Teacher Negotiations into the Seventies

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Repository Citation
Ralph P. Dupont and Robert D. Tobin, Teacher Negotiations into the Seventies, 12 Wm. & Mary L. Rev. 711 (1971), https://scholarship.law.wm.edu/wmlr/vol12/iss4/2

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ARTICLES

TEACHER NEGOTIATIONS INTO THE SEVENTIES

RALPH P. DUPONT* AND ROBERT D. TOBIN**

INTRODUCTION

Violence Ahead?

Public school teachers stand at the threshold of the second five years of statutorily mandated collective negotiations with their local boards of education.¹ The results thus far have been less than satisfactory²

¹ For a complete summary with full text of most state negotiation statutes see D. Wollett & R. Chanin, THE LAW AND PRACTICE OF TEACHER NEGOTIATIONS, appendix (1970).
² From September, 1967 to approximately October, 1970, in Connecticut alone, there have been 26 teacher strikes, chiefly by National Education Association affiliates. There were three such strikes in 1967, four in 1968, nine in 1969, and ten in 1970. See CONNECTICUT EDUCATION ASSOCIATION, CONNECTICUT TEACHER STRIKES SINCE 1965 (A publication of the Connecticut Education Association). One major study states:
The strike is the most dramatic form of concerted activity used by teachers in attempting to generate pressure against school boards, and the frequency of strikes in public education is rapidly increasing. In 1959, there were four work stoppages in public schools involving 220 employees with a loss of 440 man-days. These figures rose in 1960 to five strikes involving 10,200 employees with a loss of 17,000 man-days. By 1967 the number of work stoppages in public schools had risen to 89 involving 96,200 workers at a cost of 983,000 idle man-days. Complete figures for 1968 are not yet available. However, there were school strikes in many areas, e.g., Albuquerque, N.M.; Pittsburgh, Pa.; Montgomery County, Md.; New Haven and Waterbury, Conn.; San Francisco, Calif.; and New York City. The New York City strike alone involved a loss of about two and one-half million man-days.
D. Wollett & R. Chanin, supra note 1, at 6:81.
and, therefore, disruption of school routine will not abate. What emerges today is a picture of increasing teacher militancy against growing obdurateness respecting so-called “board prerogatives” on the part of certain of those charged with school administration, who either cannot, or will not, understand the need for, and the purpose of, collective negotiations with teachers.

Regrettable as it may be, school boards and teachers are now surely headed for violent disruption of essential educational services, unless the course of the past five years is dramatically and immediately reversed without the delays that now appear to be a virtual prelude to legislative action. Immediate congressional action is needed curtailing

3. See, e.g., W. VAUSE, NEGOTIATIONS: A GUIDE FOR SCHOOL MANAGEMENT 12-14 (1971) where the author advises school board members as follows:

Generally, teacher organizations have given the term “conditions of employment” an extremely broad meaning, while boards of education have tried to restrict that term to preserve their management prerogatives and policy-making powers... The [Connecticut Association of Boards of Education] has taken the position that “conditions of employment” can be properly interpreted to include only those matters directly affecting teacher welfare. While there are many nebulous areas that may overlap working conditions, boards should not enter negotiations on matters that are predominately matters of educational policy, management prerogative, or statutory duties of the board of education.

... Examples of educational policy matters are the question as to what extracurricular activities should be sponsored or supported, curriculum, class size, and types of specialists to be employed by the system.

... Management prerogatives usually include the rights to schedule work, to maintain order and efficiency, to hire, etc. Among the most highly controversial areas are transfers and assignments. A board of education loses control over important management functions if it surrenders by contract exclusive decision making power on these matters.

Statutory duties are those duties and responsibilities that the General Assembly has determined are most properly discharged by the representative public body—the board of education. For example, boards of education have the statutory duty to select textbooks and to determine curriculum.

Compare D. WOLLETT & R. CHANIN, supra note 1, at 6:34-6:42.

4. Even as this article is written, Newark school teachers concluded a strike of almost two months' duration, in which physical violence was said to have occurred, and as of April 1, 1971, radio news bulletins claimed that the presiding judge had signed secret bench warrants for the arrest of certain picketing school teachers.

Associated Press reports indicated that two mediators had resigned when their recommendations were declined by the school board. New London Day, March 30, 1971, at 18, col. 6.
the abuses uncovered by past failures while preserving the more salutary reforms.5

Unfortunately, however, vigorous attempts are being made to weaken the infant teacher organizations by methods rarely found, and never countenanced, in the private sector6 since the passage of Norris-LaGuardia7 and Landrum-Griffin.8 Not surprisingly, therefore, it is hard to resist analogies between militancy in the civil rights movement and student activism and the teacher effort to win respect at the bargaining table in contract determination procedures.9

Even the most timid teachers have, wherever possible, cast off the old garments of “collective begging” or “organized supplication” for the raiments of collective negotiations (in a professional context). But when the hard won new rights prove to be less than the teachers’ expectations, or when these rights are watered-down by ineffective or non-existent administration, and when school board members and the school executives are prodded toward extreme assertions of management prerogatives (in a business context),10 the entire process tends to disintegrate into a morass of collective frustration. The resulting impasse procedures, mediation, arbitration (non-binding), or fact finding conducted in many cases accomplish little11 at a great expense.12 The

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5. Legislation was advanced by the National Education Association as S. 1951 and H.R. 12-484, 91st Cong., 1st Sess. (1969).
6. With few exceptions, school boards persist in obtaining injunctive relief rather than yield to teachers, even where, as in Newark, the mediator urges the board to do so. See note 4 supra. See also D. WOLLETT & R. CHANIN, supra note 2, at 6:1-6:22.
8. Id. §§ 153 et seq. (1964).
10. See CONNECTICUT ASSOCIATIONS OF SCHOOL SUPERINTENDENTS, LOOK TO THE ’70’s at 10 (1970).
11. In Connecticut, the following figures reflect the contract disputes which advanced to mediation and arbitration:

<table>
<thead>
<tr>
<th>School Year</th>
<th>Mediation</th>
<th>Settled Through Mediation</th>
<th>Arbitration</th>
</tr>
</thead>
<tbody>
<tr>
<td>1965-66</td>
<td>16</td>
<td>11</td>
<td>5</td>
</tr>
<tr>
<td>1966-67</td>
<td>14</td>
<td>8</td>
<td>5</td>
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<tr>
<td>1967-68</td>
<td>22</td>
<td>16</td>
<td>6</td>
</tr>
<tr>
<td>1968-69</td>
<td>25</td>
<td>14</td>
<td>11</td>
</tr>
<tr>
<td>1969-70</td>
<td>38</td>
<td>15</td>
<td>22</td>
</tr>
</tbody>
</table>

Letter from Kenneth H. Lundy, Consultant, Teacher-Board Negotiations, Connecticut
level of frustration can only continue to rise until the polarization of
the parties becomes total and violent disruption of school activities
ensues.

A critical examination, therefore, of the major areas of disagreement
between teacher organizations and boards of education is attempted in
this article and some solutions, tentative to be sure, are posed. To this
end we will discuss experiences in negotiations; impasse resolution, in-
cluding mediation, fact-finding or advisory arbitration; the teachers'
strike or work stoppage; the anti-teacher injunction and post injunction
problems. While we have tried to suggest, where possible, methods and
practices which we believe will be useful in ameliorating the difficulties
we apprehend, to resolve this problem there must ultimately be recog-
nition of co-determination of educational policy18 and an enlightened
attitude on the part of school management toward contract terms in-
volving non-academic matters.

History of Teacher Negotiations

The history and present posture of the teacher drive to achieve col-
lective negotiations is too well known to require more than a cursory
summary.14 Simply stated, however, teachers form a significant portion
of the more than twelve million public employees now struggling for
recognition or commencing organization efforts.15 Some twenty-four
states have enacted some form of teacher bargaining statute.16 Teachers,

State Department of Education, to Attorney Ralph Dupont, April 6, 1971. See also
McKelvey, Fact Finding in Public Employee Disputes: Promise or Illusion?, 22 Ind.

12. In at least one case, in the author's experience, arbitration fees and costs, ex-
clusive of counsel fees, exceeded $10,000. Although the result in the particular case
included detailed findings and recommendations of three attorneys, two of whom had
had broad experience in private sector contract negotiations, the decision was not
implemented by the parties. Moreover, it is often claimed that contract arbitration,
by a single local in the private sector, may cost the local as much as $50,000. See also

13. But see, e.g., Pope & Vause, Metamorphosis of Public School Management: Five
Acts in a Continuing Negotiations Scenario in Connecticut, 2 Conn. L. Rev. 285, 303-05,

14. An excellent general history of the more significant developments, statutory
enactments, court decisions and organizational activities is contained in D. Wollett
& R. Chanin, supra note 1.

15. See Werne, A Legal Guide To Labor Relations In The Public Sector, in Col-
lective Bargaining For Public Employees 128 (PLI ed. 1968).

