire Protection
1974	4	1	2	25	3	9	44	39
1975	3	3	2	25	3	17	53	47
1976	4	3	1	19	1	17	45	38
1977	4	6	5	27	5	17	64	54
1978	8	3	4	31	2	20	68	57
1979	5	0	3	30	3	15	56	51
1980	?	?	?	?	?	?	60	?

* For 1974: U.S. Dep't of Labor, Bureau of Labor Statistics, Work Stoppages in Government, Table 7 (1976); for 1975-79: U.S. Dep't of Labor, Bureau of Labor Statistics, Work Stoppages in Government, Table 9 (1977-81); for 1980: U.S. Dep't of Labor, Bureau of Labor Statistics, Analysis of Work Stoppages, Table 20 (1982). I acknowledge the efforts of my research assistant Stan Gosch for researching the data and compiling this table.

employee function in 1980 and thereafter stopped collecting this data entirely. The last column of Table 3 shows the number of strikes excluding law enforcement, corrections, and fire protection personnel. This column roughly approximates the employees who would have the right to strike under the Ohio collective bargaining statute. Comparing these data with those in Table 1, it is apparent that there have been far fewer strikes in Ohio since they were legalized.

The Ohio statute seeks to prevent strikes through tightly controlled procedures. As Professor Clyde Summers observed: "The antipathy for . . . strikes . . . is betrayed by the multi-layered impasse procedures with rigid time tables which make fulfilling the preconditions for a legal strike extremely difficult."²⁷⁶

Studies and data from the OSERB suggest that many potential strikes are headed off in the prestrike procedures. The Ohio data, contained in Table 4, combine strike-eligible and strike-prohibited employees. The procedures for strike-prohibited employees are identical to those for strike-eligible employees except that instead of a strike, these employees may, after rejection of the fact finder's recommendations, proceed to interest arbitration, which is called "conciliation" in the statute. Table 4 shows that most contracts settle during the proceedings that lead to the terminal step of strike or interest arbitration.

In each year of the statute, except for the first, over seventy-five percent of the negotiations to which mediators were appointed advanced to the next step with fact finder appointments. Thus, settlement with third-party assistance is occurring primarily at the fact-finding stage. This is not surprising because the statute allows only fifteen days for mediation before the OSERB appoints a fact finder.²⁷⁷ Inevitably, the fact finder is forced to mediate.²⁷⁸

Some studies have tried to focus on the success of fact-finding in resolving bargaining disputes. A study by Professor Calvin Sharpe of Case Western Reserve University Law School found that from 1984 to 1986, sixty-two percent of all negotiations in which the Ohio board appointed fact finders settled before a hearing.²⁷⁹ Of the 119 disputes involving strike-eligible

276. Summers, *supra* note 28, at 274.

277. See OHIO REV. CODE ANN. § 4117.14(c)(2), (3) (Anderson 1991).

278. See Calvin W. Sharpe & Linda E. Tawil, *Fact-Finding in Ohio: Advancing the Role of Rationality in Public Sector Collective Bargaining*, 18 U. TOL. L. REV. 283, 306 (1987).

279. *Id.* at 299.

TABLE 4
PUBLIC SECTOR COLLECTIVE BARGAINING IN OHIO, 1984-91*

Year	1984	1985	1986	1987	1988	1989	1990	1991
Notices to Negotiate	994	1151	1233	1254	1262	1237	1205	1377
Mediator Appointments	364	573	672	667	733	631	781	759
Fact-Finder Appointments	63	445	529	577	631	540	586	653
Conciliator Appointments	9	43	64	73	39	43	68	67
Cases with Fact-Finding Involvement	N/A	N/A	240	204	217	212	212	233
Strikes	4	9	14	18	14	17	13	17

* Data supplied by Thomas Worley, Administrator, Bureau of Mediation, Ohio State Employment Relations Board.

employees that went to fact-finding hearings, twenty-eight settled before the fact finder's report.²⁸⁰ Another thirty-seven accepted the fact finder's report and fifty-four rejected it.²⁸¹ Of the latter, eighty percent of those responding to the survey indicated that the parties used at least one-fourth of the fact finder's recommendations in their final settlement.²⁸²

Settlements may occur during and after fact-finding in several ways. The parties may have continued negotiations and would have reached settlement even if fact-finding had not been invoked. The pressure of a forthcoming fact-finding hearing and mediation by the fact finder also may induce settlement.²⁸³ The fact-finding hearing itself may clarify the issues and aid in settlement. The parties may agree to accept the fact finder's recommendations or they may use them as a basis for further negotiations leading to settlement. All of these appear to happen under the Ohio procedures.

Settlements occur in an additional way under the Ohio fact-finding procedures. Parties may be unwilling to accept the fact finder's recommendations, but become bound by them because they do not satisfy the strict procedural requirements for rejection. This appears to happen with a significant degree of frequency. For example, one study found that forty-six percent of fact-finder recommendations which were accepted were actually "deemed accepted."²⁸⁴ The strict procedural requirements for rejecting a fact finder's report cause many reports to be deemed accepted even if the parties are not satisfied. This may be particularly true for unions. It is more difficult for a union to mobilize a rejection vote by three-fifths of its membership than for an employer to mobilize a three-fifths vote of its legislature. One study reported that employer rejections outnumbered union rejections by more than two to one.²⁸⁵ During the same period, two labor educators studied the fact-finding reports and concluded that unions were not faring

280. *Id.* at 302-03.

281. *Id.*

282. *Id.* at 300 n.111.

283. For small and medium-sized bargaining units, the costs of preparing for and presenting a fact-finding case are significant enough to have an impact on the parties' bargaining positions. GERHART & DROTNING, *supra* note 23, at 33.

284. THE REPORT OF THE PUBLIC EMPLOYMENT ADVISORY COUNSELING EFFORT TO THE GENERAL ASSEMBLY AND GOVERNOR OF OHIO 47 (1986).

285. *Id.*

particularly well.²⁸⁶ Indeed, a survey of employers by Professor Ron Portaro found that they overwhelmingly supported the three-fifths rule, viewing it as one of the few areas in the impasse procedures where management had an advantage.²⁸⁷

Under the Ohio impasse procedures, there have been far fewer strikes than occurred prior to the statute. This has been accomplished through a combination of procedural prodding to reach an agreement and the imposition of fact-finding "agreements" by making rejections difficult. The Ohio experience raises the question: Is such strict control of the strike weapon necessary to avoid public employee strikes? This question leads to an examination of the relatively laissez-faire approach to economic weapons found in Illinois.

Strikes outside of education are almost nonexistent in the Illinois public sector. They typically occur less than once per year.²⁸⁸ Table 5 shows the number of strikes in Illinois when striking was illegal. The last column, which excludes law enforcement, fire protection, and education personnel, shows strike experience by noneducational employees who now have the right to strike in Illinois. Table 5 shows that from 1974 through 1979, this group of employees averaged 9.67 strikes per year, a considerably higher frequency than has occurred since strikes were legalized. Table 6 shows the number of strikes in Illinois public education since they were legalized.

The available pre-Act data are not completely comparable, but do give some basis for assessing the legalization's impact on the incidence of strikes in education. Pre-Act data come from the Illinois State Board of Education and cover only teacher strikes in elementary and secondary education. The data exclude nonteaching staff and all higher education strikes. Table 7 lists this pre-Act exposure.

286. Brenda Cochrane and Debbie Pelley, *Fact-Finding in Ohio: How Are Unions Doing?* (Dec. 1987) (unpublished manuscript, presented to the 1987 Midwest-Southern Regional UCLEA Meeting, Louisville, Kentucky) (on file with the *University of Michigan Journal of Law Reform*).

287. Ron M. Portaro, *Public-Sector Impasse Legislation: Is It Working?*, 12 EMPLOYEE REL. L.J. 111, 124 (1986) [hereinafter Portaro, *Public-Sector Impasse Legislation*] (finding that 75.3% of employers favored the three-fifths requirement); see also Ron M. Portaro, *An Empirical Study of Ohio Impasse Resolution Procedure*, 15 J. COLLECTIVE NEGOTIATIONS IN PUB. SECTOR 153 (1986).

