*The Public Worker's Right to Strike**

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Let us now consider the main arguments advanced against the right of public employees to strike. (In view of the clarification above, I should say that I shall understand arguments against the right to strike as supporting specific legislative prohibition, and arguments for the right as supporting specific legislative recognition.)

Perhaps the oldest argument—if it can be called an argument—is based on the doctrine of sovereignty. . . .

As originally conceived, this doctrine was appealed to as justification for denying public employees not only the right to strike, but the right to bargain as well:

> What this position comes down to is that governmental power includes the power, through law, to fix the terms and conditions of government employment, that this power cannot be given or taken away or shared and that any organized effort to interfere with this power through a process such as collective bargaining is irreconcilable with the idea of sovereignty and is hence unlawful. [Hanslowe, 1967, 14–15]

Another formulation of the view is provided by Neil W. Chamberlain:

> In Hobbesian terms, government is identified as the sole possessor of final power, since it is responsive to the interests of all its constituents. To concede to any *special* interest group a right to bargain for terms which sovereignty believes contravenes the *public* interest is to deny the government's single responsibility. The government must remain in possession of the sole power to determine, on behalf of all, what shall be public policy. [Chamberlain, 1972, 13]

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Applying the doctrine specifically to the right to strike, Herbert Hoover said in 1928 that "no government employee can strike against the government and thus against the whole people" (Aboud and Aboud, 1974, 3). And in 1947, Thomas Dewey stated that "a strike against government would be successful only if it could produce paralysis of government. This no people can permit and survive" (Aboud and Aboud, 1974, 3).

On the other side, Sterling Spero wrote in 1948:

> When the state denies its own employees the right to strike merely because they are its employees, it defines ordinary labor disputes as attacks upon public authority and makes the use of drastic remedies, and even armed forces the only method for handling what otherwise might be simple employment relations. [Spero, 1948, 16]

Even if one accepts the doctrine of sovereign authority, it has been argued, it does not follow that collective bargaining or striking by public employees must be prohibited. Legislatures have often waived sovereign immunity in other areas of law. In most jurisdictions, individuals are now able to sue public bodies for negligence, for example. And since sovereignty refers to the people's will as expressed in legislative action, the concept does not preclude—indeed, it seems to require—that the people may, through their representatives, enact legislation authorizing government to engage in collective bargaining and permitting public employees to strike.

A related objection to the claim that sovereignty precludes strikes by public employees distinguishes between what might be called legal and political sovereignty. Legal sovereignty, according to this view, exists in order to meet the need for a peaceful, final, and enforceable means of settling disputes within society. Political sovereignty, on the other hand, refers to the process by which decisions are made in a political system. The American political process, it is pointed out, provides for no ultimate sovereign authority.

It might be added that the role attributed to government by the idea of legal sovereignty—that of a neutral or impartial third party for settling disputes—is clearly inappropriate where government itself is one of the parties to the dispute, e.g., as the employer in a labor-management dispute. This is so whatever one may think, in general, of the depiction of government as a neutral in disputes between private parties.

It has also been pointed out that the sovereignty argument as advanced by governmental units sounds suspiciously like the management prerogatives arguments private employers advanced against the rights of workers in the private sector to organize, bargain, and strike. If those arguments are properly rejected for the private sector, it is not clear why they should be accepted for the public sector. It is worth asking, moreover, what our reaction would

be to the sovereignty argument if it were advanced by the government of another country as justification for prohibiting strikes by its citizen-employees. As the Executive Board of the Association of Federal, State, County, and Municipal Employees (AFSCME) has said, "Where one party at the bargaining table possesses all the power and authority, the bargaining process becomes no more than formalized petitioning" (Eisner and Sipser, 1970, 267).