16. See note 1 supra.
however, are often separated from their fellow public employees by differentiating legislation\(^{17}\) and court decisions.\(^{18}\)

The legislative enactments have occurred principally since 1964\(^{19}\) and the opening salvo is said to have been President Kennedy's promulgation of Executive Order 10988 on January 17, 1962.\(^{20}\) For many years prior to 1962, however, teachers often sought, and sometimes won, court approval for local collective negotiation procedures which were arrived at by agreement with the boards of education concerned.\(^{21}\) Indeed, recommended impasse procedures were written and implemented in the early sixties with the assistance of state departments of education acting in concert with representatives of teachers and school board organizations.\(^{22}\) Thereupon, attempts were promptly made at collective negotiations.\(^{23}\) This was especially true in Connecticut which had already witnessed a major teacher strike in Norwalk in 1946.\(^{24}\)

The executive director of the Connecticut Association of Boards of Education has described the setting in which teachers found themselves in 1965:

> Before the enactment of Public Act 298 (Conn. P.L. 298, 1965 Sess.) boards of education in Connecticut often dealt with teachers in a fashion similar to parents supervising children. . . . Just as

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18. Cf., e.g., Norwalk Teachers' Ass'n v. Board of Educ., 138 Conn. 269, 280, 83 A.2d 482, 484 (1951).
20. See Werne, supra note 15, at 128.
21. See, e.g., Norwalk Teachers' Ass'n v. Board of Educ., 138 Conn. 269, 83 A.2d 482 (1951) (a landmark case of this type).
24. In 1946 there was a dispute between the Norwalk Teachers Association and the Board of Education respecting salaries. The Association represented two hundred and ninety-eight of the three hundred teachers. Two hundred and thirty of the teachers rejected the individual contracts offered and refused to return to work. After extended negotiations in which the governor of Connecticut took part, a master contract was reached which recognized the Association as the bargaining agent for all of its members, defined working conditions, and set up a grievance procedure and salary schedule. Thereafter, the teachers returned to work. See Norwalk Teachers' Ass'n v. Board of Educ., 131 Conn. 269, 271, 83 A.2d 482 (1951).
some parents view their role as benign sovereigns, some boards determined salaries and other conditions of employment without consultation with the staff, other than the superintendent.25

The constantly increasing number and intensity of teacher work stoppages since 196626 and the deepening sense of teacher frustration indicated thereby may be but slight indication of the extent to which school management actually fails to meet even the minimal requirements of existing state laws and adheres to notions and attitudes which simply refuse to yield to the present day needs of teachers.27 These needs include recognition of professional status, freedom from intolerable, bureaucratic rule-making (including selective enforcement of such rules), and community acceptance of teacher pay scales commensurate with the value of the service rendered the community.

Teachers should neither suffer from the erosion of an inflation not of their making nor be denied a fair share of the annual growth in the gross national product which they have done much to make possible. On the other hand, the cities are faced with a tax base too narrow and an allocation of responsibility too great to provide essential services. Although educational needs may not be first in the order of local budget priority, it cannot be denied that education is a close second and that

25. Pope & Vause, supra note 13, at 287.
26. See note 2 supra.
27. Some indication of the backward-looking views of school managers can be found in Connecticut Associations of School Superintendents, supra note 10, at 8:
Finally, the issues of school board-teacher negotiations: If school systems are to innovate and respond at the local level of today's education and social challenges, it is imperative that the inherent and reserve powers of the State with respect to public education and the delegated powers of the local school board must not be assigned, through negotiations, to employees of the public school system, no matter how competent and altruistic such employees may be.

The powers of our school boards, through negotiations, are continually being whittled away, and the ability of school boards to respond flexibly to the changing conditions of a modern society has become seriously limited and retarded. The usefulness of the school board, as an instrument of state and local responsibility, has become measurably diminished.

The confusion about what is and what is not negotiable between employer boards and employee teacher organizations must be eliminated. The uncounted hours of controversy must be reduced so that the energies of both parties may be devoted to the serious matters of planning and programming to meet the direct needs of children.

The conclusion last stated appears forward looking, even if inconsistent with the major premise.
improper budgetary priorities are partially to blame for the present financial crisis. The parties must recognize their respective problems and seek a full understanding of them.

The Militant Boardman

Whether due to lack of tax revenue or other causes, it will not be denied that teacher militancy is now being vigorously countered by school boards which turn with increasing frequency to regional or state organizations of board members with paid staff and a budget supported in large measure by contributions of public funds. The teacher lobbyist may now be met by an equally militant board lobbyist, following the model of the labor unions and the associations of employers. Both sides have access to seemingly tireless printers and have commissioned a veritable deluge of bulletins and reports, designed as much to boost morale as to inform.

To complete the picture of the parties' positions five years after the passage of the first significant legislation in the field, it is necessary to add that board members are apparently now convinced that they have a legislative mandate to make educational policy; and that the exercise of this mandate, in accordance with their conception of public interest in education, is exclusively a board prerogative. Although it would seem that these views are hardly conducive to a sound professional relationship with teachers, who themselves claim a considerable expertise


29. See, e.g., Pope & Vause, supra note 13 at 291. Connecticut Association of Boards of Education, Inc., 1 Negotiations No. 2 (Oct. 9, 1968) outlines the role of the Connecticut Association in negotiations:

CABE acts primarily as a catalyst in negotiations. Supporting services of research and mediation consultation are established CABE services. CABE's legal service is distinguishable from that offered by attorneys in private practice or municipal attorneys. We prepare opinions concerning the interpretation of statutes, cases or contract language and occasionally enter a case as a friend of the court (amicus curiae) but we do not represent boards in law suits or negotiations. Any information or opinions we have concerning the legal implications arising from a given set of facts are available to member boards and their superintendents, professional negotiators or town attorneys upon request.


31. See W. Vause, supra note 3.
and deep professional interest in the same subject, boards are being urged, nevertheless, to do battle on pain of conviction of the charge of breach of public trust. Fortified by private, and occasionally self-indulgent, statutory constructions, the boardmen now appear to be mounting a feverish effort of their own to preserve board authority from further incursions by teachers and, in some cases, even to reverse previous accords, as expressed in existing contracts. It is against this background that the experiences of the past should be examined, today's problems analyzed, and recommendations made for their solution now and in the future.

What's Ahead for the Negotiators?

Co-determination vs. Management Prerogative: The Scope of Negotiations

It would seem that when teachers speak of achieving professional status through collective bargaining or express concern over whether labor organization tactics are suitable in "professional negotiations," they are manifesting a desire to bargain with respect to all matters generally embraced under the heading, "educational policies," and usually view these issues on a parity with monetary concerns. When school administrators defend the role of board members in determining educational policies, they are frequently only displaying concern for continued exclusive determination of an array of working conditions, personnel policies, work rules, and like matters.

It is doubtful whether either side has been totally frank about its position. It would seem to be a time for candor, however, and teachers should not hesitate to state that they are peculiarly fitted by training, experience, and professional motivation to determine educational policies. Major policy considerations and overall goals inevitably require a true

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33. See, e.g., note 27 supra.
35. Associated Press reports in the Newark strike indicated: "The union won binding arbitration in the last contract, but the board wants to weaken the clause. The board has lost almost all the arbitration cases." New London Day, March 30, 1971, at 18, col. 6.
36. See Brown, supra note 32, at 267-68.
37. See, e.g., CONNECTICUT ASSOCIATIONS OF SCHOOL SUPERINTENDENTS, supra note 10.
community consensus for their implementation, expressed by the electorate through its public officials.

Superintendents of schools should make clear that the board's expressed wish to retain control over educational policies (tenure, selection of junior management personnel and faculty appointments generally, establishment of school calendars, length of school day, rule-making with respect to use of teacher mail boxes and school bulletin boards, curriculum development, class size, job descriptions, and a host of related matters) is but the expression of the professional administrators' desire to retain as much control as possible.

Such matters have been, and foreseeably will continue to be, under the direct control not of board members but of their designated representatives. Indeed, it is seriously to be doubted whether the expression, "board prerogative," enjoyed particularly great vogue in those halcyon days when the superintendent painstakingly acquainted each newly elected board member with the creed: matters pertaining to administration are peculiarly the function of the administrator and in these matters school board members ought not interfere. Thus, the superintendent hired personnel, made promotions, wrote job descriptions, settled tenure upon the worthy, discharged the unfit, and even prepared board bylaws, minutes and agenda.

Anyone concerned with collective negotiations, therefore, should recognize that board members probably never determined for themselves, without professional assistance, those questions they now claim to be exclusively in their domain. Management prerogatives in private industry are readily distinguishable, since those asserting the prerogatives are usually qualified by training and experience to exercise it and frequently must bear a large share of the financial consequences of failure. If one recognizes that it is merely rational behavior for trained educators to desire to formulate policies for public education in a meaningful way, and if one also recognizes that school boards are not leaders of

38. See, e.g., Pope & Vause, supra note 13.

The revolution in public school management is making its impact felt in other areas traditionally regarded as the prerogatives of local school boards and administrations. Some recent collective agreements negotiated between school boards and teacher organizations provided for teacher involvement in recruiting new faculty members. For example, one agreement in New York requires that teachers elected by their colleagues at the school, subject, or departmental level interview candidates for teaching positions during the recruiting process.
industrial complexes dealing with a challenge to their stockholders’ profits, the prior experiences under national labor legislation\(^4\) tending to establish an area for the exercise of so-called management prerogatives appears irrelevant.\(^4\) 

Furthermore, it would seem to be a legitimate aim and end result of collective negotiations that the public be afforded an educational policy, fully supported by the teachers who are required to administer it and are qualified to make such policies in the first instance. Indeed, even superintendents and their staffs were once classroom teachers, and if the system is to function in formulating an educational program for the community it must have daily participation by certified professional personnel at all levels. In the past, the public interest was well served by de facto co-determination of educational policies, although it was never called by that name. School boards ought not to turn away from the reality of the situation in the negotiations context but should seek to express the parties’ relationship in a meaningful way.

**The Present Legislative Basis for Co-determination**

In light of the community’s right to policy-making based on teacher participation, it is not surprising that Connecticut’s negotiation law imposes on “the . . . board of education and the [teacher] organization . . . the duty to negotiate with respect to salaries and other conditions of employment about which either party wishes to negotiate, and such duty shall include the obligation of such board . . . to meet at reasonable times, including meetings appropriately related to the budget-making process, and confer in good faith with respect to salaries and other conditions of employment . . . .”\(^4\) The Hawaii statute is similar in this respect and, if anything, is more specific.

The employer and the . . . [teacher representative] shall meet at reasonable times, including meetings in advance of the employer’s budget-making process. . . .\(^4\)

It is at least arguable that this language requires both parties to weigh educational policies against the cost of implementation and to make a determination of the priorities involved. This would seem especially


\(^{41}\) See generally 1 B. Werne, Labor Relations Law and Practice ch. 2 (1966).


helpful to the local legislative bodies in those states in which the school board lacks authority to appropriate funds.

