THE NEGOTIATING IMPASSE IN LABOR RELATIONS FOR TEACHERS

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INTRODUCTION

The widening circle of demands made by teachers in contract negotiations in Vermont and other states has precipitated a serious question for state government. The question is whether, or how, the labor rights of teachers can coexist with the process of political democracy and the tradition of local control of education. The establishment of collective bargaining rights for teachers is a relatively new development.[1]

The ability of teachers to associate and bargain collectively over matters affecting their employment serves important ends. Not only does this process give teachers parity with employees in the private sector, who are able to bargain collectively in order to improve the terms and conditions of their employment, but it also can serve to provide valuable input into the educational process. That is, the issues over which school boards and teachers unions bargain often concern more than the narrow self-interest of the teachers and can affect the educational process as a whole.

In education, teachers are the point of contact between the community, as represented by the school board, and the students. The collective bargaining process allows the people who are doing the educating to effectively speak their minds about the problems in the field and the means that may be found to solve them. This kind of effect is one of the reasons why the right of association is fundamental to democracy.

The central problem underlying the use of the collective bargaining process by teachers arises from the fact that, by bringing

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1. VT. STAT. ANN. tit. 16, §§ 1981-2010 (Cum. Supp. 1979) (first enacted 1969).

teachers into this process, decisionmaking in the public sector may be altered. In the field of public education, school boards are the employers. The boards comprise elected officials who have the responsibility of protecting the fiscal and policymaking integrity of the community. Decisions about education have traditionally been made by these elected officials.[2] Because schools have an important role to play in the formation of community values, education is considered "perhaps the most important function of state and local government."[3]

To be sure, the incentive for the leadership in teachers unions is to achieve a more attractive contract from each bargaining session. Experience has shown that the scope of negotiations has expanded from consideration of traditional economic issues relating to compensation to encompass noneconomic issues such as participation in policymaking[4] and the establishment of personal benefits similar to those available in other professions.[5] The danger is that this expansion will take the ultimate decisionmaking power in the educational process away from the elected representatives of the community.

It is reasonable to assume that the interest of the community as a whole is advanced when representatives of the teachers and representatives of the electorate can discuss the well-being of teachers and the school system and reach agreement on matters of concern to both sides. The regulation of the collective bargaining process, however, recognizes that negotiating in good faith[6] does not guarantee agreement, and that impasse[7] between the parties must receive attention. In teacher labor relations, impasse is the point at which the values implicit in the political process and the imperatives of the labor movement come into direct conflict. What

2. *Id.* § 563 (1974).

3. Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

4. For example, teachers have been seeking participation in decisions affecting work force, classroom size, curriculum, and teacher evaluation.

5. Such as personal leave, sick leave, and professional days.

6. See VT. STAT. ANN. tit. 16, § 2001 (Cum. Supp. 1979).

7. "Impasse" occurs when the parties are unable to reach agreement on any controversy within the scope of bargaining after a reasonable effort has been made. *See* VT. STAT. ANN. tit. 21, § 1722(9) (1978).

happens when teachers and school boards cannot agree?

The Teacher Labor Relations Act[8] in Vermont provides for impasse resolution by means of mediation,[9] fact-finding,[10] and "finality of decisons."[11] "Finality of decisions" occurs at the final point of impasse, if and when the other nonbinding procedures have been exhausted without success. It is the purpose of this article to examine the issues which are involved when final impasse is reached in teacher negotiations, using Vermont as the focal point, and to see how the conflict between these values may be resolved.[12]

I. Impasse Resolution: The Policy Choices

Collective bargaining between teachers unions and school boards in Vermont is regulated by two statutes. The principal statute defining the rights and duties of the parties negotiating teacher collective bargaining contracts is the Teacher Labor Relations Act.[13] In addition to this statute, the Vermont legislature has amended the Municipal Employees Labor Relations Act,[14] which formerly covered only municipal employees other than teachers, to extend application of certain provisions to teacher labor relations.[15] This amendment opened the Vermont Labor Relations Board[16] as a forum to hear and determine teacher labor relations