A somewhat different version of the sovereignty argument relies on the claim that the public has rights, and these rights outweigh the right of public employees to strike. Hugh C. Hansen, for example, says:

> In a democracy, the people should decide what services the government will supply. The right to strike is a powerful weapon, subject to abuse, which would indirectly give workers the power to make those decisions. A public employee strike is only successful if it hurts the public. . . . The public has rights; it should not be reluctant to assert them. [Hansen, 1980]

This sort of appeal to the rights of the public, however, is subject to what seems to me a decisive objection. As Ronald Dworkin has argued, it eliminates the protection which recognition of individual rights is supposed to provide:

> It is true that we speak of the 'right' of society to do what it wants, but this cannot be a 'competing right' of the sort that may justify the invasion of a right against the Government. The existence of rights against the Government would be jeopardized if the Government were able to defeat such a right by appealing to the right of a democratic majority to work its will. A right against the Government must be a right to do something even when the majority thinks it would be wrong to do it, and even when the majority would be worse off for having it done. If we now say that society has a right to do whatever is in the general benefit, or the right to preserve whatever sort of environment the majority wishes to live in, and we mean that these are the sort of rights that provide justification for overruling any rights against the Government that may conflict, then we have annihilated the latter rights. [R. Dworkin, 1978, 194]

Thus, if we take seriously the claim that workers in general have a right to strike, we cannot justify abrogating that right by appeal to a conflicting right of the public to decide what services government will supply. (Note that Dworkin is not here objecting to the idea of group rights in contrast to that of individual rights; it is only the idea of the rights of society as a whole, or of a democratic majority, as potentially competing with the rights of individuals, corporations, or other corporate-like entities within the society, that threatens to annihilate the latter rights.)

If we reject the argument from sovereignty, then, there are two further arguments against the right of public employees to strike that pick up different

threads from the arguments discussed so far. One appeals to preservation of the normal American political process, and the other to the essentiality of government services. The former may be dealt with more quickly, so let us consider it first.

> What sovereignty should mean in this field is not the location of ultimate authority—or that the critics are dead right—but the right of government, through its laws, to ensure the survival of the " 'normal' American political process." As hard as it may be for some to accept, strikes by public employees may, as a long run proposition, threaten that process. [Wellington and Winter, 1969, 1125–26]

But what is this normal political process? "Is something abnormal because it does not operate in conjunction with the standard political process and procedures of a particular era? Does the normal political process automatically exclude any methods or goals which will disrupt existing power relations?" (Aboud and Aboud, 1974, 4). And if a group "distorts" the political process by having more power than the average interest group, are public sector unions the only, or even the most salient examples? (Note that, by Dworkin's argument above, the "right of government. . .to ensure the survival" of the normal political process cannot be understood simply as a right to prevent individuals or groups from affecting and influencing the political process through the exercise of their rights.)

Is it true that recognizing the right of public employees to strike would give them such irresistable power that the political process would be seriously enough distorted to justify denying them that right? To argue that it would, it seems to me, one would have to base one's case on one or more independent reasons for thinking such disproportionate power would ensue. One of these—essentiality of government services—we shall examine next. Two others—absence of a competitive market in the public sector, and the idea that public employees have influence over their wages and working conditions through lobbying and voting—we shall consider briefly below.

The claim that government services are essential may be thought to provide support for prohibition of strikes by public employees in one or more of at least three ways. First, it may be argued that, since these services are essential, it is intolerable that they be interrupted, even temporarily, as they would be by a strike. A second argument is that if essential services are interrupted, the public will put enormous pressure on government to restore them, and government will have little choice but to cave in to union demands, no matter what they are. Thus, if such strikes were permitted, public employee unions would be in an extraordinarily powerful position. Indeed, one opponent of the right to strike in the public sector likens public employee strikes to sieges or mass abductions because, in such a strike, an "indispensible element

of the public welfare, be it general safety, health, economic survival, or a vital segment of cultural life such as public education, is made hostage by a numerically superior force and held, in effect, for ransom" (Saso, 1970, 37). A third argument is that, since government services are essential, the individual recipients of those services have a right to receive them. A strike that interrupted such services would, therefore, violate the rights of the would-be recipients, and, since the services are essential, the right to receive them must be an important right. These rights of individual recipients, then, may be said to compete with and outweigh any right of public employees to strike. (This appeal to the rights of individual members of the public does not run afoul of Dworkin's objection, above, which rejects only appeals to the rights of society, or the majority, as a whole.)

Clearly, however, not all government services are essential in the ways required for these arguments to be sound. In addition, somewhat different kinds and degrees of essentiality may be required by each of the three different arguments.