Of much greater significance are the first tentative steps taken in the direction of mandated co-determination in Washington. There negotiations are required on a broad range of matters, some of which are clearly associated with the function of policy-making.\(^4\)

The seventies will undoubtedly witness further inroads by teachers into areas still regarded by some as exclusively board prerogatives. Doubtlessly, such inroads will be made at heavy cost to educational tranquility if boards and administrators persist in a hard line attitude toward teachers' bargaining attempts in this area. It has been said that if the labor organization is weak nothing is negotiable, but if it is strong everything is negotiable,\(^4\) and that a discussion of the range of negotiable topics may be of little more than academic interest.\(^4\) It cannot be doubted, however, that overly generalized definitions of the scope of negotiations subject to narrow interpretations by boards of education and broad interpretations by teacher organizations have aggravated the situation. Difficulty in determining the legislative intent as to the proper scope of negotiations has undoubtedly increased resort to impasse procedures. Legislation in the seventies must define the proper scope of and subjects for collective negotiations to avoid the present tendency away from positive enumeration of the issues.\(^4\)

An Emerging Constitutional Requirement for Collective Negotiations

Recent decisions recognizing the right of public employees to organize for collective negotiations leave unanswered the extent of the employers' duties in the bargaining process.\(^4\) It is, however, a logical step from the recognition of a right to organize for purposes of collective

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\(^4\) See \textit{WASH. REV. CODE ANN. § 28A72.030} (1970) which includes as negotiable items "curriculum, textbook selection, in-service training, student teaching programs, personnel, hiring and assignment practices, leaves of absence, salaries and salary schedules and non-instructional duties."\(^4\)

\(^5\) See \textit{D. Wollett & R. Chanin, supra note 1, at 6:39 n.124.}\(^5\)

\(^6\) \textit{Id. at 6:41.}\(^6\)

\(^7\) \textit{Id. Discussing committee reports, such as that of the so-called Aaron Committee which eschewed a listing of subjects in favor of a general proposition as to negotiability.}\(^7\)

bargaining to the imposition of a duty on the employer to negotiate collectively. It would seem, moreover, that unlike a private employer, a public agency may not adopt rules, or follow policies, in its dealings with its employees which are patently arbitrary or capricious. Refusal to consider a teacher organization's proposal for the adoption of a policy of collective negotiations would seem arbitrary and capricious. Moreover, teacher organizations' requests for minor changes in school administration could be denied, but not without reason and only after a procedure which would have at least some of the elements of collective bargaining. Arguably, therefore, a board of education is under a constitutional duty to negotiate in good faith with its employees. The right, if it exists, is based on the due process clause of the fourteenth amendment and undoubtedly the issue will soon be resolved by the courts.

However the Board may undertake the duty to negotiate, it cannot be doubted that since governmental agencies are compelled to accord due process of law, what is customary and permissible in the context of private bargaining under regulatory labor legislation may be constitutionally impermissible in public sector bargaining. It must be asked, therefore, whether boards of education, or their agents, may ever engage in any type of shrewd bargaining technique in light of the due process requirement. Will the end of carrying out a public trust, as defined by the board, justify the use of constitutionally impermissible conduct to achieve that end? Thus, although the question of the scope of negotiations and of bad faith therein should be reviewed by legislatures, it is questionable whether statutes which contain no reference to the requirement for good faith bargaining need do so, since it would seem that minimal constitutional requirements of due process would import standards of fair play and good faith.

Who Should Negotiate?

If the scope of the bargainable issues and the techniques to be utilized should now be carefully scrutinized, then the choice of persons charged

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49. See text accompanying notes 150-61 infra.

50. For a consideration of sanctions against teachers and boards see text commencing at note 92 infra.

51. Keyishian v. Board of Regents, 385 U.S. 589 (1967), and Garrity v. New Jersey, 385 U.S. 493 (1967), require total rejection of the shop-worn argument that public employee status is dispositive where constitutional guarantees are concerned; something more is required of the employer than proof of status as justification for abridgment of a right otherwise constitutionally guaranteed.
with the conduct of negotiations should be reassessed. At present, teachers and boardmen frequently conduct negotiations with little preparation, armed only with lengthy lists of demands and grievances. The usual result is that the entire bargaining process collapses with negotiations continuing into mediation and ultimately into fact-finding of one kind or another depending upon the impasse procedures available in the particular jurisdiction.52

Board members, in the first instance, would seem to have no place at the bargaining table,53 but regrettably they have become personally involved in work that private industry delegates to second level executives. The board's time and energies are consumed in seemingly endless, and often bitter, debate with a resultant lowering of its image before teachers and taxpayers. Moreover, there exists a grave potential for harm to the entire school system when personality clashes precipitate work stoppages. Indeed, with as many as nine board members trying to engage in ad hoc discussions of management's philosophy toward negotiations, the board is often made to look ridiculous and sometimes is committed to an extreme view.54

Boards must revert to their proper role as policy makers and leave

52. See D. WOLLETT & R. CHANIN, supra note 1, at 6:45-6:60.
53. The Connecticut Association of Boards of Education has recognized the "undesirability" of the board of education acting as negotiator. The Association has stated:

The board of education as negotiator: Although fairly common, this practice is undesirable for many reasons:

(4) Few board members are in a position to keep themselves thoroughly informed of current developments and trends in negotiations.
(5) Effective negotiations requires specialized skill, training and experience in the field of educational negotiations; few board members qualify as professional negotiators.

W. VAUSE, supra note 3, at 10-11.

In those states which require "the board of education . . . to negotiate," it would not seem that use of an expert negotiator would violate the statutory provision even though a literal interpretation of the statute would require the board itself to negotiate. See, e.g., CONN. GEN. STAT. ANN. § 10-153d (Supp. 1970).

54. A recent survey published by the National Education Association research division notes that most negotiations today are carried on by a team of board members, superintendents, and other school administrators. While the role of board members does not seem to have changed, superintendents today generally act as advisors to the board only, whereas in the past they have advised both board and teacher negotiators. See NATIONAL EDUCATION ASSOCIATION, NEGOTIATION RESEARCH DIGEST 15-21 (Nov. 1970).

Disagreements often occur among boardmen, during negotiations, resulting in personal views being injected into negotiations; for example, that no teacher should be granted a personal day and if the contract so provides, then the boardman will withhold support for other parts of the contract.
bargaining to full-time employee experts. They should be reluctant, however, to assign this task to anyone not in their employ on a regular basis, although nothing would prevent several boards from engaging the services of one full-time specialist in teacher contract negotiations.55 This person must be extremely knowledgeable in all phases of public education and, therefore, he must be selected from among present-day teachers or school managers. It is even arguable that a knowledge of collective bargaining techniques gained in the industrial world may be a definite handicap in dealing with teachers, and that outside negotiators ultimately tend to exacerbate the problem rather than solve it, however effective they may be on a one-time basis.56 Most importantly, however, these professional negotiators have no real stake in the community or its schools and may be bound to leave for the next town promptly upon the conclusion of negotiations. Daily meetings between teachers and management representatives in the course of contract enforcement would seem more likely to build the mutual respect and trust that is sorely needed if the parties' fears are to be overcome.

Teachers assigned duties at the bargaining table and in contract enforcement must similarly relate to their local educational system and have the widest knowledge of and experience with their board's problems.57 Moreover, failure of the teacher negotiator to achieve a complete understanding of the educational goals of the local staff can have extremely adverse effects58 and threaten cherished academic freedoms with union regimentation. Any tendency to commit negotiations to the most militant, youthful "hard-liner" is to be deplored if he is lacking in essential knowledge of the needs of local teachers. This may not only aggra-

55. For a discussion of possible adverse effects of agreements and exchanges of information between boards, see text accompanying notes 103-06, infra.
56. A case in point is the experience of the Newington Teachers' Association, Newington, Conn. Interview with Mr. Richard W. Peplau, President, Newington Teachers' Association, in Hartford, Connecticut, Aug. 15, 1970. See also Wollett, The Coming Revolution in Public School Management, 67 Mich. L. Rev. 1017, 1030 (1967) pointing out that such labor mediators, fact-finders and arbitrators may tend to treat teachers' professional proposals as mere "window-dressing".
57. A team of negotiators (the personnel policy committee, as it is sometimes called in the NEA affiliated organizations) should include elementary school specialists, special subject experts, high school spokesmen (from all tracks of the curriculum), and junior high or middle school teachers. The problems of all groups must be sifted and analyzed in preparing for negotiations, and priorities must be fairly determined in contract settlement.
58. Cf. Brown, supra note 32, at 268-74. Academic freedom could suffer under rigid organizational control, and important educational concepts could be pushed aside
vate a bad situation at the bargaining table but also may commit the teacher organization to actions which it would prefer to reject.\textsuperscript{59}

It is essential that a corps of teacher-board relations specialists be recruited promptly from within the teaching profession. The state boards of education have been lax in developing acceptable programs for training negotiators and others charged with contract administration, although New Jersey seems to be a notable exception.\textsuperscript{60} The apparent tendency of some state boards and their executives to maintain a neutral attitude may be the cause of the noted failure to train skilled negotiators and should no longer be accepted without critical examination.\textsuperscript{61}

If all will look anew at the scope of negotiations in terms of the reasonable aims of the parties in collective negotiations, and if the parties will detail their arguments with supporting evidence, presented by skilled negotiators, prepared to bargain in accordance with the strictures of due process and professional ethics, then settlement of many more teacher disputes could be effected without resort to impasse. If the developments of the past few months continue, however, the prediction of increasing tensions in the schools will be realized in the seventies.