8. Vt. Stat. Ann. tit. 16, §§ 1981-2010 (Cum. Supp. 1979).
9. *Id.* § 2006.
10. *Id.* § 2007.
11. *Id.* § 2008.
12. See text accompanying notes 2-5 *supra.*
13. Vt. Stat. Ann. tit. 16, §§ 1981-2010 (Cum. Supp. 1979).
14. *Id.* tit. 21, §§ 1721-1735 (1978).
15. *Id.* § 1735 reads as follows:

> For the purposes of representation in, and prevention of, unfair labor practices under sections 1726-1729 of this title, a teacher who is a certified employee of a school district shall be considered a municipal employee; and any school district, which includes any public school district or any quasi-public or private elementary or secondary school within the state which directly or indirectly receives support from public funds shall be considered a municipal employer. Nothing in this section shall be taken to alter or repeal the provisions of chapter 57 of Title 16, relating to labor relations for teachers, except that enforcement and review under section 1729 of this title shall not be subject to the provisions of section 2010 of Title 16.

16. *See* Vt. Stat. Ann. tit. 3, § 921 (1969).

disputes and to generally supervise the negotiating practices of school boards and teachers unions.[17]

The principal command of both statutes is that the parties bargain together in good faith.[18] The duty of the parties to bargain in good faith may take on different meanings depending upon the stage in negotiations in which the parties find themselves.[19] This duty is ongoing and continues even when the parties have reached impasse and it appears that there will be no change of position reducing the differences between the parties without resort to additional procedures.[20]

As noted, there are three procedures available in the Teacher Labor Relations Act that are specifically designed to resolve the bargaining impasse.[21] The first two steps of this process, mediation[22] and fact-finding,[23] are typical provisions in labor relations statutes, and they permit resort to intervention in the bargaining process by a third party. Both procedures are nonbinding and attempt to induce private settlement. The duty to bargain does not require the parties to reach agreement or to make concessions.[24] The function of a mediator or fact-finding committee is to encourage or pressure the parties to reach accommodation.[25] The likelihood of success depends upon the depth or bitterness of the dispute. This is particularly true in the case of the fact-finding

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17. *Id.* tit. 21, §§ 1726-1729, 1735 (1978).

18. *Compare* VT. STAT. ANN. tit. 16, § 2001 (Cum. Supp. 1979) *with* VT. STAT. ANN. tit. 21, § 1726 (1978). VT. STAT. ANN. tit. 16 § 2001 reads as follows: "The school board and the recognized teacher or administrator organization shall meet together at reasonable times, upon request of either party, and shall negotiate in good faith on all matters properly before them under the provisions of this chapter."

19. *See generally* Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958).

20. *See* Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 MICH. L. REV. 885, 924 (1973).

21. Resolving impasse signifies not merely that the parties continue bargaining, but that a contract be reached on all matters under discussion.

22. VT. STAT. ANN. tit. 16, § 2006 (Cum. Supp. 1979).

23. *Id.* § 2007.

24. *See* H.K. Porter Co., Inc. v. NLRB, 397 U.S. 99, 108 (1970). *But see* United Steelworkers of America v. NLRB, 389 F.2d 295, 299, 302 (D.C. Cir. 1967).

25. *See generally* Fuller, *Collective Bargaining and the Arbitrator*, 1963 WISC. L. REV. 3 (1963).

committee, which essentially recommends a contract to the parties.[26] Both procedures, however, are based on the belief that introducing an outside party, presumably neutral, whose function is to encourage compromise, will rationalize the negotiations. By so doing, ultimate settlement will be more likely, and the risk of job actions[27] during the negotiations will be lessened.