288. Telephone Interview with Brian Reynolds, Executive Director, Illinois State Labor Relations Board & Illinois Local Labor Relations Board (Sept. 11, 1992). Unfortunately, the ISLRB and ILLRB do not keep statistics on specific strikes and strike durations under the IPLRA. Therefore, a year-by-year breakdown of the few strikes that have occurred is not available.

TABLE 5
WORK STOPPAGES IN GOVERNMENT IN ILLINOIS BY FUNCTION, 1974-80*

Year	Law Enforcement and Corrections	Fire Protection	Sanitary Services	Education	Hospitals and Health Service	All Other	Total	Total Excluding Law Enforcement, Fire Protection and Education
1974	0	0	1	19	1	5	26	7
1975	1	0	1	28	0	11	41	12
1976	1	3	0	26	1	12	43	13
1977	3	2	0	19	0	5	29	5
1978	1	1	1	28	0	7	38	8
1979	2	2	2	36	1	10	53	13
1980	?	?	?	?	?	?	51	?

* For 1974: U.S. Dep't of Labor, Bureau of Labor Statistics, Work Stoppages in Government, Table 7 (1976); for 1975-79: U.S. Dep't of Labor, Bureau of Labor Statistics, Work Stoppages in Government, Table 9 (1977-81); for 1980: U.S. Dep't of Labor, Bureau of Labor Statistics, Analysis of Work Stoppages, Table 20 (1982). I acknowledge the efforts of my research assistant Stan Gosch for researching the data and compiling this table.

TABLE 6
STRIKES IN ILLINOIS UNDER THE IELRA*

Year	Notices of Intent to Strike	Number of Strikes	Ratio of Notices to Strikes
1984-85	85	35	2.42:1
1985-86	57	13	4.38:1
1986-87	52	16	3.25:1
1987-88	26	6	4.33:1
1988-89	27	6	4.50:1
1989-90	63	11	5.73:1
1990-91	43	14	3.07:1
1991-92	68	25	2.72:1

* Data obtained from the Illinois Educational Labor Relations Board's annual reports.

TABLE 7
ILLINOIS STRIKES BY K-12 TEACHERS*

Year	Number of Strikes
1975-76	26
1976-77	25
1977-78	16
1978-79	26
1979-80	40
1980-81	36
1981-82	21
1982-83	16
1983-84	15

* Data obtained from Malin, *supra* note 29, at 123 n.95.

During the first year of the IELRA, 776 K-12 school districts engaged in teacher bargaining, representing a fifty-three percent increase over the pre-Act years.²⁸⁹ The increase does not include the nonteaching staff and higher education units. During the nine years preceding the statute, K-12 teacher strikes averaged 24.56 per year. The incidence of thirty-five strikes experienced in 1984-85 is roughly comparable, given the increase in bargaining. Since the first year of the IELRA, strike activity has dropped dramatically, hitting a low of six in the 1987-88 and 1988-89 school years, even though the number of bargaining units increased substantially.²⁹⁰

Thus, the experiences in Ohio and Illinois run counter to the expectation that enactment of comprehensive public sector bargaining laws containing a right to strike would increase the incidence of strikes. Despite an increase in bargaining activity²⁹¹ in the first eight years under the Ohio statute, strikes averaged 13.75 per year,²⁹² compared with an average of 55.71 strikes per year from 1974 to 1980.²⁹³ In the first eight

289. ILLINOIS EDUCATIONAL LABOR RELATIONS BOARD, STATEMENT OF OPERATIONS FOR THE PERIOD OF JANUARY 1, 1984 THROUGH JUNE 30, 1986, at 12 (1987).

290. The ILERB's annual reports show the following:

Year	Election Certifications	Voluntary Recognition	Decertification Petitions
Calendar Year 1985	62	17	6
Jan. 1986-June 1986	49	10	8
Fiscal Year 1987	44	10	10
Fiscal Year 1988	65	2	8
Fiscal Year 1989	59	5	7
Fiscal Year 1990	59	14	7
Fiscal Year 1991	50	5	12

The reports do not provide the outcome of the decertification petitions. Nevertheless, even if we make the unlikely assumption that all of those petitions resulted in the union's decertification, this would be a net increase of 393 bargaining units since the 1984-85 school year.

291. See PUBLIC EMPLOYMENT ADVISORY AND COUNSELING EFFORT COMM'N REPORT TO THE GENERAL ASSEMBLY AND GOVERNOR OF OHIO 10 (1986) (detailing voluntary recognitions and union certifications pursuant to OSERB elections during the first two years of the Ohio statute).

292. See *supra* Table 1 (showing 110 strikes over eight years).

293. See *supra* Table 3 (showing 390 strikes over seven years).

years of the Illinois statute, strikes averaged 15.75 throughout public education,²⁹⁴ despite an increase in bargaining,²⁹⁵ compared to an average of 24.56 strikes per year among K-12 teachers prior to the IELRA.²⁹⁶

Of course, the enactment of the new legislation was not the only factor which might have influenced the changes in strike activity over the years in Ohio and Illinois. Two economic factors which merit attention are the unemployment rate and the inflation rate. Studies in the private sector generally agree that strikes decline as the unemployment rate increases.²⁹⁷ Intuition suggests a similar result in the public sector. As unemployment increases, employees lower their expectations for a new collective bargaining agreement. Higher levels of unemployment also reduce the availability of temporary work while on strike and increase the availability of striker replacements. Studies in the public sector, however, have reached inconsistent results regarding the relationship between unemployment rates and strikes, although most find a relationship similar to that in the private sector.²⁹⁸

As the inflation rate increases, employees' expectations in collective bargaining probably increase as they try to regain losses in real wage levels. Therefore, it is not surprising that studies generally find that the incidence of public sector strikes is positively correlated with inflation.²⁹⁹

294. See *supra* Table 6 (showing 126 strikes over eight years).

295. See *supra* note 290 and accompanying text.

296. See *supra* Table 7 (showing 221 strikes over nine years).

297. See, e.g., Orley Ashenfelter & George Johnson, *Bargaining Theory, Trade Unions and Industrial Strike Activity*, 59 AM. ECON. REV. 35 (1969); Henry S. Farber, *Bargaining Theory, Wage Outcomes, and the Occurrence of Strikes: An Econometric Analysis*, 68 AM. ECON. REV. 262 (1978); Albert Rees, *Industrial Conflict and Business Fluctuations*, 60 J. POL. ECON. 371 (1962); Michael Shalev, *Trade Unionism and Economic Analysis: The Case of Industrial Conflict*, 1 J. LAB. RES. 133 (1980); Andrew R. Weintraub, *Prosperity Versus Strikes: An Empirical Approach*, 19 INDUS. & LAB. REL. REV. 231 (1966).

298. See, e.g., OLSON ET AL., *supra* note 8, at 65 (noting that public sector strikes increased as unemployment increased); William B. Nelson et al., *An Economic Analysis of Public Sector Collective Bargaining and Strike Activity*, 2 J. LAB. RES. 77 (1981) (finding that public sector strikes decrease as unemployment increases); Dane M. Partridge, *A Time Series Analysis of Public Sector Strike Activity*, 20 J. COLLECTIVE NEGOTIATIONS IN PUB. SECTOR 3 (1991) (finding no significant relationship between unemployment rates and public sector strikes as a whole, but finding that teacher strikes decrease as unemployment increases); Weintraub & Thornton, *supra* note 67, at 197 (finding that teacher strikes decrease as unemployment increases).

299. See, e.g., OLSON ET AL., *supra* note 8, at 65; Partridge, *supra* note 299, at 3; Weintraub & Thornton, *supra* note 67, at 201.

Table 8 shows the inflation and unemployment rates and the number of strikes in the public sector in Ohio and in public education in Illinois. The table shows that the inflation rate was generally lower during the last half of the 1980s than in the prior ten years. This may have contributed to the reduced number of strikes during the first six years of the statutes. On the other hand, the unemployment rate also declined during this period. More often than not, a lower unemployment rate is associated with an increase in strikes.