\section*{The Relevancy of Impasse Procedures in the Strikeless Sector}

\textit{Background and Early Attempts to Resolve Impasse}

The development of impasse procedures in the public sector probably preceded the passage of most negotiating acts, since school boards and their teachers had had prior disputes and even major confrontations

\textsuperscript{59} Cf. D. Wollett \& R. Chanin, \textit{supra} note 1, at 3:2-3:3.

\textsuperscript{60} New Jersey, by statute, provides a program to assist boards of education in negotiations. The statute provides:

\begin{quote}
The [public employment relations] commission in conjunction with the Institute of Management and Labor of Rutgers, the State University, shall develop and maintain a program for the guidance of public employers in employee-management relations, to provide technical advice to public employers on employee-management programs, to assist in the development of programs for training management personnel in the principles and procedures of consultation, negotiation and the settlement of disputes in the public service, and for the training of management officials in the discharge of their employee-management relations responsibilities in the public interest.
\end{quote}


\textsuperscript{61} The failure of the state board to publish even interim instructions guiding local board members in negotiations would also indicate state failure to accept a proper role in negotiations, and this is especially bad if the resulting vacuum is filled by persons having no official responsibility.
that required mediation of some form of fact-finding.\textsuperscript{62} Thus, the teachers' first encounter with impasse resolution techniques usually involved impartial officials, often elected, who seemed anxious to help teachers and who appeared unsympathetic to any form of bureaucratic arbitrariness.\textsuperscript{63}

Not surprisingly, therefore, many public school managers resisted any form of mediation or fact-finding and, in fact, still vigorously decline compulsory arbitration, whether over grievances or contracts, because they usually do not prevail.\textsuperscript{64} This attitude has had a debilitating effect upon the entire negotiation process, since the teachers, having no reason to refuse the result of a binding arbitration (or even the reasonable recommendations of a mediator) are, practically speaking, bound by awards in arbitration, even though termed advisory. School boards, on the other hand, with apparent impunity, reject the advice of mediators and act with regal imperiousness toward any fact-finding award which displeases them.\textsuperscript{65}

The array of fact-finding, arbitration, and mediation techniques in current use has been catalogued, described and evaluated with exemplary thoroughness by others.\textsuperscript{66} We undertake here an examination of the subject at the operations level, where the parties are fully engaged, and certain difficult questions we pose. First, is all this machinery really achieving effective results, especially in light of the costs involved? Second, is there any danger that professional negotiators for school boards are forcing issues to impasse and, if so, to what purpose? Third, what can be done to impose meaningful sanctions on parties who persist in refusing reasonable settlements of their disputes after negotiations and impasse procedures have been exhausted?

\textit{Fact-Finding and Advisory Arbitration}

If the experience of the past few years is of any significance at all,

\textsuperscript{62} See, e.g., Norwalk Teachers' Ass'n v. Board of Educ., 138 Conn. 269, 83 A.2d 482 (1951).

\textsuperscript{63} In the Norwalk Teachers' Ass'n case, the governor of Connecticut became involved in the dispute. \textit{Id.} at 271, 83 A.2d at 483.

\textsuperscript{64} See note 35 supra.

\textsuperscript{65} Boards and their attorneys usually rely on statements such as those found in Norwalk Teachers' Ass'n v. Board of Educ., 138 Conn. 269, 279, 83 A.2d 482 (1951), to the effect that a board's "power to submit to arbitration would not extend to questions of policy but might extend to questions of liability. . .Agreements [sic] to submit all disputes to arbitration, commonly found in union contracts, are in a different category."

\textsuperscript{66} See, e.g., G. Roumell, \textit{The Role of the Fact Finder} 85 (PLI ed. 1968).
then surely its greatest significance is in the area of impasse procedures, especially in fact-finding or non-binding compulsory contract arbitration,\(^67\) which is now in danger of degenerating into the fact-finding follies, an annual waste of time. Advisory arbitration (or fact-finding; the terms are somewhat synonymous) is of two types: (1) that in which the arbitrators must base any award exclusively on the evidence before them,\(^68\) and (2) that in which the arbitrators may enter awards based on the evidence before them, as well as on all other knowledge or information possessed by them.\(^69\)

In all events, the parties must carefully marshal the evidence and skillfully plead their cases. The precision of the skilled trial lawyer is not an absolute necessity, but if the tragi-comedy of an arbitration presented by an unskilled, would-be advocate is once observed, the tendency to recommend lawyer-trained advocates in impasse procedures becomes very strong. If the alternative is simplification or exclusion of issues, then so be it. If the benefits sought are not worth the cost of adequate preparation and expert representation, then it is submitted that the matter should not be placed in arbitration at all.\(^70\)

Moreover, by their very nature certain matters are extremely difficult to arbitrate, and teacher bargaining teams must recognize this before the matter reaches arbitration. For example, consider the difficulties attendant upon a teacher proposal that class size be limited to twenty-three students in a self-contained classroom situation. To formulate an award on this issue, the arbitrators at least must know the total school population, present and predicted; the number and kind of classrooms presently available; the extent to which the proposal would require the construction of additional classrooms and their location (with due regard to any possible problem of de facto segregation resulting); and the number and training of the teachers available, and how many additional teachers, if any, must be hired. Indeed, there are a host of sub-issues


\(^{70}\) \textit{See, e.g.}, note 12 \textit{supra}.
with which the panel may be required to deal, e.g., the effectiveness of such a provision in the contract.\textsuperscript{71} Is this provision legally enforceable, and if it is not, then of what value is it in the contract?\textsuperscript{72}

Perhaps teachers and boards unable to agree on matters such as class size should strive in arbitration to win adoption of certain principles, the application of which to other facts found would be dispositive. Perhaps a contract could be recommended to the parties that would name other fact-finders who would apply the recommended principles. Implementation of the decision and the time within which it shall be accomplished is also bargainable and should be determined by the arbitrators. If possible, alternatives should also be offered as, for example, increased compensation or other form of \textit{quid pro quo} for teachers working an understaffed school system or without adequate classrooms and other necessities. In this manner the board will be encouraged to move toward solutions to problems too vast for consideration in a single arbitration.

Another aspect of impasse today, especially at mediation, is the apparent tendency to use this procedure as an extension of collective negotiations. One cannot ignore the fact that the parties' attitudes have seemingly been conditioned by inadequacies in mediation, especially a lack of trained personnel,\textsuperscript{73} coupled with an inexplicable ritualism which educators seem to evolve in connection with their every task.\textsuperscript{74}

Thus, after a few successful attempts at mediation,\textsuperscript{75} a standard procedure emerges (somewhat like a lesson plan). The ritual includes a host of terms whose meaning and moment of application are known only to the initiated. Thus, everyone apparently knows during negotiations over the salary schedules that a visit to the state capitol for mediation will result, and that a suggestion will be made by the mediator that "mid-point" be applied. Since this involves nothing more or

\textsuperscript{71} See, e.g., West Hartford Educ. Ass'n and Bd. of Educ., Opinion of Neutral Arbitrator, III (Case No. 1230 0130 69, filed Oct. 3, 1969, American Arbitration Association, Hartford, Conn.).

\textsuperscript{72} See, e.g., Brief on Behalf of West Hartford Board of Education, filed in West Hartford Educ. Ass'n and Bd. of Educ., Case No. 1230 0130 69, American Arbitration Association, Hartford, Conn. (1969).

\textsuperscript{73} In Connecticut, for example, staff assistants to the Commissioner of Education endeavored to mediate. Later the General Assembly established a panel of persons who had had prior experience in labor disputes, or who had had prior involvement with public education. See Conn. Gen. Stat. § 10-153f(a) (Supp. 1970).


\textsuperscript{75} See note 11 supra.
less than “splitting the difference,” the negotiators obviously will not make a true final offer to settle short of mediation, for this is not allowed for in the ritual.

In all probability, the parties may hold back certain issues which will be modified or dropped entirely in exchange for concessions from the other side in mediation. Moreover, those parties that understand the mediation ritual, introduce additional refinements so that virtually the entire economic package is reserved for full fact-finding, or compulsory non-binding arbitration.76

Where teachers lack experience in negotiations, they tend to seek salvation in mediation and fact-finding.77 Rather than approaching negotiations with a well prepared case, the team learns its case only with each step of the impasse procedure.78 Such negotiators are usually ignorant of the role of mediators and do not realize that professional mediators will put the greatest settlement pressure on the weakest party.79 Of course, these are usually the same inexperienced, underfinanced, poorly prepared teachers, whose sword and buckler is all too frequently only the righteousness of their claims. In the adjoining room, meanwhile, the school managers huddle with their board of education, steadfastly asserting the non-negotiability of many issues or the “inappropriateness to the contract” of others,80 secure in the knowledge


77. Teachers in Connecticut at least had high hopes for mediation and boards in 1966 seemed somewhat awed by the presence of the Commissioner of Education. Settlements were easier to reach than later when the experienced party negotiators took over and guided the mediation with a view to ultimate arbitration. See note 11 supra. There is no reason to believe the experience was a unique one.

78. See, West Hartford Educ. Ass’n and Bd. of Educ., Opinion of the Neutral Arbitrator, VI (Case No. 1230 0130 69, filed Oct. 3, 1969, American Arbitration Association, Hartford, Conn.) wherein it is stated:

[S]hould the parties ever have to go this route again we would respectfully suggest a full discussion of all issues before arbitration, and the dropping of clearly unnecessary or unwise items which should be obvious to two intelligent parties honestly seeking to obtain a mutual accommodation, but which have to be fully considered by an arbitration panel in a careful search for a kernel of merit.