The third step in the impasse resolution process in Vermont is called "finality of decisions."[28] After the other procedures have been fully utilized finality permits the school board to decide all issues which remain in dispute.[29] On its face this procedure appears to mark a severe departure from the policy underlying bargaining, mediation and fact-finding. At this point in negotiations, the bargaining process is reduced to unilateral action. The school board is given the "final say."[30]

It is obvious that impasse cannot continue indefinitely. Some mechanism must be available to the parties to resolve their differences. However, the ability of one party in negotiations to take unilateral action intended to end the dispute has not been favored,[31] and the approach most frequently recommended to resolve final impasse involves third-party intervention in the form of binding interest arbitration.[32] Under this procedure, the parties submit

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26. The purpose of the fact-finding committee is to formally hear the positions of each side and, after deliberation, issue a report recommending a basis for settlement. The report is advisory only. VT. STAT. ANN. tit. 16, § 2007 (Cum. Supp. 1979).

27. Job actions, such as work slowdowns or "working to the rule" have a severe impact upon education, and have been characterized by the Vermont Labor Relations Board as a form of strike. Green Mountain Union High School Bd. of Dir. v. Chester Educ. Ass'n, 2 V.L.R.B. 90 (1979).

28. VT. STAT. ANN. tit. 16, § 2008 (Cum. Supp. 1979). This provision reads: "All decisions of the school board regarding matters in dispute in negotiations shall, after full compliance with this chapter, be final."

29. The opinions of the Vermont Labor Relations Board that have considered "finality of decisions" have been limited to the questions of when finality may be exercised and what "full compliance" with the other provisions in the statute means. *See* Chester Educ. Ass'n v. Chester-Andover School Bd., 1 V.L.R.B. 426 (1978); North Country Educ. Ass'n v. Brighton School Bd., V.L.R.B. opinion (unpublished), Jan. 23, 1976.

30. *See* Rachlin, *Developing Labor Law for Vermont Teachers*, 40 ALB. L. REV. 733, 738 (1976).

31. *See* NLRB v. Katz, 369 U.S. 736 (1961).

32. *See* Anderson, *Strikes and Impasse Resolution in Public Employment*, 67 MICH. L.

matters remaining in disagreement at impasse to an arbitrator, who issues a binding opinion that establishes the terms of the contract.[33]

With binding interest arbitration, of course, teachers unions feel more fairly treated and, ultimately, are more likely to be satisfied because an arbitrator is a neutral third party. Such a third party would naturally be preferred over the teachers' bargaining adversary for making the final and hardest decisions in negotiations.

The attraction of binding arbitration is based on the fact that it will resolve final impasse without resort to a strike. Dissatisfaction with binding interest arbitration in teacher labor relations arises because of its impact on the way that educational policy is made.[34] An arbitrator deciding final issues, which are likely to be crucial because they remain contested after the exhaustion of other statutory impasse-resolution procedures,[35] is not accountable to the voters. Thus, under binding arbitration, crucial educational decisions are beyond the control of the public or its elected officials. In short, arbitration is not a democratic institution, and, to the extent final impasse is resolved under this regime, decisions in education are outside public control.

A similar problem arises if the statute defining public sector labor rights is based on strict analogy to the principles of private sector bargaining. If the regulatory provisions seek simply to equalize the comparative strengths of the parties and to allow them to exert the pressures available to them, the most important of which is the teacher strike, decisions regarding schools and education will be made under a process which deviates from the para-

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REV. 943 (1969). Professor Anderson points out that statutory impasse resolution techniques, such as mediation or fact-finding, are intended to be a substitute for the strike weapon, which has the same basic purpose. *Id.* at 947-48. *See also* Kheel, *Strikes and Public Employment*, 67 MICH. L. REV. 931 (1969).

33. Anderson, *supra* note 32 at 947-48.

34. *See, e.g.*, City of Biddeford v. Biddeford Teachers Ass'n, 304 A.2d 387, 398 (Me. 1973).

35. The other procedures, which must be exhausted first, are mediation and fact-finding. See text accompanying notes 22-23 *supra*.

digm of representative government.[36] No other interest group has an equivalent power to bring its views to bear on the local school board.[37] In this way, trade unionism in the public sector would impinge on the relation between voter and representative.