To further evaluate the experiences in Ohio and Illinois with legalizing public employee strikes, we ran single and multivariate regression analyses of the data in Table 8.³⁰⁰ Each regression showed a very strong correlation between the change in the law in Ohio and the decrease in the number of strikes.³⁰¹

Regression analyses of the experience with strikes in Illinois public education yielded considerably weaker results. Although in the single-variate regression, the change in the law was correlated with a decrease of slightly more than ten strikes per year and was significant below the .025 confidence level, the

300. I am deeply grateful to my colleague on the Chicago-Kent faculty, Professor Kevin Smith, for guiding me through the regressions, to our colleague in the IIT Mathematics Department, Professor Andre Adler, for reviewing the data analysis and making helpful suggestions for further refinement, and to Carol Johnson for entering all of the data and running the regressions.

In each case, a dummy variable was used to represent the state of the law, with "0" indicating that strikes were illegal and "1" indicating that they were legal. We factored in inflation by lagging the percentage change in the consumer price index by one year. This was done because we assumed that the increase in the cost of living during the year before negotiations would represent the degree to which the employees believed that they had to catch up in salaries. We used the unemployment rate for the year in which the strikes occurred because we assumed that it would show the degree to which striker replacements might be available and the degree to which temporary jobs might be available for strikers.

301. The regressions used the change in the law as the independent variable alone, and in varying combinations with the inflation and unemployment rates. In all cases, the model explained over 90% of the change in the number of strikes, the change in the law was correlated with a decrease of over thirty-five strikes per year, and the correlation was significant below the .005 confidence interval.

For the single-variate regression, using the change in the law as the only independent variable, the R-Square value was 0.927 and the adjusted R-Square was 0.918. This indicates that the model explained over 90% of the change in the number of strikes (the dependent variable). The coefficient was -35.2333, indicating a correlation between the change in the law and a decrease of 35.2333 strikes per year. The *t* value for the change in the law was -10.6622, significant well below the .005 confidence level. That is, we can be more than 99.5% sure that the negative correlation was not the result of chance. The specific results of the regressions for various combinations of the change in the law with inflation and unemployment rates (including squares of the inflation or unemployment rates) are on file with the author.

TABLE 8
STRIKES, INFLATION, AND UNEMPLOYMENT*

Year	% Change in CPI	U.S. Unempl.	Illinois Unempl.	Ohio Unempl.	Illinois Educational Strikes**	Ohio Public Sector Strikes Excluding Law Enforcemt.
1974	11.0	5.6	4.5	4.8	N/A	39
1975	9.1	8.5	7.1	9.1	26	47
1976	5.8	7.7	6.5	7.8	25	38
1977	6.5	7.0	6.2	6.5	16	54
1978	7.6	6.0	6.1	5.4	26	57
1979	11.3	5.8	5.5	5.9	40	51
1980	13.5	7.1	8.3	8.4	36	N/A
1981	10.3	7.6	8.5	9.6	21	N/A
1982	6.2	9.7	11.3	12.5	16	N/A
1983	3.2	9.6	11.4	12.2	15	N/A
1984	4.3	7.5	9.1	9.4	35	4***
1985	3.6	7.2	9.0	8.9	13	9
1986	1.9	7.0	8.1	8.1	16	14
1987	3.6	6.2	7.4	7.0	6	18
1988	4.1	5.5	6.8	6.0	6	14
1989	4.8	5.3	6.0	5.6	11	17
1990	5.4	5.5	6.1	5.7	14	13

* I acknowledge the efforts of my research assistant Stan Gosch who compiled this table.

** The Illinois data are collected by school year. The data are listed in the year in which the school year began as most school strikes occur in the beginning of the school year. Thus, strikes during the 1975-76 school year are listed as 1975. Data through 1983 provide only K-12 teacher strikes and 1984-92 cover all of public education.

*** Partial year.

change in the law explained only between twenty and twenty-five percent of the change in strike activity. Multivariate regressions of various combinations of the change in the law with inflation and unemployment rate independent variables produced little improvement in the explanatory ability of the model and showed the change in the law correlated with decreases in the number of annual strikes ranging from just under seven to between ten and eleven. All combinations, except for those limited to the change in the law and the unemployment rate, showed the change in the Illinois law as not statistically significant.³⁰²

Interpretation of this data requires caution. Although the Ohio data showed a very strong correlation between passage of the public sector collective bargaining act and the decrease in strike activity, data was not available for five years. Although the Illinois data consistently showed a correlation between the Illinois statute and a decrease in strike activity, each model explained a very small portion of the decrease in the number of strikes, thus suggesting that the independent variables analyzed here cannot predict strike frequency.

Several caveats apply to the data from both states. First, the data in both states do not take into account the increase in bargaining activity that followed the enactment of the statutes. To this extent, the data underestimate the effects of the statutes on decreasing strike frequency.

Second, the data do not take into account other factors that may affect strike frequency. Chief among these omitted factors is the employer's fiscal climate. Experienced negotiators generally agree that tight fiscal constraints often lead to more strikes.³⁰³ Another factor not captured by the data is the relative experience of the negotiators.³⁰⁴

302. The single-variate regression yielded an R-Square value of 0.251, an adjusted R-Square of 0.197, a coefficient of -10.1270, and a *t* value of -.2.1652. The results of the multivariate regressions are on file with the author.

303. Cf. Robert C. Rodgers & Jeffrey D. Straussman, *What Factors Contribute to the Duration of Strikes by Public Employees?*, 6 INT'L J. PUB. ADMIN. 183 (1984) (finding that tight fiscal constraints result in longer strike durations).

304. See Montgomery & Benedict, *supra* note 23, at 380. One may speculate that the increased bargaining activity after the Illinois and Ohio statutes were enacted might indicate an increase in the number of bargaining units with inexperienced negotiators. To the extent that this is true, one would expect the lack of experience to lead to greater strike frequencies. If this is the case, the failure to account for negotiator experience would underestimate the relationship between the change in the

Third, the pre-Act data in both states are not completely comparable to the post-Act data. The pre-Act Ohio data may include some strikes by employees who now have the right to go to interest arbitration, such as nurses and employees of the state schools for the blind and deaf and the state retirement system.³⁰⁵ To the extent that such strikes are included, the data overstate the number of pre-Act strikes and overestimate the effect of the statute in decreasing strike frequency. On the other hand, the Illinois pre-Act data covered only K-12 teachers and, therefore, may exclude pre-Act strikes by employees who now have the right to strike. To the extent that such strikes are not included, the Illinois data understate the number of pre-Act strikes and underestimate the effect of the statute in decreasing strike frequency.

Finally, the data may overestimate the effect of legalizing public employee strikes on decreasing strike frequency because the data do not distinguish between strikes over bargaining impasses and strikes over recognition. In addition to legalizing strikes, the Illinois and Ohio statutes provide procedures whereby a union may force recognition by petitioning for and winning a representation election conducted by the labor board.³⁰⁶ There is strong evidence that by reducing the union's need to resort to self-help to force recognition, comprehensive public employee collective bargaining statutes reduce strikes over recognition as well as strikes over the parties' first collective bargaining agreement.

Indiana, for example, has a comprehensive collective bargaining statute governing public education,³⁰⁷ but does not have a similar statute governing the remainder of the public sector. Recognition strikes in public education are virtually nonexistent, but occur frequently in the rest of the public sector.³⁰⁸ Similarly, recognition strikes in Ohio and Illinois

laws and the decrease in strike activity.

305. See *supra* text accompanying note 132.

306. 115 ILL. COMP. STAT. act 5, § 8 (1992); OHIO REV. CODE ANN. § 4117.07 (Anderson 1991).

307. IND. CODE § 20-7.5 (1976).

308. See OLSON ET AL., *supra* note 8, at 261 (finding that from 1974 to 1977, 290 teacher bargaining units were recognized without any recognition strikes, while during the same period, 35 new bargaining units were recognized in local governments with three recognition strikes (approximately eight percent), but not indicating how many of the other recognitions might have been prompted by a strike threat).

during the 1970s occurred significantly more often than in the rest of the country.³⁰⁹

Undoubtedly, some of the reduction in strike incidence in Illinois and Ohio resulted from taking the fight over recognition out of the streets and placing it before the labor boards. It is not likely, however, that this accounts for most of the reduction. Indeed, the IELRA replaced a 1981 amendment to the Illinois School Code that provided a procedure for recognition elections in teacher bargaining units.³¹⁰ Although the 1981 law contained no express duty to bargain and no enforcement procedure, it probably reduced recognition strikes, albeit not to the same extent as a comprehensive statute such as the IELRA.