79. See D. WOLLETT & R. CHANIN, supra note 1, at 6:51.

80. Cf., e.g., West Hartford Educ. Ass’n and West Hartford Bd. of Educ., Concurring Opinion of Board Appointed Arbitrator, 1-2 (Case No. 1230 0130 69, filed Oct. 3, 1969 American Arbitration Association, Hartford, Connecticut) wherein it is stated:

My concurrence in the Award of the majority of this Panel results from an exhaustive analysis and discussion by each Panel member of each of the
that teachers cannot lawfully strike, \textsuperscript{81} and certainly cannot match the unlimited funds and public relations machinery available to the board to justify its every decision. The board’s position seems impregnable and in most cases it is, until a strike or other work stoppage finally closes the schools.

In these circumstances, it should be clear that boards of education have the most to gain in mediation and fact-finding. It is arguable that professional managers and their paid negotiators may be resorting to the impasse techniques to weaken teacher organizations financially and to impair the morale of the bargaining unit by a series of frustrations created by a seemingly omnipotent school board. \textsuperscript{82}

The cost of mediation and fact-finding is said to be a deterrent to its use and, therefore, a reason why parties should settle short of impasse. It has also been noted, however, that the shibboleths of the private sector are not meaningful in the context of public bargaining. This is because school boards have virtually unlimited resources for bargaining.

\textsuperscript{39} individual issues presented. However, I wish to make it clear that I do not view this opinion as in any way determining one of the more basic underlying problems created by the Connecticut Statutes, to wit: the obvious conflict between the powers granted to local Boards of Education under Section 10-220 of the General Statutes and the obligations to negotiate with respect to teacher “working conditions” thrust upon such boards by Section 10-153d of the General Statutes. It is clear to me that this opinion does not answer the question of whether a Board of Education may stand on the powers granted it by Section 10-220 of the General Statutes and legally refuse a request of a teacher organization, negotiating teacher working conditions, when in its best judgment such Board of Education does not feel it would be in the best interest of the Town (which such Board of Education represents) to include such a provision in an agreement. Clearly this issue was not before us, because at no time did the Board refuse to include a specific provision but rather indicated its reluctance to incorporate a given clause in the agreement. Neither did it refuse to discuss any particular association proposal.


\textsuperscript{81.} See text accompanying note 108 \textit{et seq.}, infra.

\textsuperscript{82.} In Newark, for example, the Board of Education apparently asserted that the previous year’s contract must be completely renegotiated on grievance and non-professional responsibilities. This caused one reporter to note:

This position, considered unusually strong for labor-management talks, has led the Teachers’ Union to charge that what the Board really wants is to destroy the union and force white teachers out of Newark.

and are seldom called to account by taxpayers to explain expenditures for purposes relating to teacher bargaining.\footnote{83. A Connecticut town meeting in 1969, however, at first refused to appropriate funds to pay attorney's fees incurred by the board of education in the course of teacher negotiations. In another case, a town attorney refused to sanction the retention by a board of education of a private attorney and at first directed the town treasurer not to pay the attorney's statement for past services.}

Whatever may be the supposed public relations effect of the issuance of findings and recommendations adverse to the school board's position, it must be noted that political opponents rarely use such reports in campaigns to unseat board members. Although the news media seem to strive to publish the facts found and the recommendations made, the school managers are adept at conducting "the war of words."\footnote{84. In the Newark strike, Mayor Gibson charged that the original issues in the strike have been submerged in a welter of "emotional inflammatory rhetoric." N.Y. Times, April 11, 1971, at 1, col 3.} Unfortunately, most media coverage is restricted to the factual context, whereas, not unlike an author's play, the parties' pre-impasse positions should receive critical review by knowledgeable newsmen after arbitration is concluded. Of course, those states which make arbitration binding\footnote{85. See, e.g., ME. REV. STAT. ANN. tit. 26, § 965.4 (Supp. 1970).} would seem to menace the parties sufficiently to force agreements at least on those issues which are subject to binding arbitration.\footnote{86. The experience in Maine indicates that the parties reach agreement short of arbitration on those issues as to which arbitration is binding. Interview with J. Donald Belleville, Assistant Director of Field Services, Maine Teachers Association, Augusta, Maine, April 28, 1971.}

\section*{Sanctions}

\textbf{The Present Situation}

Some measure of the distance yet to be traveled before sanctions will be imposed on parties who fail to reach a contract during collective negotiations can be had by reference to a North Carolina statute\footnote{87. N.C. GEN. STAT. § 95-97 (1965).} which expressly forbids teacher-board negotiations, and even prohibits teachers from organizing for such purposes, although that portion of the statute was promptly declared unconstitutional.\footnote{88. See Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D.N.C. 1969).} Moreover, of those states which do accord teachers the right to negotiate collectively, only a few have made any statutory provision for sanctions, even against a party proceeding in bad faith.\footnote{89. See, e.g., MICH. STAT. ANN. § 17-455 (1968).}
Perhaps equally troublesome is the absence in most states of an administrative procedure for dealing with complaints of unfair labor practices (or its professional equivalent, unethical conduct). As a result, no working definition of "good faith" has yet evolved in the context of board-teacher dealings, except, perhaps, in Michigan, New York, and Wisconsin where significant attempts are being made to evolve a pattern of sanctions, and where administrative procedures exist. Of course, no sanction equivalent to actual or threatened loss of profits is possible in the public sector. In the absence of an administrative procedure with provision for sanctions, the parties must resort to the courts whose judges, seemingly startled by the presence of a labor law case on the docket involving substantial constitutional issues, tend to treat the teachers' claims of bad faith most gingerly.

It would seem, therefore, that the absence of real sanctions not only has had an adverse effect on the otherwise promising possibilities of some, if not most, impasse procedures, but also has directly contributed to strikes in the public sector, since the impasse process tends toward spiraling frustrations in which teachers become increasingly more polarized.

**Evolving Sanctions Against Boardmen Pending Corrective Legislation**

It is interesting to note at the outset that the only extensive statutory provision for sanctions has met with limited success. New York's Taylor Law aims a direct threat against the labor organization's purse and at contract provisions respecting organizational efforts such as check-off privileges. Notwithstanding, the law actually relies on a broadly based court injunction as the solution to a teachers' work stop-

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91. Mich. Stat. Ann. § 17-455 (1968); N.Y. Civ. Serv. Law §§ 200-12, (McKinney Supp. 1969); Wis. Stat. Ann. § 111.70 (Supp. 1969). Significantly, therefore, teachers are seeking legislative establishment of teacher relations boards. In Connecticut, legislation has been introduced to establish such a board with broad powers to issue cease and desist orders and to order the payment of arbitration and/or mediation costs where there is a failure to negotiate in good faith.

92. In Connecticut, we know of no broadly based opinion on teacher-board relations, although 18 injunctions have issued, 17 of them in the past three years, with 10 contempt proceedings. See note 2 supra.


page and has not made extensive provisions for reciprocal sanctions in cases involving the school board's apparent refusal to bargain in good faith.\footnote{95}

Some possible remedies presently available appear to have been overlooked. A recalcitrant board might be prorogued with attendant control of local education by the state board.\footnote{96} While this sanction would be limited in scope and time to that which, in the opinion of the state board of education, is necessary to permit a resolution of the problem, the ultimate step could involve removal from office.\footnote{97} Where state department of education officials are intimately involved in the process of mediation and fact-finding, the suggested sanctions would seem particu-

\footnote{95. Failure to bargain in good faith on the part of the board was found in North Dearborn Heights School Dist. and Local 1439, North Dearborn Heights Fed'n of Teachers, Mich. Fed'n of Teachers, 1965-1966 LAB. OES. 434 (Mich. LMB. 1966) where the trial examiner stated:}

The employer violated the Act by coming to the bargaining table with his mind hermetically sealed against the thoughts of entering into any agreement. Collective bargaining imposes upon the Employer a duty to bargain to the end that a collective bargaining agreement should be reached. An essential requirement is that there be a sincere endeavor to overcome obstacles and difficulties existing between the parties. I find that the Employer made no reasonable effort to resolve the difficulties between the parties. On the basis of the above, I find that the Employer's course of conduct in the month of May, 1966, constituted an additional violation of [the Act].

\textit{Id.} at 444.

\footnote{96. State boards of education generally have wide powers to supervise and control local boards. In Connecticut, for example, the "educational interests of the state" over which the State Board of Education has general supervision include that "the mandates in the general statutes pertaining to education within the jurisdiction of the state board of education be implemented." Presumably this would include supervision of the statutorily mandated duty to negotiate in good faith. See Conn. Gen. Stat. Ann. § 10-4, § 10-4a, § 10-153d (Supp. 1970).}

\textit{Id.} § 10-4b provides:

Whenever said state board finds that a board of education of any school district has failed to make reasonable provision to implement the educational interests of the state as defined in section 10-4a, said state board shall conduct an inquiry to identify the cause of such failure and shall determine what recommendations should be made as to the necessary remedies to be pursued by the responsible local or state agencies. In conducting such inquiries, the state board of education shall give the board of education involved the opportunity to be heard. Said state board may summon by subpoena any person whose testimony may be pertinent to the inquiry and any records or documents related to the provision of public education in the school district.

\footnote{97. No statute has been found which mandates removal.}
larly sound, since the state's chief education official is thereby in an excellent position to collect the facts upon which his recommendations and the judgment of the state board of education would be based.

Teachers should explore what, if any, constitutionally protected rights may exist in respect to teacher-board bargaining. 98 If such rights exist, then a violation would be accompanied by consequences not heretofore observed in the private sector. School board members and their hired negotiators, and even associations of school board members, maintained in whole or in part by contributions of public funds, may be personally liable for money damages without a right of reimbursement from the taxpayers. 99 Even independent contractors, paid out of tax funds and purporting to act under color of local law, are state officials for all purposes. 100 Such persons enjoy no immunity from suit under pertinent civil rights legislation and may be personally liable for their tort-like conduct in depriving teachers of benefits otherwise obtainable by collective bargaining. 101 The school board itself is subject to the court's mandate because all equitable remedies apply under the civil rights act to municipal corporations, including school boards. 102 It cannot be denied that collective negotiations are, in every case, the conduct of public business by public officials bound by constitutional imperatives.