Finality, on the other hand, permits elected representatives to decide all issues that are outstanding at the time it may be invoked. Although finality is consistent with the democratic principles of the political system, it may seem to be inconsistent with principles of private sector bargaining to which public employees aspire. Before proceeding further, therefore, some attention should be given to three safeguards to the integrity of the bargaining process that is concluded in the public sector when finality is invoked.[38]

First, finality is subject to review for "reasonableness" by the Labor Relations Board.[39] This review should prevent a school board from imposing terms that were never bargained for, that have no history in the negotiations, or that can be viewed as retaliatory against the teachers union.[40] Terms agreed upon by the parties during bargaining, mediation and fact-finding, which must precede finality,[41] should not be permitted to be altered.

Second, the duty to bargain, and the availability of remedies to enforce this duty,[42] require that the school board be flexible in negotiations and have a sincere intent to reach a negotiated contract.[43] Therefore, the final position the school board takes will al-

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36. *See* Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107, 1111-15 (1969).

37. *See* text accompanying notes 62-65, *infra*.

38. Finality does not, however, cut off the right to negotiate a successor agreement. VT. STAT. ANN. tit. 16, § 2003 (Cum. Supp. 1979) permits negotiations to begin in October of the year in which a contract expires. It is obviously unreasonable to believe that the school board could impose an unending contract by invoking finality.

39. Green Mtn. Union High School Bd. of Dir. v. Chester Educ. Ass'n, 2 V.L.R.B. 90, 102 n.1 (1979).

40. *See* NLRB v. Crompton-Highland Mills, Inc., 337 U.S. 216 (1949).

41. VT. STAT. ANN. tit. 16, § 2008 (Cum. Supp. 1979) required "full compliance" with these provisions.

42. *See* VT. STAT. ANN. tit. 21, §§ 1726-1727 (1978).

43. *See* H.K. Porter Co. v. NLRB, 397 U.S. 99, 101 (1970); NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 134-35 (1st Cir. 1953), *cert. denied*, 346 U.S. 887 (1953).

most always be different from its initial position, having been affected by the statutory requirements. Boulwareism[44] is an unfair labor practice in public sector bargaining just as it is in the private sector.

Third, the accountability of the school board to the electorate is an inherent limitation upon abuse of finality by the school board. The educational climate in the schools is important to every parent. Among the most important factors in a positive educational climate are the attitude of the teachers and their cooperation with the administration. To be responsive to the electorate, the school board must strive to maintain a tension-free relationship with the teachers. There is no direct gain to school board members from imposing their will on, or in frustrating, the teachers union. The creation of ill will erodes the educational climate and should result in the selection of different board members by the electorate. The political accountability of the school board militates against abuse of finality.[45]

Any tension between the teachers union and the school board, created by the existence of finality as the "termination point" in the bargaining process, arises because of a perception of one-sidedness in this procedure. But this appearance should not undermine the ultimate goal of peaceful labor relations between the parties. There should be a consensus in favor of the principle of local control protected by finality, or at least a recognition of its importance by a group as sophisticated as teachers. The real questions that remain to be answered are whether a strong construction of the

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44. "Boulwareism" is a bargaining technique named after Lemuel R. Boulware, a former negotiator for General Electric Company, who came to the first bargaining session with the company's first and only offer, having taken time and effort to determine the company's best position before, rather than during, negotiations. The Court of Appeals for the Second Circuit, in reviewing this technique, held that a take-it-or-leave-it approach combined with an unbending negotiating stance violates the duty to bargain. NLRB v. General Electric Co., 415 F.2d 736 (2d Cir. 1969).

45. Not only are school board members subject to the electoral process, but annual school district meetings are also required. At this time, the electorate can question board members, and indicate to the board the feelings of the community. Regular elections, however, are the clearest means of expressing the will of the electorate. *See* VT. STAT. ANN. tit. 16, § 423 (1974).

finality provision can make sense in the broader context of a statutory plan to grant labor rights to teachers, and what actions dissatisfied teachers might take outside the bounds of the statutes in order to advance their goals. The answer to both these questions focuses on the teachers' use of their ultimate weapon, the strike.