First, from the fact that a given service, such as public education, for example, is essential to society and its members over the long term, it by no means follows that any temporary interruption of such a service is intolerable. Public education is routinely interrupted for summer vacation, spring and fall breaks, holidays, and snow days. Time lost due to (legal or illegal) strikes by school employees can be, and is, made up by scheduling extra days and/or hours of classes. Are transportation services provided by municipal bus lines essential in ways that those provided by privately owned bus companies are not? If hospital workers in voluntary hospitals have the right to strike, why are public hospital employees different? Are their services any more essential? Upon reflection, it appears that few, if any, public services are essential in the way required to make the first argument sound, i.e., that even temporary interruption of them would be intolerable. Many who reject the first argument as applied to most government services do, nonetheless, accept it for two specific categories of service, those provided by police and firefighters. We shall return to these possibly special cases below.

In response to the second argument, that enormous public pressure to end a strike and restore services would force government to yield even to unreasonable union demands, there are at least three things to be said. First, in the absence of the economic pressure that a strike in the private sector exerts on the employer, public pressure to restore services is the only real leverage public employees can bring to bear on management to come to terms. Striking workers, of course, forfeit wages and place their jobs on the line in the public sector just as in the private sector. So the pressure on workers to arrive at an agreement and end a strike is very strong indeed. In contrast, the public sector employer is likely to have tax revenues continue to accrue during a

strike, while saving on the wage bill. Without public pressure for the restoration of services, management could comfortably wait out almost any strike, thus rendering the strike weapon totally ineffectual.

Second, the impact on tax rates of wage and benefit packages provides a strong incentive for public sector employers to bargain hard. "For the public employer, increases in the tax rate might mean political life or death; hence, unions are not likely to find him easy prey" (Aboud and Aboud, 1974, 6). And, as AFSCME's Victor Gotbaum points out:

> An automobile can increase in price 300 percent. Your food can go up 200 percent. If your taxes go up even less of a percentage, somehow the public is being raped by public employees. That is not so. In fact, our own studies show that the wage bill has not been going up that high since the arrival of unionism, taxes have not increased at a greater pace than costs in other areas, and yet we get this funny comparison that somehow when workers in the public sector strike, they get a helpless hopeless citizen. [Gotbaum, 1978, 161]

A third response to the second argument is that it is essential to identify the source of the public pressure. As Ronald Dworkin's argument above establishes, public disapproval or displeasure at being inconvenienced or made somewhat worse off does not justify the abrogation of a right. Certainly, then, the anticipation of public pressure arising from such displeasure cannot justify the abrogation of the right to strike. Thus it seems that prohibition of public sector strikes could be justified only by showing that they constitute a very direct and serious threat to the public safety or well-being, or that exercise by public employees of the right to strike would somehow violate more important rights of other members of society, as the third argument from essentiality of government services maintains. The claim that *any* strike would seriously and directly threaten the public safety or well-being does not seem at all plausible applied across the board to public employees. Again, it appears most plausible in the case of police and firefighters, although even here a blanket prohibition may be far more restrictive than is justifiable. We shall return to this question below.

Now let us consider the third argument, that the individual recipients of government services have rights to those services which would be violated if they were interrupted by a strike. First, from the fact that an individual has a right to a government service it does not follow that the right is violated if the service is temporarily interrupted. Even a very important right to a given service need not be violated by a temporary interruption, as it would be, let us suppose, by permanent cessation of the service. Moreover, from the fact that individuals have very important rights to certain services it does not follow that the onus is entirely upon government workers to provide

those services without interruption under whatever conditions management chooses to impose. The right is against government or society as a whole, whose obligation it is to create and maintain conditions in which qualified workers are willing to work and provide those services.

It is worth noting, too, that in many instances the issues over which government employees are likely to strike are issues on which the interests of the recipients of government services coincide with those of the providers. Welfare workers demanding lighter case loads, teachers insisting on smaller classes, air traffic controllers complaining about obsolete equipment, understaffing, and compulsory overtime are all instances of government workers attempting to secure adequate conditions in which to do their jobs. The rights of the recipients of these services are not protected by prohibiting the providers from using what may be the only effective means of securing such conditions—quite the contrary. Even where this is not the case, there appear to be no grounds for a general claim that strikes by public employees would violate the rights of the recipients of governmental services. If such a case is to be made, it must be made in much more particular terms with respect to specific categories of service. Once again, the chief candidates presumably will be policing and firefighting, to be discussed below.