The full extent of the constitutional imperative, if directed against school board members, needs to be carefully considered. Can boardmen, for example, without incurring liability under the Civil Rights Act of 1871, meet and confer with members of other school boards and exchange information concerning their respective ultimate positions on wages and other conditions of employment, while making contradictory

98. Recently teachers have turned to the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1964), for protection of their organizational right. The Act provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.


101. Id.

claims to the general public and teachers in bargaining sessions? It is perfectly clear that the impact of such meetings on collective negotiations can be great, and that teachers may suffer considerable economic loss by reason of concerted action of board members. Similarly, may school managers conduct meetings among themselves and determine minimum wages to be offered new teachers for a region or state?

Certainly salary agreements, if reached, would clearly subvert the purpose of collective negotiations. The anti-competitive effect of such agreements is obvious. Even if no agreements as to salary were reached, the question remains whether the mere exchange of salary information while teacher negotiations are in progress violates the purpose and intent of collective negotiations. Analogous exchanges of price information in the business world, even without an agreement to adhere to a specific price schedule, violate the Sherman Act and it would seem that exchanges of information and establishment of guidelines relative to teachers' salaries and other conditions of employment should likewise not be countenanced. When school administrators take anti-competitive action outside meetings properly convened and open to the public, their conduct should be prohibited, if it is not already, and remedies analogous to those available in antitrust actions should be afforded.

The evolution of remedies involving liability for money damages and allowance of counsel fees and expenses could have a sobering effect upon an imperious school board, and could provide an alternative to a strike or work slow-down. Fear of these sanctions by boards predictably will be great. There will be a resultant reappraisal of the board position toward its teachers which, hopefully, will have a salutary effect.

**Teacher Sanctions and Licensing**

Teachers, not unlike school boards, may be exposed to sanctions that

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103. It has been stated that bad faith could be imputed to a board where it agrees with other boards to a ceiling on salaries. See Pope & Vause, supra note 13, at 309.


105. In United States v. Container Corp. of Am., 393 U.S. 333, 337-38 (1969), the Court stated:

The inferences are irresistible that the exchange of price information has had an anticompetitive effect in the industry, chilling the vigor of price competition . . . . Price is too critical, too sensitive a control to allow it to be used even in an informal manner to restrain competition.

have been rarely discussed extensively. For example, teachers, like doctors and lawyers and unlike most of their fellow government employees, are licensed by the state to engage in their profession. Revocation of this license by procedures similar to disbarment may be possible, therefore, and may be fully justified where the teacher's conduct in collective negotiations has been unethical. There is no reason why state boards of education or other proper authorities cannot expand existing procedures as necessary to accommodate the administration of unethical practice complaints. Presumably, such complaints would be generated by false representations in negotiations, persistent refusal to bargain, demonstrable bad faith, or similar conduct.

Professionals subject to licensing may be denied their right to practice entirely, or they may be limited to some degree. It would not seem that any teacher making a good faith effort to negotiate the settlement of a dispute need fear curtailment of his license if his conduct will be judged by an impartial tribunal at the state level.

Recommendations for Legislation in the Impasse Area

Perhaps the major shortcoming of presently existing impasse resolution procedures is the lack of forceful sanctions at all levels. The absence of sanctions may be explained by an apparent assumption that impasses are legitimately reached despite the fact that both parties are proceeding in good faith. The sixties have proven this to be a largely unwarranted assumption. Legislation is immediately needed which, in addition to making impasse procedures available, provides sanctions, such as payment of costs and attorneys fees, where it is found that either party is not approaching the collective negotiations process with the requisite good faith. Immediate appeal of such decisions to an independent board should be provided. Should lack of good faith continue, more drastic remedies, such as those previously discussed, would be necessary through specific remedial legislation.

107. See, e.g., CONN. GEN. STAT. ANN. § 10-146a (Supp. 1970) which provides:

The state board of education may, in accordance with such regulations as it prescribes, grant a certificate of qualification to teach . . . in any public school in the state and may revoke the same.

Connecticut has established an advisory board on state certification of teachers consisting of nine members of the teaching profession, three board members and three electors to advise the state board of education with respect to the standards and procedures for the issuance and revocation of professional certificates.
Teacher Refusals to Work: Strikes and Other Work Stoppages

Some Threshold Questions in Equity

Significance of the Employment Relationship

When negotiations fail, teachers have increasingly turned to concerted refusals to work, and injunctive relief is normally obtained. Where the applicable statute is couched in language such as: "No certified professional employee shall . . . engage in any strike or concerted refusal to render services," it would seem that an employment relationship must be proved as the sine qua non to the grant of a restraining order of any kind.

In the ordinary situation, teachers sign one of several types of employment contracts. An initial contract is used by non-tenure teachers and a long-term contract by tenure teachers. In both cases an annual salary agreement is normally executed some time prior to the commencement of the academic year. The master contract is executed by the authorized teacher organization. At any given time, therefore, the school administration may be faced with an expired master contract, no current annual salary agreements, and a collection of "evergreen" initial and long-term contracts which appear to be dependent for their renewal upon the execution of annual salary agreements.

While no court has yet ruled that the fact situation just stated constitutes an absence of an employment relationship so that jurisdiction to issue an injunction is lacking, the issue has been troublesome. In School District for City of Holland v. Holland Education Association, the concurring opinion stated:

Until written contracts of employment were executed, they [teachers] were under no obligation to report for duty; they could not absent themselves from their positions, for they had none; they could not stop work for they had not yet begun to work, nor had they agreed even to work; and finally they could not abstain from performing the duties of employment for any purpose, for they had not assumed yet any such duties . . . .

108. See note 2 supra.
In *Pinnellas County Classroom Teachers' Association v. Board of Public Instruction*, the Florida Supreme Court upheld the issuance of an injunction in a case in which the teachers had signed individual contracts, even though a master contract had not been concluded. The court indicated that had the teachers not signed their individual contracts for the ensuing school year it might have been constrained to reach a different result.\(^{113}\)

In *National Education Association, Inc. v. Lee City Board of Public Instruction*, on facts involving a Florida injunction against striking teachers, a federal court found that nothing in the prior state court order enjoining the strike "... affect[ed] or prevent[ed] a defendant [teacher] from effect[ing] a lawful resignation." \(^{115}\) When the local school board thereafter attempted to condition teachers' return to work upon payment of a fine, the United States District Court ruled that since the teachers had effectively resigned they were legally free not to return to the classroom. The importance of the *Lee City* case lies in its recognition that there may be a termination of the employer-employee relationship. It does not appear whether, as in *Pinnellas*, \(^{116}\) the teachers had signed their individual contracts for the school year.

The only argument that can be made by a board of education confronted by such a fact situation is that the teacher tenure law creates "a continuing contract," \(^{117}\) and that reasonable compensation is to be implied in law by the court. It would seem, however, that tenure is a statutory right to a contract, with certain specified exceptions.\(^{118}\) The

112. 214 So. 2d 34 (Fla. 1968).
113. Id. at 37.
115. Id. at 836.
116. 214 So. 2d 34 (Fla. 1968).
118. E.g., the Connecticut tenure act provides:

(a) ... The contract of employment of a teacher shall be in writing and may be terminated at any time for any of the reasons enumerated in subdivisions (1) to (6), inclusive, of subsection (b) of this section, but otherwise it shall be renewed for a second, third or fourth year unless such teacher has been notified in writing prior to March first in one school year that such contract will not be renewed for the following year ... ...

(b) Beginning with and subsequent to the fourth year of continuous employment of a teacher by a board of education, the contract of employment of a teacher shall be renewed from year to year, except that it may be terminated at any time for one or more of the following reasons: (1) Inefficiency or incompetence (2) insubordination against reasonable rules of the board of education; (3) moral misconduct; (4) disability, as shown by
statute, however, cannot create a contractual relationship. This must
depend upon the intent of the parties, and the parties obviously intend
that an agreement as to salary is essential to a contractual relationship. In
the absence of such an agreement there exists no employer-employee
relationship, and it would seem that a court cannot order the teachers
to teach since there is no statutory basis for the exercise of such jurisdic-
tion.

**Good Faith**

No court appears to have refused an injunction to a board on the
grounds that its members failed to negotiate with the defendants in good
faith, although the issue has doubtlessly been raised. Even in the
absence of an express statutory provision requiring good faith bargain-
ing, injunctive relief should be denied where there is evidence of lack of
good faith on the board's part.

**Irreparable Harm**

Although a few jurisdictions expressly direct courts to grant injunctive
relief against teacher work stoppages without requiring proof of irreparable
harm, it is at least arguable that such statutes might violate

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120. In one case, for example, Helm v. Groton Educ. Ass'n, No. 37037 (Sup. Cr.
New London County Conn. 1969), on a motion to dissolve a temporary injunction, the
court allowed extensive testimony on the point. The defendants' claims that the board
engaged in delaying tactics in order to frustrate an opportunity for impartial arbitra-
tion under a statute later repealed were accorded a hearing; apparently on the basis that
the issuance of a prerogative writ lay in the sound discretion of the court. Evidence
was also adduced that the members of the plaintiff board of education were also
members of an association of boards of education which devoted time and energy to
the dissemination of information regarding teacher-board negotiations, including the
publication of data respecting announcements of contract signings, salaries, and major
contract terms achieved therein. Testimony of school board members, both within and
without the community involved indicated that private meetings of the area board mem-
bers were held at which salary negotiations were discussed, although no agreement was
reached as to salary.
N.W.2d 206 (1968).
122. E.g., the Maine statute provides:

Violations of this section [prohibiting work stoppages, slow downs and
strikes] may be enjoined upon complaint of any party affected by such viola-
tion . . . . [N]either an allegation nor proof of unavoidable substantial

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state constitutions commanding separation of powers, since the legislature has usurped the judicial function of conditioning the issuance of the prerogative writ.\textsuperscript{123} Normally, however, legislatures have left the matter to the courts, presumably permitting the courts to achieve a degree of balance between the competitive interests of boards and their employees by application of traditional equitable principles.\textsuperscript{124} It would appear, therefore, that there should be proof of irreparable harm, and even then the court must carefully husband its discretionary power to grant or withhold relief depending upon the facts of the case.