II. Finality and the Teachers Strike

Finality of decisions is not the last word in the Teacher Labor Relations Act. The finality provision[46] is followed by a provision entitled "Injunctions."[47] In labor matters involving "pending or future negotiations," this provision prohibits the use of ex parte temporary restraining orders. It also limits the use of injunctions to those cases where, after hearing, the court finds that the action poses a "clear and present danger" to the educational program at the school involved.[48] This provision is in the tradition of anti-injunction legislation in labor matters, and is patterned after the Norris-LaGuardia Act.[49] Historically, anti-injunction legislation has had the aim of preventing court intervention in labor disputes in order to permit the parties "breathing room" to employ pressure in the effort to reach private solutions.[50] The Norris-LaGuardia

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46. *Id.* § 2008 (Cum. Supp. 1979).

47. *Id.* § 2010. The full text is:

> No restraining order or temporary or permanent injunction shall be granted in any case brought with respect to any action taken by a representative organization or an official thereof or by a school board or 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.

48. *Id.*

49. 29 U.S.C. §§ 101-115 (1976). The purpose of the Act has been held to protect rights of employees to organize and bargain collectively and to withdraw federal courts from a type of controversy for which they are ill-suited. Marine Cooks & Stewards v. Panama S.S. Co., 362 U.S. 365 (1960).

50. *See* Lesnick, *State-Court Injunctions and the Federal Common Law of Labor Contracts: Beyond Norris-LaGuardia*, 79 Harv. L. Rev. 757, 761 (1966).

type of legislation, therefore, has been deemed to protect strikes by unions.[51]

Traditionally, state Norris-LaGuardia statutes have, like the Act itself, applied strictly to private sector labor disputes.[52] There is no legislative history available to explain the intent of the legislature in applying anti-injunction law to the public sector in Vermont, but certain points are clear. Anti-injunction statutes are designed to protect union activity.[53] The scope of the activity protected, however, depends upon the context in which it is placed by the labor statute involved. In the private sector, anti-injunction language has meant the right to strike. In the public sector, the result should be different.

A. *The Implications of the Right to Strike*

Historically, strikes by public employees, including teachers, have been forbidden unless expressly authorized by statute.[54] Courts applying common law have almost universally enjoined strikes by public employees, reasoning that it is the function of government to decide upon and provide certain essential services to the electorate: and in order to carry out this function, people are employed to act as agents of the government. As the New Hampshire Supreme Court has put it, these agents

> exercise some part of the sovereignty entrusted to [government] . . . . They occupy a status entirely different from those who carry on a private enterprise. They serve the public welfare and not a private purpose. To say that they can strike is the equivalent of saying that they can deny the authority of government and contravene the public welfare.[55]

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51. For an annotation on this subject, see Annot., 29 ALR 2d 431 (1953).

52. *Id. See, e.g.*, Anderson Fed'n of Teachers, Local 519 v. School City of Anderson, 252 Ind. 558, 251 N.E.2d 15 (1969); *but see* Board of Educ. v. Public School Employees' Union Local 63, 233 Minn. 144, 45 N.W.2d 797 (1951).

53. 252 Ind. at 561, 251 N.E.2d at 16; 233 Minn. at 148, 45 N.W.2d at 799-800.

54. *E.g.*, Board of Educ. v. New Jersey Educ. Ass'n, 53 N.J. 29, 247 A.2d 869 (1969); Norwalk Teachers Ass'n v. Board of Educ., 138 Conn. 269, 83 A.2d 482 (1951). *See* Kheel, *supra* note 32, at 932.