Reasonable theoretical grounds exist for believing that legalizing strikes may reduce the number of strikes overall. Artificial strike prohibitions distort the communication value of the union's strike threat. While at the bargaining table, unions threatening an illegal strike usually maintain that they are fully prepared to deal with the consequences of the strike's illegality. Employers may excessively discount such representations, thereby underestimating the settlement that the union is willing to accept. A lawful and credible strike threat is a great incentive for peaceful settlement.³¹¹ Eliminating artificial strike prohibitions may promote more realistic bargaining.

The data presented in this Article, however, do not firmly support a conclusion that the legalization of public employee strikes in Illinois and Ohio caused their frequency to decrease. On the other hand, there is no evidence that legalization caused strikes to increase in frequency. All of the evidence is to the contrary. Part I of this Article concluded, for normative reasons, that reliance on a right to strike is preferable to both interest arbitration and nonbinding fact-finding as a method for resolving public employee bargaining impasses. Legislators and other policymakers may take heart from the experiences in

309. During the period from 1974 to 1977, 21% of Illinois' public sector strikes and 17% of Ohio's concerned recognition or the negotiation of a first contract, as compared to 12.1% for the rest of the country. *Id.* at 309. During this period, over 12% of new bargaining relationships in Illinois and over 14% in Ohio followed a strike, compared with 2.9% in the rest of the country. *Id.* at 310-11.

310. ILL. ANN. STAT. ch. 122, para. 3-14.24 (Smith-Hurd Supp. 1982) (repealed in 1984 by the IELRA).

311. This is evident in the ratio of strike notices to actual strikes under the IELRA. Depending on the year, the ratio ranges from 5.73:1 to 2.42:1, demonstrating that the strike notice itself dramatically pressures settlement. *See supra* Table 6.

Illinois and Ohio and may grant public employees a legal right to strike without fear that doing so will lead to an increase in strike frequency.

B. *Mandatory Prestrike Fact-Finding*

Legislatures which decide to recognize public employees' right to strike have several models from which to choose. A key issue which they must confront is whether (and if so, under what circumstances) to require fact-finding as a condition for a lawful strike. States which mandate exhaustion of fact-finding procedures before a union may lawfully strike assume that such action will reduce strikes. A study of private sector strikes in Canada found that prestrike fact-finding significantly reduced strike activity.³¹² Ohio reinforces the use of fact-finding to prevent strikes by making it procedurally cumbersome to reject the fact finder's recommendations.³¹³

Ohio and other states that rely on fact-finding to prevent strikes face a dilemma. Fact-finding is nonbinding interest arbitration. Fact-finder recommendations, like interest arbitration awards, are based primarily on considerations of comparability, and fact finders are just as reluctant as interest arbitrators to change the status quo.³¹⁴ To the extent that a state succeeds in having fact-finder recommendations accepted or deemed accepted, the state substitutes an adjudicatory system for traditional collective bargaining to set terms and conditions of employment and thus risks the same disadvantages that accompany interest arbitration.³¹⁵

The nonbinding nature of fact-finding acts as a safety valve. A party that strongly desires to change the status quo or to

312. Morley Gunderson et al., *The Effect of Labour Relations Legislation on Strike Incidence*, 22 CAN. J. ECON. 779 (1989).

313. See *supra* notes 137-41 and accompanying text.

314. See *supra* notes 90-94 and accompanying text.

315. See *supra* notes 88-95 and accompanying text. The principal exception is where the fact finder serves as a supermediator. Unfortunately, time limits inhibit use of the supermediator model. See JACKSON, *supra* note 56, at 37-38. There is no reason why aggressive mediation cannot be used without having to place it in a fact-finding context. The main advantage that the fact finder/supermediator offers over conventional mediation is the ability to make an agreed upon settlement more palatable politically by embodying it in a fact finder's recommendations. Nothing, however, prohibits parties in mediation from voluntarily proceeding to fact-finding for the purpose of embodying an agreed upon outcome in formal recommendations.

resist a settlement comparable to other employers can make its wishes known early in the negotiations and indicate its willingness to lose the issue in fact-finding, reject the fact finder's recommendations and, if necessary, strike or take a strike. Thus, bargaining under the fact-finding, right-to-strike model is more realistic than bargaining under interest arbitration. Unfortunately, the injection of a mandatory fact-finding procedure appears to affect efforts to avoid and settle a strike. Tables 9 and 10 compare strike durations in Illinois, which does not mandate prestrike fact-finding, and Ohio, which does.

Only one out of 126 strikes in Illinois exceeded thirty days—the 1986–87 Homer School District strike which consumed most of the school year. In Ohio, seventeen strikes, representing 15.45% of the total strikes and 16.83% of the total authorized strikes, exceeded thirty days.

Not only are strikes more likely to be lengthy in Ohio, they also are less likely to settle quickly. Almost two-thirds of the strikes in Illinois (63.54%) settled within ten days or less. In Ohio, less than half (45.54%) of the authorized strikes settled within ten days or less.³¹⁶

A chi square (X^2) analysis of strike durations in Illinois and Ohio confirms that strikes last significantly longer in Ohio. By using Tables 9 and 10 to compare the frequency of strike duration by five-day intervals in each state, a result was obtained that is significant at a confidence level below .01.³¹⁷

316. The authorized strikes provide the appropriate comparison. Unauthorized strikes will always end in five days or less because the statute requires the OSERB to rule on a strike investigation petition within 72 hours. Even this figure inflates the number of strikes settled within five days. One of the authorized strikes which ended in less than five days ended by injunction rather than agreement. Three of the strikes which lasted five days or less were brought by the same union against the same employer within a three week period and justifiably could be treated as a single strike with a total length of two days and one hour. See *supra* Table 10 and accompanying notes.

317. I am grateful to my colleague Kevin Smith for guiding me through the chi square (X^2) analysis. To compute a chi square analysis of strike durations in Illinois and Ohio, the percentages of strikes at five-day intervals provided in Tables 9 and 10 can be compared as follows:

	0–5 Days	6–10 Days	11–15 Days	16–20 Days	21–25 Days	26–30 Days	Over 30 Days
Illinois	24.60	38.94	19.05	10.32	4.78	1.59	0.79
Ohio	28.67	16.83	19.80	6.93	6.93	2.97	16.83

TABLE 9
DURATIONS OF STRIKES IN ILLINOIS UNDER THE IELRA *

Year	0-5 Days	6-10 Days	11-15 Days	16-20 Days	21-25 Days	26-30 Days	31 + Days	Total
1984-85	6	16	8	4	1	0	0	35
1985-86	4	5	3	1	0	0	0	13
1986-87	3	2	2	3	3	2	1	16
1987-88	1	2	2	1	0	0	0	6
1988-89	0	3	2	1	0	0	0	6
1989-90	4	6	0	1	0	0	0	11
1990-91	3	8	2	1	0	0	0	14
1991-92	10	7	5	1	2	0	0	25
Totals	31	49	24	13	6	2	1	126
%	24.60	38.94	19.05	10.32	4.78	1.59	0.79	

* I acknowledge the efforts of my research assistant Siobhan Murphy who compiled this table from lists of all Illinois strikes in public education obtained from the Illinois Educational Labor Relations Board's annual reports.

TABLE 10
DURATIONS OF STRIKES IN OHIO*

Year	0-5 Days	6-10 Days	11-15 Days	16-20 Days	20-25 Days	25-30 Days	31 + Days	Not Known	Total
1984	2**	0	2	0	0	0	0	0	4
1985	3**	2	2	1	1	0	1	1	9
1986	7**	0	0	0	2	0	4	1	14
1987	7***	2	3	3	0	2	1	0	18
1988	1 ^e	4	4	1	1	0	3	0	15
1989	6 ^{ee}	4	3	1	2	0	1	0	17
1990	3 ^{eee}	2	3	1	0	1	3	0	14
1991	9	3	3	0	1	0	3	0	19
Total	38	17	20	7	7	3	17	1	110
%	34.55	15.45	18.18	6.36	6.36	2.72	15.45	0.91	
Total Auth.	29	17	20	7	7	3	17	1	101
%	28.67	16.83	19.80	6.93	6.93	2.97	16.83	0.99	

* I acknowledge the efforts of my research assistants Siobhan Murphy and Stan Gosch who compiled this table from lists of all public sector strikes in Ohio obtained from the Ohio State Employment Relations Board.