\textit{Scope of the Injunction}

Anti-teacher injunctions are either directed against individual teachers\textsuperscript{125} or against the teacher organization and some, but not necessarily all, teachers.\textsuperscript{126} The courts have not shown great interest in resolving the thorny legal issues posed, but instead have issued \textit{ex parte} injunctions freely, often merely upon the representation of an attorney, or occasionally after taking some brief testimony.\textsuperscript{127}

\begin{quotation}
and irreparable injury to the complainant's property shall be required to obtain a temporary restraining order or injunction.
\end{quotation}

\begin{quotation}
\end{quotation}

\textsuperscript{123} In School Dist. for City of Holland v. Holland Educ. Ass'n, 380 Mich. 314, 325, 157 N.W.2d 206, 210 (1968) the court noted,

\begin{quotation}
To attempt to compel legislatively, a court of equity in every instance of a public employee strike to enjoin it would be to destroy the independence of the judicial branch of government.
\end{quotation}

\textsuperscript{124} E.g., CONN. GEN. STAT. ANN. § 10-153f (Supp. 1970), while providing for \textit{ex parte} injunctive relief, further provides that

\begin{quotation}
[I]f such injunction is issued such employee may file a motion to dissolve such injunction and a hearing upon such motion shall be held by the superior court not later than three days after service of such motion upon said board of education pursuant to an order of court or a judge thereof.
\end{quotation}

There have been nineteen teacher strikes in Connecticut during the past two years, with fourteen injunctions, not one of which has been dissolved.

\textsuperscript{125} E.g., id.: No certified professional employee shall, in an effort to effect a settlement of any disagreement with his employing board of education, engage in any strike or concerted refusal to render services. This provision may be enforced . . . by an \textit{ex parte} injunction.

\textsuperscript{126} E.g., New York's Taylor law provides that "[n]o public employee or employee organization shall cause, institute, encourage or condone a strike." N.Y. CIV. SERV. LAW § 210(l) (McKinney Supp. 1969).

\textsuperscript{127} The following excerpts from the case of Helm v. Groton Educ. Ass'n, No. 37037
(Sup. Ct. New London County, Conn. 1969), reflect the ease with which *ex parte* injunctive relief has been obtained by boards of education in Connecticut:

THE COURT: How many primary schools are there?

THE WITNESS: [John L. Helm, Chairman of the Board of Education]: Well, there are eighteen schools; one is a high school; three are junior highs, and the rest are primary.

THE COURT: This covers all of them?

THE WITNESS: This covers all of them, yes, Your Honor.

THE COURT: How many pupils?

THE WITNESS: I said nine thousand four hundred. We won’t know, of course, until we have had a chance to count them.

THE WITNESS: Well, yesterday these gentlemen held a meeting, and they passed a resolution in the meeting in which they stated they would not report for work without a contract, and they told us--these are essentially the last words that we had—they said, “We won’t accept your offer. We won’t work without a contract.”

THE COURT: What is the situation with respect to the contract? Does the contract provide that it should continue in effect until the—

MR. O’CONNOR: There are two contracts.

THE COURT: Do you have copies of them?

MR. O’CONNOR: I do not have copies of the contract with me this morning, Your Honor. The contract does provide for conditions of employment as well as salary scales in the Groton situation. To my best knowledge, we have resolved all matters except the salary scale.

THE COURT: I understand. Your answer to the argument is that they will not work without a contract.

MR. O’CONNOR: They do have a contract because each of the individual teachers, Your Honor, are under a tenure agreement. This Board of Education is required to accept each of these teachers. We cannot discharge them except for very special grounds.

THE COURT: Can they refuse to work?

MR. O’CONNOR: They have refused to work, Your Honor.

THE COURT: Can they refuse to work?

MR. O’CONNOR: They cannot refuse to work, Your Honor.

THE COURT: Without what? Without breaching their tenure agreement?

MR. O’CONNOR: Without breaching their tenure agreement; that’s true.

THE COURT: What is the tenure agreement? Is that an individual agreement? What does it provide?

MR. O’CONNOR: The tenure agreement is the individual agreement between the Board of Education and the individual teachers that sets out the amount of money that he [sic] will receive in a given year.

THE COURT: What is the provision of the statute with respect to strikes by teachers?

MR. O’CONNOR: It is Public Act 811, and the other one is 10—

THE COURT: Where is the specific provisions [sic] with respect to a strike?

MR. O’CONNOR: I think it is right on top of that page, Your Honor. There has been a change in the statute this year.
The injunctions issued are often overly broad, vague orders to teachers to refrain from striking or withholding services. Courts are not pleased by requests for clarification of these orders, even by teachers willing to obey them but who expect that the injunction must make some clear provision for running the school system. A few examples of the detail needed in the court’s decree, if it is to be truly effective, include such major issues as the performance of non-academic duties; payment for services rendered under the court order (by whom, when and in what amount); the responsibility of teachers to administrative personnel; the type of after school meetings required; and school days and hours.

Where the court has maintained teachers in school under injunctive command, teachers’ organizations seem to be left with considerable responsibility for running the school system since they, not the school administrators, must make the initial decisions as to what should be done pursuant to the injunction. On the other hand, court interpretations of the scope of the injunction place the court in the position of the school administrators. Discipline appears to deteriorate in any case and there is inevitably disruption of the usual chain of command. Plagued by questions such as whether teachers are required to attend meetings after school hours, administrators find themselves in the unaccustomed role of seeking the support of the teacher organization in order to avoid the delays and expense entailed in securing specific court orders.

It would hardly seem remiss to conclude that injunctive relief, couched in sweeping language, is not particularly useful if the teachers attend school but insist on specific court directives. The board of education, faced with the loss of administrative control and a less than adequate educational program, would probably prefer to settle teacher disputes

THE COURT: This is Section 4 of Public Act No. 811 of 1969 which means this year. It seems clear enough. In other words, they refuse to work.
MR. O'CONNOR: That's correct, Your Honor.
THE COURT: The injunction, temporary injunction, may issue. The penalty is set at $500. . . .

128. Mintz v. The Norwalk Teacher's Ass'n, (Sup. Ct. Fairfield County, Conn. 1969) ordered the teachers to refrain from
a. Threatening to strike or striking, in an effort to effect settlement of any existing dispute, including a salary dispute with the plaintiffs.
b. Threatening to engage in or engaging in any concerted refusal to render services in an effort to effect a settlement of any dispute, including a salary dispute, with the plaintiffs.
on terms more favorable than were offered prior to the injunction. It is suggested that school administrators, therefore, will probably not find the injunction wholly satisfactory.

Injunctions: What's Ahead?

Some teacher organizations, unwilling to obey the court order, seek to dissolve the injunction, or otherwise proceed under judicial decrees substituted for school board policies. The resultant disobedience of court orders has brought contempt sanctions of major magnitude. Through March 30, 1971, according to an Associated Press tally, striking Newark teachers had been fined more than $200,000 (at the rate of $7,500 for each day) and three union officers were sentenced to six month terms for contempt.129

Without drastic reforms, the number of injunctions issued against teachers, the number of contempt citations, and the number of teachers jailed under such contempt citations can be expected to increase dramatically in the seventies. The ease with which injunctive relief has been obtained in most states has undoubtedly had a debilitating effect on impasse procedures such as mediation, fact-finding, and arbitration. Strict application of traditional equitable concepts such as irreparable harm and clean hands (good faith in the context of professional collective negotiations), and denial of injunctive relief where appropriate, would seem in order pending corrective legislation.

Right to Strike: Constitutional Protection

Injunctions obtained by school boards in the face of a no contract—no work position taken by the teachers have generally been attacked on constitutional grounds. To date the arguments have failed.130 In the absence of a contract, teachers have argued that an injunction ordering them to refrain from withholding services violates the involuntary servitude provisions of the thirteenth amendment.131 Acceptance of the teachers' position on involuntary servitude would, of course, recognize their right to strike without limitation, a stance which no court has yet been willing to take.

A second argument against the constitutionality of injunctive relief is that it deprives the teachers of fundamental rights guaranteed by the due process clause of the fourteenth amendment. The New York Court of Appeals, in sustaining the constitutionality of the Taylor Law, held that the fourteenth amendment did not grant to any person an absolute right to strike, and that the right is subject to the qualification that a strike for an illegal purpose may be enjoined.

Recognition of a limited constitutional right to strike, would, like strict application of equitable principles, provide a meaningful alternative to the automatic injunctive relief presently available in most states. Presumably, injunctions would be available only upon a showing of a clear and present danger to the well-being of the community. No one would seriously contend that the right to strike is absolute. But because it involves fundamental liberties, the question of what overriding state interest is to be protected arises. Does the mere fact that teachers failed to teach for a few days justify the granting of affirmative relief when viewed in the constitutional context of the right sought to be exercised? It has been aptly stated:

133. Id. at 182, 243 N.E.2d at 131, 295 N.Y.S.2d at 906.
134. In Dorsey v. Kansas, 272 U.S. 306 (1926), Justice Brandeis noted that while there is no absolute right to strike the right is constitutionally protected, and attempts to curtail it will be scrutinized closely. Similarly, in Stapleton v. Mitchell, 60 F. Supp. 51 (D. Kans. 1945), appeal dismissed, 326 U.S. 690 (1945), the court recognized a limited right to strike based on constitutional grounds and subject to abridgement only upon a showing of clear and present danger to the community.