Let us now briefly consider two additional reasons which have been offered in support of the claim that recognizing the right of public employees to strike would give them such power as to seriously distort the political process: absence of a competitive market in the public sector, and the claim that public employees have the opportunity to influence their wages and working conditions through lobbying and voting. The absence of competitive market forces in the public sector has been said to lend disproportionate power to striking public employees in two ways. First, it is argued that in the private sector market forces such as elasticity of demand for the employer's product and the extent of nonunion competition limit the ability of an employer to absorb increased labor costs. Since employees recognize these limits, and have no interest in putting the employer out of business, they have reason to limit their demands accordingly. In the absence of such forces, it is held, public employee unions have little reason to restrict their demands to reasonable levels. This argument seems to ignore the fact that all striking workers have a very direct incentive to reach a settlement—they lose wages each day that they are out. Even with a strike fund, strikers' incomes are drastically reduced, and in a prolonged strike, any existing strike fund is in danger of being exhausted. Moreover, unions in the public sector are not entirely insulated from competitive labor. The threat of permanent job loss through layoffs or even complete elimination of public agencies is very real. Santa Monica, California, for example, ended a strike of city employees by threatening to

contract out its sanitation work. In Warren, Michigan, a similar threat was carried out (Burton and Krider, 1972, 277).

The second way in which the absence of market forces is said to result in greatly increased power for potential of actual strikers in the public sector is that public employers, not needing to minimize costs to remain competitive and profitable, will not bargain hard. As we saw above, however, the pressure to keep tax rates down can also provide an effective incentive for hard bargaining. Indeed, in many cases, the absence of a competitive market can work to strengthen the hand of the employer rather than that of the union, since the economic pressure a private sector strike brings to bear on the employer is absent, or greatly reduced, in the public sector.

Our final candidate for an argument showing that granting public employees the right to strike would seriously distort the political process is the claim that, unlike private sector workers, public employees and their unions have the opportunity to affect their wages and working conditions through the political process, so that if they had the right to strike as well, they would wield undue power. Thus it has been argued that, through collective bargaining, public employee unions can acquire the maximum concessions management will offer at the bargaining table, and then they can apply political pressure, through lobbying efforts and voting strength, to obtain additional concessions. If the right to strike were added, according to this argument, public sector bargaining would be heavily weighted in favor of employees.

But the capacity of public employee unions to influence legislative decisionmaking is a necessary (and often inadequate) counterweight to the tendency of legislators, responding to public pressure to keep taxes down, to solve difficult and ubiquitous fiscal problems at the expense of public employees. Representatives of each of the different categories of government workers must attempt to bring their concerns to the attention of legislators in an effort to avoid being lost in the budgetary shuffle. Further, although they constitute a growing percentage of the workforce, public employees as a group are unlikely to constitute anything approaching a voting majority in any given jurisdiction. And, although public employees as a group may constitute a potentially significant voting block, those workers directly affected by negotiations over any particular contract will almost certainly be a tiny minority. Thus, whatever truth there may be to this argument, it seems grossly inadequate to the task of showing that if on top of their right as citizens to participate in the political process they had, as workers, the right to strike, the political process would be so seriously distorted as to justify prohibiting the exercise of one of these important rights.

We have been unable to find any justification for a general prohibition of strikes by public employees. I conclude that public employees generally, like

workers in the private sector, have the moral right to strike, and the right ought to be recognized and protected by law, as it is for all other workers.

We must turn now to consider whether police and firefighters constitute a special case where prohibition of strikes may be justified, even though it is not justified for other public employees. We shall not be able to give this complex and admittedly difficult question adequate discussion here, but we can try at least to identify some of the relevant considerations.