** Including one unauthorized strike.

*** Including two unauthorized strikes.

^e Unauthorized strike.

^{ee} Including three separate strikes (two lasting one day each and one lasting one hour) by the same union at the University of Cincinnati in a three-week period.

^{eee} Including one strike ended by a TRO.

In other words, it is more than ninety-nine percent certain that the differences in strike durations in Ohio and Illinois did not occur by chance.

There is reason to believe that this difference may be attributable to Ohio's requirement of fact-finding. Although Ohio's fact-finding process has contributed to the settlement of many contracts without a strike, it also is likely that when a party rejects a fact finder's report and a strike ensues, the fact-finding process adds to the difficulty of settling the strike. A fact-finding hearing is litigation and is therefore adversarial in nature. Parties are likely to perceive the fact finder's report in terms of whether they have won or lost. Certainly, a party that votes to reject a fact finder's report believes that it has lost. The party that has not rejected it is likely to react by saying, "Why should I change anything? A neutral objective fact finder found what is right and fair."

Thus, the fact-finding may serve to further polarize the parties, making the impasse more difficult to settle. This polarization can be particularly acute if the party that did not reject the fact finder's report views the report as vindicating its position. For example, one commentator who has written extensively on the Ohio statute reported a management negotiator's feelings of elation when he won the fact-finding followed by his frustration when the union rejected the report and engaged in a seventeen-day strike.³¹⁸ At a minimum, the requirement of fact-finding injects a new issue at the

The chi square (X^2) calculation is as follows, where O is the observed frequency of strike durations at each five-day interval in Illinois and Ohio and E is the expected frequency if the state in which the strike occurred made no difference:

$$\begin{aligned}
 X^2 &= \sum \frac{(O-E)^2}{E} = \\
 &\frac{(24.60-26.64)^2}{26.64} + \frac{(38.94-27.89)^2}{27.89} + \frac{(19.05-19.43)^2}{19.43} + \frac{(10.32-8.63)^2}{8.63} + \frac{(4.78-5.85)^2}{5.85} \\
 &+ \frac{(1.59-2.28)^2}{2.28} + \frac{(0.79-8.81)^2}{8.81} + \frac{(28.67-26.64)^2}{26.64} + \frac{(16.83-27.89)^2}{27.89} + \frac{(19.80-19.43)^2}{19.43} \\
 &+ \frac{(6.93-8.63)^2}{8.63} + \frac{(6.93-5.85)^2}{5.85} + \frac{(2.97-2.28)^2}{2.28} + \frac{(16.83-8.81)^2}{8.81} \\
 &= 25.1694
 \end{aligned}$$

318. James T. O'Reilly, *Ohio Begins Public Sector Bargaining: "The Best of Times" Lies Ahead*, 35 CASE W. RES. L. REV. 426, 450 (1985) (discussing interviews with negotiators in Ohio and warning that mandatory fact-finding might disrupt the bargaining process and inhibit agreements).

bargaining table—why should we deviate from the fact finder's recommendations?—which diverts attention from the settlement issues. The fact-finding also may polarize the parties further and make it more difficult for the party that did not reject the fact finder's recommendation to change its position.

The polarization and hardening of positions that results from the rejection of a fact finder's report may be exacerbated by the statutory requirement that the OSERB publicize the fact finder's report. It is even more difficult for a party to back away from a position upheld by the fact finder when the fact finder's report is made public.³¹⁹

Apparently, many in Ohio have concluded that prestrike fact-finding is not conducive to dispute resolution. Professor Portaro's survey found that 27.1% of Ohio public employers "strongly disagreed" and 32.2% "disagreed" with the fact-finding procedure.³²⁰ Over half of the bargaining units in Ohio have adopted MADs, and most of these dispense with fact-finding.³²¹

Because half of Ohio's bargaining units have opted out of the statutory impasse procedures and most of those have opted out of fact-finding, it is necessary to investigate the Ohio experience further. Fortunately, the OSERB's files reveal, for most strikes, whether the bargaining unit proceeded under the statute or under a MAD. Tables 11 through 14 analyze the Ohio strike data according to the type of impasse procedure used by the parties.

As can be seen from Tables 12 and 13, strikes are more prevalent under MADs than under the statutory procedures. This result is not surprising in light of the statutory procedural hurdles to rejection of fact-finder recommendations.³²²

Interestingly, strikes undertaken pursuant to MADs have almost the same chance of settling quickly as strikes under the statutory procedure: 46.46% of authorized strikes under the statutory procedures ended within ten days. If the three University of Cincinnati strikes are treated as a single strike,

319. The theory behind requiring fact-finding holds just the opposite, that is, that the fact finder's recommendations will cause the parties to reevaluate their positions. In a study of the use of prestrike fact-finding in Ontario, Canada, however, 50% of the parties reported that fact-finding did not cause them to change their positions, while another 45.1% reported that they changed their positions only to a slight degree. JACKSON, *supra* note 56, at 49.

320. Portaro, *Public-Sector Impasse Legislation*, *supra* note 288, at 123.

321. Telephone Interview with Thomas Worley, Administrator, Bureau of Mediation, Ohio State Employment Relations Board (June 26, 1990).

322. See *supra* notes 137-41 and accompanying text.

TABLE 11
OHIO STRIKE BREAKDOWN*

Year	MAD	Statute	Unknown	Total
1984	1	0	3	4
1985	6	3	0	9
1986	10	4	0	14
1987	11	5	2	18
1988	8	6	0	14
1989	13	5	1	19
1990	11	3	0	14
1991	13	6	0	19
1992	3	1	0	4
Total	76	33	6	115

* I acknowledge the efforts of my research assistant Stan Gosch who obtained the relevant data from the Ohio State Employment Relations Board and compiled this table and Tables 12-14.

TABLE 12
DURATIONS OF MAD STRIKES IN OHIO

Year	0-5 Days	6-10 Days	11-15 Days	16-20 Days	21-25 Days	26-30 Days	31 + Days	Not Known	Total
1984		1							1
1985	2		1		1		1	1	6
1986	6 ^{*e}				1		3		10
1987	3		3	2		2	1		11
1988		3	2	1	1		1		8
1989	3 [*]	5	2	1	2				13
1990	1	2	3	1		2	2		11
1991	7 [*]	2	2		1		1		13
Total	22	13	13	5	6	4	9	1	73
%	30.14	17.81	17.81	6.85	8.22	5.48	12.33	1.37	
Total Auth.	19	13	13	5	6	4	9	1	70
%	27.14	18.57	18.57	7.14	8.57	5.71	12.86	1.42	

* Including one unauthorized strike.

e Including a two day unauthorized COTA strike, which was followed by a sixty-three day authorized strike.

TABLE 13
DURATIONS OF STATUTE STRIKES IN OHIO

Year	0-5 Days	6-10 Days	11-15 Days	16-20 Days	21-25 Days	26-30 Days	31 + Days	Not Known	Total
1984									0
1985	1*		1	1					3
1986	1				1		2		4
1987	2*	2		1					5
1988	1*	1	2				2		6
1989	4**						1		5
1990	2						1		3
1991	2* ^e	1	1				2		6
Total	13	4	4	2	1	0	8		32
%	40.63	12.50	12.50	6.25	3.13	0	25.0		
Total Authorized	9	4	4	2	1	0	8		28
%	32.14	14.29	14.29	7.14	3.58	0	28.57		

* Including one unauthorized strike.

** Including three separate strikes at the University of Cincinnati by the same union within a three week period.

^e Including one strike that began under a MAD, but finished under statute (Weathersfield Local Board of Education strike).

TABLE 14
DURATIONS WHEN NO DATA ON WHETHER A MAD OR STATUTE STRIKE IN OHIO

Year	0-5 Days	6-10 Days	11-15 Days	16-20 Days	21-25 Days	26-30 Days	31 + Days	Not Known	Total
1984	2*		1						3
1985									0
1986									0
1987	2**								2
1988									0
1989			1 ^{ee}						1
1990									0
1991									0
Total	4	0	2	0	0	0	0	0	6

* Including one unauthorized strike.