In the recent decision of Postal Clerks v. Blount, 39 U.S.L.W. 2565 (D.C. Cir. March 31, 1971), Judge Wright, while concurring in the majority decision which refused to recognize a right to strike by public employees noted:

It is by no means clear to me that the right to strike is not fundamental. The right to strike seems intimately related to the right to form labor organizations, a right which the majority recognizes as fundamental and which, more importantly, is generally thought to be constitutionally protected under the First Amendment—even for public employees. See Melton v. City of Atlanta, 39 LW 2469 (N.D. Ga. 1971); Atkins v. City of Charlotte, 296 F. Supp. 1068, 37 LW 2517 (W.D.N.C. 1969) ....

Nevertheless, I feel that I must concur in the result reached by the majority in .... its opinion. As the majority indicates, the asserted right of public employees to strike has often been litigated and, so far as I know, never recognized as a matter of law. .... If the right of public employees to strike—with all its political and social ramifications—is to be recognized and protected by the judiciary, it should be done by the Supreme Court which has the power to reject established jurisprudence and the authority to enforce such a sweeping rule.
Schools are closed for Summer, Christmas, Easter and Thanksgiving vacation, for football games, basketball tournaments, harvesting, teachers conventions, inclement weather, presidential visits and for a host of other reasons without anyone getting excited over the harm done to the children but if schools are closed for one day as a result of a teachers' strike, the time lost supposedly constitutes irreparable damage to them. Intellectually, this is not an overwhelming argument.\textsuperscript{135}

Public employment does not automatically call for second-class treatment.\textsuperscript{136} The effect of a strike by public employees and a determination of the relief to be granted by the court should depend almost entirely on the nature of the employment and its relationship in the circumstances to the safety and well-being of the community. Government may have an interest in prohibiting a strike by firemen or policemen that overrides constitutional guarantees otherwise controlling. Significantly, however, the janitorial staff of the local town hall occupies precisely the same employment relationship as the police or fire officers, although the public interest in a work stoppage is hardly identical.

There is no magic in starting the school year the week after Labor Day. In most cases, the board could not show a "grave and immediate danger to the community" which would override the exercise of freedom of speech, for example, by the teachers. At most, a work stoppage would amount to a mere extension of the summer recess, without the slightest jeopardy to completion of the school year. Admittedly, a strike might continue over such a long period of time that the state's overriding interest would require the most extreme equitable remedies. At that moment, however, a "grave and immediate danger to the community" would exist and hence, there would be no right to continue the strike.

It is suggested, therefore, that a total prohibition on the right to collectively refuse to render teaching services is overly broad. It is clear that, even in those cases where disparate treatment between public and private employees is justified, the state must draw its restrictions in


\textsuperscript{136} Keyishian v. Board of Regents, 385 U.S. 589 (1967), eliminates the claimed distinction between public and private employment insofar as basic constitutional protections are concerned. The \textit{Keyishian} doctrine is simply stated: in order to justify disparate treatment between public and private employees the result must be explainable in terms of some overriding state need having the closest possible nexus to protection of the essential functions of government. See also Garrity v. New Jersey, 385 U.S. 493 (1967).
terms sufficiently narrow to reach only that area legitimately entitled to protection.\textsuperscript{137}

Right to Strike: Statutory Protection

The blanket prohibition approach to strikes and work stoppages in public education per se, with consequent restraint through injunctive relief, has caused more problems than it has solved. Recognition of the existing imbalance against teachers has been slow to come. However, recent legislation in Hawaii,\textsuperscript{138} Vermont,\textsuperscript{139} and Pennsylvania\textsuperscript{140} has modified this approach.

Perhaps the most liberal legislation affecting public employee collective negotiations was passed by the Hawaii legislature in May of 1970.\textsuperscript{141} A public employment relations board consisting of two management, two labor, and one public representative is established to carry out the legislation.\textsuperscript{142} Refusal to bargain in good faith is defined as a prohibited

\textsuperscript{137} In Shelton v. Tucker, 364 U.S. 479 (1960), the Supreme Court ruled unconstitutional an Arkansas statute which required all teachers to file annually an affidavit containing the names of all organizations to which they belong. The Court stated:

In a series of decisions this Court has held that even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be reviewed in the light of less drastic means for achieving the same basic purpose.

\textit{Id.} at 488.


No restraining order or temporary or permanent injunction shall be granted in any case brought with respect to any action taken by a representative thereof in connection with or relating to pending or future negotiations, except on the basis of findings of fact made by a court of competent jurisdiction after due hearing prior to the issuance of the restraining order or injunction that the commencement or continuance of the action poses a clear and present danger to a sound program of school education which in the light of all relevant circumstances it is in the best public interest to prevent. Any restraining order or injunction issued by a court as herein provided shall prohibit only a specific act or acts expressly determined in the findings of fact to pose a clear and present danger.


If a strike by [teachers] occurs after the collective bargaining process ... [has] been completely utilized and exhausted it shall not be prohibited unless or until such a strike creates a clear and present danger or threat to the health, safety, or welfare of the public.


\textsuperscript{142} Id. § 89-5.
If both parties agree, an impasse may be submitted to final and binding arbitration.\textsuperscript{143} Mediation and fact-finding under the auspices of the board are available in the case of impasse.\textsuperscript{144} The most far reaching feature of the act, however, is that it accords a conditional right to strike to all public employees who are represented by an exclusive bargaining representative.\textsuperscript{145} As a condition to a strike, the employee organization must submit the dispute to mediation and fact-finding.\textsuperscript{146} The statute also requires a sixty-day cooling-off period after the publication of a fact-finding award as well as the filing of a ten-day notice of intent to strike.\textsuperscript{147} Where a strike threatens public health or safety, the state board will investigate an employer's petition and may set requirements to avoid or remove such danger.\textsuperscript{148} The Hawaii legislation represents a realistic attempt to reconcile the conflicting interests involved in public sector disputes. It may provide a format for national legislation in the seventies.

\textbf{Teacher Protection Under the Civil Rights Acts}

Doubtlessly the seventies will witness a considerable increase in litigation directed against school boards and their minions pursuant to the civil rights acts.\textsuperscript{149} In the past two years teachers have won significant victories as the application of the Civil Rights Act of 1871\textsuperscript{150} was extended to fact situations involving teachers' rights. The federal courts have sustained teachers in the exercise of the constitutionally protected rights of speech\textsuperscript{151} and association,\textsuperscript{152} and have required due process, both substantive and procedural, of school boards in the employment relationship with their teachers.\textsuperscript{153}

In \textit{McLaughlin v. Tilendis},\textsuperscript{154} non-tenure teachers were ordered rem-
stated, after dismissal for conduct related to activity on behalf of a teachers' organization. Significantly, in Keefe v. Geanakos, the First Circuit not only protected the teacher's academic freedom (by extending to him the benefits of free speech in his classroom), but also found a constitutional requirement that dismissal must be based on prior warnings and founded on proof of violation of a specific regulation clearly prohibiting the complained of conduct. Moreover, the dual remedies of teacher reinstatement and money damages, under the Civil Rights Act of 1871, were approved in Gouge v. Joint School District, against the defense of school board immunity.

The seventies may witness one or more tests of state laws which categorically forbid teachers' strikes in every circumstance. Certainly an application for injunctive relief to restrain the enforcement of such a state statute and the administrative orders of state and local boards taken pursuant thereto will be made, possibly this summer or fall. It would seem that the opportunity for success will be greatest in cases where teachers have no signed annual employment agreements, are without a contract, and have otherwise complied with all state laws requiring good faith in collective negotiations, including exhaustion of the established impasse procedures. The remedy by way of motion to dissolve a state court temporary injunction would not seem to be adequate, especially where an immediate appeal to the highest state court cannot be had by reason of the failure of the lower court, or the school board, to apply the provisions of the state's "little Norris-LaGuardia act" to the case. In such instances, immediate resort to a three-judge federal district court would be proper, and it would seem that a substantial federal question is necessarily involved.

Thus, teachers, absent effective labor legislation according protection for the exercise of their constitutionally protected rights, have opened new vistas in the federal courts. This positive movement will, no doubt, continue. A sound national policy toward teacher-board relations can-

156. 418 F.2d 359 (1st Cir. 1969).
161. See, e.g., CONN. GEN. STAT. ANN. § 31-118 (1958) providing a speedy appeal to the Supreme Court where injunctive relief is granted or denied in a case arising out of a private sector labor dispute.
not evolve solely from court decisions, however, and the recommendations made herein for legislative action are no less urgent.

**Some Recommendations for the Seventies**

Pending a national legislative solution, the judiciary must take an approach that it has been largely unwilling to take in the sixties. The anti-teacher injunction has not proved a simple solution to a problem which, unchecked, is growing increasingly more complex. The courts hereafter must strictly apply recognized equitable principles, such as irreparable harm and clean hands. Judicial recognition of a constitutionally based limited right to a strike would also appear just. Moreover, it is only reasonable for the courts to apply and extend civil rights legislation to teachers in their relationships with school boards.

The judiciary, however, is not particularly well suited to solve the complex problems discussed herein. There exists an urgent need for legislation, national in scope. Such legislation must recognize teachers' rights to engage in the determination of educational policy. All levels of impasse resolution must provide for the imposition of sanctions on any party not proceeding in good faith. Furthermore, the present imbalance in favor of boards of education must be rectified by statutory recognition of a right to strike by teachers who have in good faith exhausted available administrative procedures. The right should be denied only upon a showing of clear and present danger to the public health and safety. In such cases, provision must be made for final resolution of the dispute by binding arbitration before an impartial tribunal of full-time experts in teacher-board relations. Funds should be provided for the training of these personnel now and in the future.

While the need for national legislation is clear, a role may be preserved for those states seeking good faith solutions, as many have yet to do, by providing exemptions for those states with legislation as extensive as the federal law. Absent drastic change, we may see in the seventies a total breakdown of our educational systems and a complete reversal of the moderate gains made in the past half decade.