Of the various arguments discussed above, only those appealing to essentiality of services may apply differently to police and firefighters than to other public employees, so those are the only arguments relevant here. As you may recall, there were three arguments from essentiality of services. First, it may be argued that police and firefighting services are essential in a way that makes it intolerable for them to be interrupted, even temporarily. The second argument claims that, if such services were interrupted by a strike, public pressure to have them restored would be so strong that even outrageous demands would be agreed to. Thus police and firefighters are in a position to "hold hostage" the public safety. And, third, individual members of the public may be said to have very important rights to protection of their lives, safety, and property that police and firefighters provide, rights that would be violated if those protections were suspended by a strike.

Concerning the second argument, the burden of proof must be on those who would deny an important right to show that there is more than a theoretical possibility that the right would be abused in seriously harmful ways. More than that, many of our important rights and freedoms are occasionally abused in ways that result in serious harm to others. In most cases, we reluctantly accept the risks in order to preserve the freedoms. Proponents of prohibition of strikes by police and firefighters must, then, provide convincing evidence that legal recognition of their right to strike would create a serious *practical* threat that is out of proportion to the other risks we endure out of respect for rights. I have so far seen no reason to believe that such evidence can be produced. Note, too, that the fact that the restriction in question applies to a minority of the members of society, in contrast to many other possible restrictions of rights that might be adopted, is a reason to be suspicious of it.

Let us grant, though, that one or more of these arguments may have some force in the case of police and firefighters. Is that force sufficient to justify flatly denying to these individuals an important right? The answer to this question seems to depend on what the available alternatives are. It may be that, with some constraints, the right to strike could be retained by these workers without serious threat to the rights or safety of the public. If so, outright prohibition of such strikes still would not be justified.

For example, provision might be made for partial work stoppages with emergency services continued for life-threatening situations. Police functions include many that could be interrupted with some inconvenience but little serious danger to the public; for example, traffic control, parking violations, paper work not immediately essential to protecting the rights either of victims of crime or of the accused. Firefighters might respond to alarms but limit their firefighting to those measures needed in order to carry out all possible rescue efforts.

Another possibility is to provide for a mandatory "cooling off" period of, say, thirty or sixty days. This could be either automatic or available to be invoked by the appropriate public official if he or she deemed it necessary. During this period, mediation could take place in an effort to help the parties reach voluntary agreement. (A mediator is a third party who attempts to help the disputants find a resolution they can agree upon. A mediator has no power to impose a settlement.) Also, during such a period, public officials would have the opportunity to make contingency plans for protecting the public in the event of a strike. It may be objected with some justification that such a "cooling off" period is, or should be, unnecessary. Mediation efforts could be undertaken before, rather than after, a contract runs out, and contingency plans could be made when officials see that negotiations are not going well and the contract is within a month or two of running out. Nevertheless, supposing that public officials sometimes lack wisdom and foresight, and that the public safety may be at stake as a result, there may be some grounds for such a provision.

I see no reason why some such constraints would not suffice to eliminate any serious special threat to the rights and safety of the public that the prospect of a strike by police or firefighters poses. But since some will no doubt remain unpersuaded, and since the precise nature and degree of constraints justifiable on these grounds will be controversial among those who are persuaded, it may be worthwhile to look briefly at what the alternative is if the right to strike is entirely denied. Some procedure must be provided for arriving at a settlement when contract negotions are at an impasse.

The principal alternative is compulsory binding arbitration. Arbitration differs from mediation in that an arbitrator investigates a dispute and issues a decision which is binding on both parties. There are two sorts of labor disputes in which arbitration may be used. It is most commonly used as a final step for resolving individual grievances that arise under an existing contract. Frequently, the contract itself provides that grievances that are not resolved by the other measures provided in the grievance procedure will go to arbitration. The second kind of dispute is that in question here, where the parties are unable to reach agreement on a contract. We shall be discussing only arbitration of the latter sort.