^e Canton Regional Transit Authority strike and Fairhaven 169 School Board strike.

^{ee} Akron Board of Education strike.

this percentage drops to 42.36. By comparison, 45.71% of authorized strikes under MADs ended within ten days. The strikes that occur under the statutory procedures, however, are more likely to be lengthy and difficult to settle than those which occur under MADs. Over one-fourth (28.57%) of authorized strikes under the statutory procedures took longer than thirty days to settle. If the three "quickie" strikes at the University of Cincinnati are treated as a single, forty-nine-hour strike, the percentage of authorized strikes lasting over thirty days increases to 30.80. In contrast, 12.33% of authorized strikes under MADs lasted longer than 30 days.

Using the frequencies from Tables 12 and 13, a chi square (X^2) analysis can be computed to compare the significance of strike durations under an Ohio MAD and under the statutory procedures.³²³ The result is significant at a confidence level below .025. In other words, the probability is less than 2.5% that the difference in the durations of strikes under MADs, which usually are not preceded by fact-finding, and strikes

323. To compute a chi square (X^2) analysis of strike durations under MADs and the statutory procedures, the percentages of authorized strikes at five-day intervals provided in Tables 12 and 13 can be compared as follows:

	0-5 Days	6-10 Days	11-15 Days	16-20 Days	21-25 Days	26-30 Days	Over 30
MADs	27.14	18.57	18.57	7.14	8.57	5.71	12.86
Statute	32.14	14.29	14.29	7.14	3.58	0	28.57

The chi square (X^2) calculation is as follows, where O is the observed frequency of strike durations at each five-day interval under MADs or the statutory procedures and E is the expected frequency if the procedure used made no difference:

$$\begin{aligned}
 X^2 &= \sum \frac{(O-E)^2}{E} = \\
 &\frac{(27.14-29.64)^2}{29.64} + \frac{(18.57-16.43)^2}{16.43} + \frac{(18.57-16.43)^2}{16.43} + \frac{(7.14-7.14)^2}{7.14} + \frac{(8.57-6.075)^2}{6.075} \\
 &+ \frac{(5.71-2.855)^2}{2.855} + \frac{(12.86-20.615)^2}{20.615} + \frac{(32.14-29.64)^2}{29.64} + \frac{(14.29-16.43)^2}{16.43} + \frac{(14.29-16.43)^2}{16.43} \\
 &+ \frac{(7.14-7.14)^2}{7.14} + \frac{(3.58-6.075)^2}{6.075} + \frac{(0-2.855)^2}{2.855} + \frac{(28.57-20.615)^2}{20.615} \\
 &= 15.002
 \end{aligned}$$

under the statutory procedure requiring fact-finding is the result of chance.

The experience in Pennsylvania further suggests that prestrike fact-finding results in longer strikes. Prior to the 1992 amendments governing teacher strikes, the PLRB had discretion to invoke fact-finding when mediation failed to produce an agreement. As a matter of policy, the PLRB invoked fact-finding only when the parties or the mediator indicated that it would be helpful.³²⁴ Tables 15 and 16, derived from reports in the PLRB's files, compare the durations of strikes in the absence of fact-finding with strikes following fact-finding.

Pennsylvania's experience confirms the lessons from Ohio. Whereas 45.59% of strikes without fact-finding settled within ten days, only 28.58% of strikes after fact-finding ended that quickly. Further, strikes after fact-finding were just as likely to last more than thirty days as they were to settle within ten days. Strikes without fact-finding were almost four times as likely to settle within ten days than to last more than thirty days. Less than one-eighth (12.25%) of strikes without fact-finding lasted more than thirty days.

A chi square (X^2) analysis of the differences in strike durations in Pennsylvania with and without prestrike fact-finding can be computed using the frequencies from Tables 15 and 16.³²⁵ The result is significant at the .05 confidence level.

324. See *supra* text accompanying note 223.

325. To compute a chi square (X^2) analysis of strike durations with and without prestrike fact-finding, the percentages of strikes at five-day intervals provided in Tables 15 and 16 can be compared as follows:

	0-5 Days	6-10 Days	11-15 Days	16-20 Days	21-25 Days	26-30 Days	Over 30 Days
With fact- finding	14.29	14.29	7.14	14.29	7.14	14.29	28.57
Without fact- finding	25.49	20.10	11.76	9.80	10.29	10.29	12.25

The chi square (X^2) calculation is as follows, where O is the observed frequency of strike durations at each five-day interval with and without fact-finding and E is the expected frequency if fact-finding made no difference:

TABLE 15
DURATIONS OF STRIKES AFTER FACT-FINDING IN PENNSYLVANIA*

Year	0-5 Days	6-10 Days	11-15 Days	16-20 Days	21-25 Days	26-30 Days	31 + Days	Total
1980-81	0	0	0	0	0	0	0	0
1981-82	1	0	0	2	0	0	1	4
1982-83	0	0	0	0	0	0	1	1
1983-84	0	0	0	0	0	1	0	1
1984-85	0	0	1	0	0	0	0	1
1985-86	0	0	0	0	0	1	1	2
1986-87	0	1	0	0	1	0	0	2
1987-88	1**	0	0	0	0	0	1	2
1988-89	0	0	0	0	0	0	0	0
1989-90	0	0	0	0	0	0	0	0
1990-91	0	1	0	0	0	0	0	1
Totals	2	2	1	2	1	2	4	14
%	14.29	14.29	7.14	14.29	7.14	14.29	28.57	

* I acknowledge the efforts of my research assistant Kathleen Blood who obtained the relevant data from the Pennsylvania Labor Relations Board and the Pennsylvania Bureau of Mediation and compiled this table and Table 16.

** There also was a strike before fact-finding.

TABLE 16
DURATIONS OF STRIKES WITHOUT FACT-FINDING IN PENNSYLVANIA

Year	0-5 Days	6-10 Days	11-15 Days	16-20 Days	21-25 Days	26-30 Days	31 + Days	Total
1980-81	3	8	4	3	6	1	4	29
1981-82	5	9	0	0	4	0	3	21
1982-83	4	3	1	7	4	3	6	28
1983-84	4	0	1	0	0	2	1	8
1984-85	6	3	3	5	2	0	2	21
1985-86	3	1	2	0	1	2	1	10
1986-87	5	3	3	0	1	5	2	19
1987-88	4	4	3	1	0	0	1	13
1988-89	5	5	3	2	0	4	2	21
1989-90	7	2	2	2	1	1	2	17
1990-91	6	3	2	0	2	3	1	17
Totals	52	41	24	20	21	21	25	204
%	25.49	20.10	11.76	9.80	10.29	10.29	12.25	

In other words, the probability of the differences in Pennsylvania strike durations occurring by chance is only five percent. Although the small sample size for strikes after fact-finding calls for caution in relying on the Pennsylvania data alone, the data are consistent with the quantitative and qualitative analyses of the experiences in Ohio and Illinois. Mandatory prestrike fact-finding makes strikes more difficult to settle.

Oregon's experience with fact-finding differs from Pennsylvania's and Ohio's. Oregon has experienced very few strikes. Although the OERB's data on strike duration are incomplete, the data show only one strike that lasted more than thirty days—a seventy-six work day strike in 1981 against Portland.³²⁶ Table 17 presents bargaining data collected and tabulated from the OERB's files.

There appear to have been 591 fact-finding recommendations. Of these, ninety-eight (16.58%) were accepted by the parties as their agreed upon settlement, while only twenty-seven (4.57%) resulted in strikes. The remaining 466 (78.85%) were settled in mediation after fact-finding, presumably on terms differing from the recommendations.

How has Oregon been able to avoid the lengthy strikes which characterize post-fact-finding conduct in Ohio and Pennsylvania? Oregon's procedures incorporate a significantly longer waiting period between the publication of rejected fact-finder recommendations and the date upon which a lawful strike may begin.³²⁷ This longer waiting period may allow positions hardened by fact-finding to soften and may enable the parties to compromise without a lengthy strike.