In the most usual form of arbitration for settling the terms of a contract, the parties present and argue for their positions on the issues that are in dispute, and then the arbitrator draws up terms that he or she considers most fair. Thus the arbitrator may impose terms that were not proposed by either party. It has been objected against this sort of arbitration that, since arbitrators most often "split the difference" between the two sides, there is little incentive for the parties to bargain in good faith, since the more extreme the position they present to the arbitrator the more they are likely to get in the compromise. To avoid this problem, another form of arbitration has been proposed. It is called final-offer arbitration because the arbitrator is restricted to a choice between the final offers of the two parties on all unresolved issues. The arbitrator may not pick and choose among the offers of the parties on different issues—the choice is between one total package or the other. The purpose of this restriction is to provide a strong incentive for each party to make the most reasonable possible proposals—with the hope that, in so doing, they may even arrive at an agreement without going to arbitration. A serious problem with this procedure is that one or both of the final offers may contain some provisions which are eminently reasonable and others which are not. An employer's final offer, for example, might be very reasonable in terms of wages and benefits, but contain a change in the grievance procedure that would be disastrous for the union. In addition, an arbitrator, who is not familiar with the day-to-day opertions and problems, may not be in a position accurately to assess which proposals—especially non-economic proposals—are reasonable.

This latter problem constitutes an objection against compulsory arbitration in any form. The parties themselves know best what the issues mean in terms of what it would be like to live and work under a given provision for the next year, two years, or three years, depending on the duration of the prospective contract. They know which issues are so important to them that they are worth risking a strike over, and which provisions they can live with. No third party can know these things as well as the disputants themselves. Thus, both practical considerations and appeal to the right of self-determination argue in favor of allowing the parties to settle their disputes themselves, even if that means strides will sometimes occur.

Another potential problem with final-offer arbitration is that a different form of "splitting the difference" would tend to arise. Since both parties generally have the right to veto the appointment of an individual arbitrator—and surely they must have this right, since this individual will determine the terms and conditions that will govern their working lives for, typically, one to three years—there will be a strong tendency for arbitrators to decide half of their cases in favor of management and half in favor of unions. An arbitrator with a record of decisions going too often either way would soon

be out of work. Now it may be thought that this pressure should be welcomed, since it amounts to a strong incentive for arbitrators to be even-handed, and hence fair. But it must be noted that there is little reason to expect that, over any given period of time, for any particular arbitrator, management will have made the most reasonable offer in just 50 percent of the cases he or she hears, and the union in the other 50 percent. Yet the pressure is to build a record that appears to reflect just this situation.

Finally, whichever form of arbitration is used, some opponents of compulsory arbitration argue—with a good deal of plausibility, in my view—that arbitrators tend to have backgrounds, educations, life-styles, and social contacts that lead them, consciously or unconsciously, to identify more with supervisors, managers, and public officials than with workers. This identification cannot help but influence their sympathies, their assessment of the arguments put forth by the parties, and hence, ultimately, their decisions. Thus, a system of compulsory arbitration is, probably inevitably, biased in favor of management and against workers. Note that this objection is compatible with the previous one, although it may at first appear not to be. If unions are aware of the pro-management bias of arbitrators then they will risk going to arbitration only when their case is particularly strong. They will settle voluntarily in many cases where they ought to win in arbitration but probably would not. In such a situation, unions would have a better case than management in significantly more than 50 percent of the cases that actually got to arbitration, so a fifty-fifty split of the decisions would reflect a promanagement bias.

For all of these reasons, then, compulsory binding arbitration is unsatisfactory as a substitute for the right to strike. As a matter of political reality, however, it may be that, given the kinds and degrees of constraint likely to be placed on their right to strike by legislators in a given jurisdiction, police and firefighters do better to accept a system of arbitration than to retain a right to strike that would be rendered utterly ineffectual.

To conclude this discussion of the right of public employees to strike, it must be emphasized that prohibition of strikes does not prevent strikes. Indeed, it can be argued that it is likely to have the opposite effect. New Jersey's Commissioner of Labor and Industry said in 1965 that "it may be more critical to have the strike weapon available to workers to alert management, government, the customers of the government, and the public that they must do something; they cannot go on ignoring the problem" (Male, 1965, 109). (As we noted above, New Jersey still has not recognized the right of public employees to strike.) Allan Weisenfeld develops the argument as follows:

> Strikes in the public sector will be no more frequent, probably less, than in the private sector and cause no greater inconvenience and dislocation. . . . It is the

denial of the right to strike in the public sector . . . which invites strike threats. Anti-strike laws create a tendency on the part of public managers to rely on them to bail them out, and hence, they tend to contribute little to help solve the problems before the bargainers. [Weisenfeld, 1969, 139]

Prohibition of strikes may thus exacerbate the very problems it is intended to solve.