Reliance on mandatory prestrike fact-finding to reduce strikes

$$\begin{aligned} \chi^2 &= \sum \frac{(O-E)^2}{E} = \\ & \frac{(14.29-19.89)^2}{19.89} + \frac{(14.29-17.195)^2}{17.195} + \frac{(7.14-9.45)^2}{9.45} + \frac{(14.29-12.045)^2}{12.045} + \frac{(7.14-8.715)^2}{8.715} \\ & + \frac{(14.29-12.29)^2}{12.29} + \frac{(28.51-20.38)^2}{20.38} + \frac{(25.49-19.89)^2}{19.89} + \frac{(20.10-17.195)^2}{17.195} + \frac{(11.76-9.45)^2}{9.45} \\ & + \frac{(9.80-12.045)^2}{12.045} + \frac{(10.29-8.715)^2}{8.715} + \frac{(10.29-12.29)^2}{12.29} + \frac{(12.25-20.38)^2}{20.38} \\ & = 13.8075 \end{aligned}$$

326. Information provided by the Oregon Employment Relations Board, Conciliation Service Division.

327. See *supra* note 214 and accompanying text.

TABLE 17
OREGON BARGAINING DATA, JAN. 1974-DEC. 1988*

Raw Numbers	Percentages	Disposition
3047	100%	Total contract negotiation mediation cases
2325	76%	Settled in mediation, prior to fact-finding or interest arbitration hearings (722 moved on to fact-finding or interest arbitration hearings)
98	3%	Settled on fact finder's recommendations
466	15%	Settled in mediation after fact-finding
151	5%	Interest arbitration awards issued for protective service/nonstrikeable units
27	1%	Strikes

* Data collected and tabulated from the files of the Oregon Employment Relations Board, Conciliation Service Division.

is a policy that is damned if it works and damned if it fails. To the extent that it succeeds in preventing strikes, it functions considerably like interest arbitration. As with interest arbitration, strikes are prevented at a cost of innovation and problem solving in bargaining.³²⁸ When it fails, it introduces new issues into the bargaining process, hardens attitudes, and makes compromise more difficult. Although many factors may contribute to the duration of a particular strike,³²⁹ requiring prestrike fact-finding increases the likelihood of longer strikes. Thus, mandating prestrike fact-finding does not appear to be a sound policy.

IV. INJUNCTIONS AND RELATED MEDDLING

Parts I through III show that states should recognize public employees' right to strike and that states should not regulate the strike by imposing prestrike fact-finding. In other words, impasse resolution in the public sector should approximate impasse resolution in the private sector.³³⁰ Even in the private sector, however, reliance on the right to strike is not absolute. Some strikes so endanger the public interest that they may be enjoined.³³¹ Legislatures that recognize public employees' right to strike also must face the injunction issue.

Strike injunction petitions place judges in no-win situations. These judges recognize that they are being used by the parties to further their bargaining positions and not simply to resolve a legal dispute.³³² Sometimes the judge's decision on the

328. See *supra* note 95 and accompanying text.

329. See, e.g., Robert C. Rodgers & Jeffrey D. Strausmann, *What Factors Contribute to the Duration of Strikes by Public Employees*, 6 INT'L J. PUB. ADMIN. 183 (1984).

330. Issues such as the regulation of employer economic weapons and whether to mandate prestrike mediation are beyond the scope of this Article.

331. See 29 U.S.C. § 178 (1988).

332. A trial court judge in Pennsylvania, ruling on a school district's injunction petition under the clear and present danger to the public welfare standard, aptly summarized the sentiments of many judges in strike injunction cases:

If the court issues an injunction, it is unlikely that the demands of the public-school teacher will be met. Should the court refuse to grant the injunction, the public employer may capitulate to the demands. The public employer then blames the court for forcing it to agree to unreasonable demands by the union. Neither result is in the public interest. . . . A trial judge is placed by PERA (Public

injunction request is influenced strongly by the judge's view of the merits of the underlying bargaining dispute.³³³ The broader the standard for issuance of an injunction, the greater the court's discretion and the greater the likelihood that the judge's attitude toward collective bargaining will affect the outcome.³³⁴

Often judges react to their no-win positions by involving themselves in the parties' negotiations. Much of the predecision process takes place in chambers rather than in open court, as the judge attempts to get a feel for and settle the dispute.³³⁵ Judges commonly enter the negotiations actively as supermediators in an attempt to settle the collective bargaining agreement.³³⁶ Because most state trial judges are elected officials, they also may feel political pressure to mediate the contract talks rather than adjudicate the injunction request.³³⁷

Armed with the power to grant or deny the injunction request, a judge may be able to apply more pressure to the parties than a traditional labor relations mediator. Most judges, however, probably have little or no training or expertise in labor relations. Collective bargaining mediation differs

Employee Relations Act) in a position that is not only untenable but also one that requires more of a political and economic result than a judicial decision.

DAVID L. COLTON & EDITH E. GRABER, *TEACHER STRIKES AND THE COURTS* 105 (1982) (quoting *Butler Area Sch. Dist. v. Butler Educ. Ass'n*, 9 Pa. Pub. Employee Rep. (Lab. Rel. Press) ¶ 9039, at 75, 76 (C.P. 1978) (deletion in the original)).

333. For example, in one case, a judge rejected an employer's claim that a strike by water and sewage treatment workers endangered the public health and sounded like a cheerleader for the union: "The day will soon be gone when a public employe, be he a teacher, a utility worker or a sanitation department employe, will be forced to supplement his income with a 'moonlighting' job or by applying for food stamps." *Highland Sewer & Water Auth. v. IBEW Local 459*, 67 Pa. D. & C.2d 564, 568 (C.P. 1973).

334. See Bernard C. Brominski, *Limited Right to Strike Laws—Can They Work When Applied to Public Education? From the Perspective of the Local Judge*, 2 J.L. & EDUC. 677, 683–84 (1973) (observing that the vagueness of the injunction standard in Pennsylvania coupled with varying judicial attitudes toward teacher collective bargaining led to inconsistent results in Pennsylvania injunction cases).

335. See COLTON & GRABER, *supra* note 333, at 97–99.

336. See DAVIS & FISCHER, *supra* note 23, at 64; Brominski, *supra* note 335, at 686–87 (raising the issue of judicial mediation); Charles Redenius, *Participant Attitudes Toward a Judicial Role in Public Employee Collective Bargaining*, 25 LAB. L.J. 94, 98 (1974) (conducting a survey of Wisconsin trial judges which found them divided over whether they should mediate the parties' contract negotiations or simply limit themselves to adjudicating the injunction petition).

337. See Redenius, *supra* note 337, at 99. For a further discussion of the use of political pressure in teacher strike injunction cases, see COLTON & GRABER, *supra* note 333, at 102–03.

significantly from the mediation of traditional litigation.³³⁸ More importantly, if the judge remains unsuccessful in bringing the parties to an agreement, she still has to rule on the merits of the injunction request. It is extremely difficult for any person to cast aside the view of the parties' dispute that she developed during mediation and resolve the injunction dispute objectively. Even if the judge is able to do so, the parties, particularly the losing party, likely will doubt whether the result was truly objective and impartial.

A standard which makes it relatively easy to enjoin a lawful strike thus strains the judicial process. It also may have the ironic effect of encouraging strikes and discouraging settlement through bilateral agreement by reducing the fear of the consequences of a strike. These consequences include the short-term inconveniences and economic and political costs that accompany a strike. They also include recognition that, once begun, a strike may escalate out of control and inflict lasting damage to all parties. Fear of such uncontrolled escalation also pressures the parties once a strike begins, adding a sense of urgency to settle the strike before it engenders lasting damage.

The role of uncertainty regarding strike consequences in pressuring settlements can be seen clearly in Illinois, where the standard for enjoining lawful strikes is quite narrow.³³⁹ The only lawful strike in Illinois which lasted more than thirty days began on October 17, 1986, when the Homer Association of Teachers struck against the Homer School District 208. The strike involved a bargaining unit of thirty teachers who served approximately 360 students in rural Champaign County. It lasted 143 days and was not settled until after the end of the 1986-87 school year. The resulting contract did not resolve two of the issues involved in the strike—the salary schedule and whether teachers would advance a step on that salary schedule.³⁴⁰

338. In most litigation, the conclusion of the litigation also ends the relationship between the parties. Collective bargaining is distinct because the parties have a continuous relationship and neither party has the ability to walk away from the other. Once a contract is settled, the parties must return to the workplace together and again will face each other across the bargaining table when the time comes to negotiate a successor contract.

339. See *supra* notes 123-28 and accompanying text.

340. For a detailed discussion and analysis of the Homer strike, see Martin H. Malin, *Collective Bargaining Laws in Ohio and Illinois: An Analysis of the Six-Year History of the Newest Public Sector Labor Laws 30-37* (July 23, 1990) (unpublished manuscript, presented to the Association of Labor Relations Agencies, 39th Annual Conference, Cincinnati, Ohio) (on file with the *University of Michigan Journal of Law Reform*).

Everyone lost in Homer.³⁴¹ The 1300 residents of the community had a disastrous year with their schools. The school district lost a substantial percentage of its state aid. The school district no longer exists, merging with the district on its southern boundary, although there is disagreement over whether the strike contributed to this. Four school board members who were up for reelection either chose not to run or were defeated. The other three, including the chair, sought seats on the board of the merged district. One was elected; the chair, who had been the district's chief negotiator, was defeated. The teachers forfeited almost an entire year's pay and, probably, a step advancement on the salary schedule. At least eight left the district during the strike. By the time the district merged, only eight or nine of the strikers remained.

The Homer strike had a dramatic impact on other teacher negotiations, especially in small school districts. The Homer strike is notorious in Illinois. It demonstrated that a small school district can, at great cost, replace striking teachers and cause them great financial harm. It also showed the state-wide union organization's willingness to invest a large amount of money on behalf of a tiny local. It showed both sides that there is much to fear in a strike. Indeed, many fear that a long strike in a small district means the death of that district. Homer increased the incentive for parties to settle at the bargaining table. In fact, only six strikes disrupted Illinois public education in each of the two years following the Homer strike.³⁴²

The concerns with uncertainty that pressure Illinois negotiators to settle contrast markedly with the situation in Pennsylvania. Pennsylvania's provision to enjoin strikes which endanger the public welfare has resulted in courts enjoining teacher strikes when it becomes impossible to make up enough strike days to meet the state's requirement of 180 instructional

341. The following discussion of the Homer strike and its impact on collective bargaining in Illinois public education is drawn from Malin, *supra* note 341.

342. See *supra* Table 6. In Wisconsin, a very bitter, long strike in the Hortonville School District might have had a similar effect on teacher bargaining in subsequent years. Craig A. Olson, *Strikes, Strike Penalties and Arbitration in Six States*, 39 INDUS. & LAB. REL. REV. 538, 542, 550 (1986).

days.³⁴³ The availability of injunctions as soon as a strike persists long enough to endanger state aid ensures that the strike will not escalate out of control. If the court enjoins the strike just in time to make up the lost days, teachers and school districts suffer little or no net economic losses. Thus, Pennsylvania's clear and present danger to the public welfare standard for enjoining lawful strikes reduces the uncertainty which parties face when considering the consequences of a strike.³⁴⁴ Under Act 195, the only risk of the strike escalating out of control was that the employer would not seek an injunction. The recent Pennsylvania amendments appear to eliminate even this minor risk by outlawing teacher strikes once it becomes impossible to make up the strike days and providing for the Pennsylvania Secretary of Education to seek injunctions against those strikes that persist.³⁴⁵

The ease of enjoining a lawful strike not only increases the probability of having a strike, but it may also reduce the urgency for settling a strike. As strike-induced losses mount and the parties approach the point where the strike will cause substantial damage, their interests in cutting losses and avoiding further damage increase the pressure to settle. Where, however, the result of continuing the strike is not the risk of greatly escalating losses, but rather a judicial back-to-work order, the pressure and sense of urgency to settle is diminished.³⁴⁶

343. See *supra* notes 254–257 and accompanying text. Allowing injunctions when strikes endanger the public welfare instead of limiting injunctions to strikes that endanger public health and safety makes injunctions more available outside of public education, too. For example, the public welfare standard makes it much easier to enjoin public transit strikes. Compare *Masloff v. Port Auth.*, 613 A.2d 1186 (Pa. 1992), with *Central Ohio Transit Auth.*, 4 Ohio Pub. Employee Rep. (Lab. Rel. Press) ¶ 4040, at VII-58 (Ohio St. Empl. Rel. Bd. 1987).

344. See *OLSON ET AL.*, *supra* note 8, at 160 (finding that knowledge that the employer would seek an injunction provoked and prolonged teacher strikes in Pennsylvania).

345. See *supra* text accompanying notes 269–70.

346. The negotiators may covertly welcome the injunction. It relieves them of having to make the difficult compromises necessary to end the strike. The employer gets the workforce back without having to make further bargaining concessions. The union leadership, instead of making further concessions that recognize employer resistance, can return to work without a contract and blame the judge for saving the employer with an injunction. Of course, if the union believes that it will ultimately win, it can defy the injunction, thereby escalating the controversy further and injecting a new issue—amnesty from a contempt proceeding. Such a course of action occurred in the 1973 Philadelphia teachers strike. For discussions by three of the principals in that strike, see Philip Davidoff, *The Limited Right to Strike Laws—Can They Work When Applied to Public Education? A School Board Member's Perspective*, 2 J.L. &

The Illinois and Ohio approaches to enjoining lawful public employee strikes have much to commend them. First, both states confine injunctions to the very narrow group of strikes that pose a clear and present danger to public health and safety.³⁴⁷ Thus, they do not allow injunctive relief to significantly reduce the uncertainties of a strike's consequences and, accordingly, maintain maximum pressure on the parties to settle. Second, Ohio and Illinois place primary responsibility for determining whether a clear and present danger exists on the labor boards and provide specific procedures for resolving postinjunction bargaining impasses.³⁴⁸ Thus, they remove the primary decision regarding whether to issue an injunction from the potentially politically-charged atmosphere of the state trial courts, thereby removing many of the concerns that tempt judges in other jurisdictions to mediate the contract talks. The judge's role is confined to a purely judicial function—reviewing the labor board's determination, issuing the injunction, and sending the parties to the next phase of the statutory procedures.

CONCLUSION

Public sector labor relations have come a long way since Franklin Delano Roosevelt maintained categorically that public employees were not entitled to the same rights that he signed into law for private sector workers. States have experimented with a wide variety of approaches to resolving collective bargaining impasses.

Experience shows that granting public employees the right to strike is an appropriate policy. Public employee strikes do not distort the democratic process as once was feared. Fact-finding coupled with artificial strike prohibitions do not provide a real alternative to the right to strike. States which supposedly rely on fact-finding actually rely on the strike to motivate the parties to settle. Interest arbitration does provide a true strike substitute, but it is a poor one, tending to stifle innovation and

EDUC. 689 (1973); Thomas H. Lane, *The Limited Right to Strike Laws—Can They Work When Applied to Public Education? From the Perspective of a School Board Attorney*, 2 J.L. & EDUC. 703 (1973); Leonard M. Sagot & Thomas W. Jennings, *The Limited Right to Strike Laws—Can They Work When Applied to Public Education? From the Perspective of a Union Attorney*, 2 J.L. & EDUC. 715 (1973).

347. See *supra* notes 123–28, 167–71 and accompanying text.

348. See *supra* text accompanying notes 124, 167.

creative problem solving in negotiations. Experiences in Illinois and Ohio show that legalizing public employee strikes does not cause an increase in strikes and may encourage more realistic bargaining.

Legislatures which recognize public employees' right to strike should subject them to only minimal regulation. Mandatory prestrike fact-finding, currently imposed in several states, carries with it the danger of stifling bargaining in much the same way as interest arbitration, while making those strikes which do occur more difficult to settle. If fact-finding is not required, most strikes will settle quickly. Those strikes that do not settle quickly usually should be allowed to run their courses. Liberal standards for strike injunctions cause more harm than good. They strain the judiciary and reduce the incentives to settle at the bargaining table. An injunction standard narrowly confined to strikes which endanger public health and safety, applied in the first instance by a labor relations board rather than a court, and coupled with specific poststrike impasse resolution procedures, relieves the strain on the judiciary and maximizes incentives to settle at the bargaining table.