55. City of Manchester v. Manchester Teachers Guild, 100 N.H. 507, 510, 131 A.2d 59, 61 (1953).

The right to strike would clearly enhance the right given to public employees to advance their interests through collective bargaining. However, even though it would give the unions more leverage, it is not essential to the right of collective bargaining given to employees,[56] which retains meaning in the absence of the right to strike. Negotiating in concert,[57] against the backdrop of the duty to bargain in good faith[58] and other standard safeguards,[59] represents a real and substantial measure of protection for employees. It is reasonable for the government that sets policy, makes law, and creates the rights of its citizens to insist upon a higher degree of loyalty from its employees than is demanded of private employees,[60] at least to the extent of prohibiting its employees from frustrating decisions to provide for the public welfare by a concerted refusal to work.[61]

The common law presumption against public-sector strikes does not prevent the Vermont legislature from creating a right to strike for teachers, but it does suggest scrutiny of the argument that the legislature has done so.[62] This is all the more true in view of the legislative choice to provide for finality, which indicates that a high value has been placed upon protection of the political values implicit in the final-impasse situation.

As Professors Wellington and Winter have pointed out, the public-sector strike, unlike the private-sector strike, has primarily

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56. *See* Zeluck v. Board of Educ., 62 Misc. 2d 274, 275, 307 N.Y.S.2d 329, 331-32 (1970).

57. *See* VT. STAT. ANN. tit. 16, §§ 1982, 1991 (Cum. Supp. 1979).

58. *Id.* § 2001; *id.* tit. 21, §§ 1726(a)(5), (b)(4) (1978).

59. VT. STAT. ANN. tit. 21, § 1726 (1978). Subsection (a) of this provision defines unfair labor practice of an employer/school board to include interference with employees in the exercise of their labor rights, interference with the formation of an employee organization, discrimination against an employee to discourage membership in an employee organization, and other protections.

60. *See In re* Block, 50 N.J. 494, 499-500, 236 A.2d 589, 592 (1967). *Cf.* Gardner v. Broderick, 392 U.S. 273, 277-78 (1968).

61. *See* Board of Educ. v. New Jersey Educ. Ass'n, 53 N.J. 29, 247 A.2d 867 (1968).

62. In a case involving a strike by teachers, the New Jersey Supreme Court said that "the subject is so vital that we will not attribute to the Legislature an intent to depart from the common law [presumption against the right of public employees to strike] unless that intent is unmistakeable." *Id.* at 46, 247 A.2d at 876.

a political rather than an economic effect.[63] The public-sector employer is not seeking profit by providing goods in the marketplace, but rather is seeking to represent the voters who elected him. When public employees such as teachers strike, they are able to put direct pressure on the voters to whom the school board is answerable. The result is that government decisions may be affected not by normal political considerations and traditional processes, but rather by the unmatched influence of a single pressure group.[64] The authors argue that this is such a disruption of the political system that the best rationale for the traditional prohibition against strikes by teachers or other municipal employees is that with the right to strike they "have too much power."[65]

B. *The Statutory Framework in Vermont*

In 1969 the Teacher Labor Relations Act set out an anti-injunction provision which, while not affirmatively creating a "right" to strike, clearly brings with it a history of protection for strikes and other concerted actions engaged in by employees.[66] In 1975 the Municipal Labor Relations Act was amended,[67] and some of its provisions were made applicable to labor relations for teachers.[68] In these provisions the legislature moved with an uncertain hand. In one section, expressly applied to teacher labor relations, striking is broadly defined and declared to be an unfair labor practice.[69] In

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63. Wellington & Winter, *supra* note 36, at 1117-25; Wellington & Winter, *More on Strikes by Public Employees*, 79 YALE L.J. 441 (1970).

64. Wellington & Winter, *supra* note 36, at 1123-25.

65. Wellington & Winter, *supra* note 63, at 443.

66. *See* Note, *Labor Injunctions and Judge-Made Labor Law: The Contemporary Rule of Norris-LaGuardia*, 70 YALE L.J. 70, 71-76 (1960) [hereinafter cited as *Labor Injunctions*]. A policy of neutrality in the face of a strike is "a means of aiding the growth of organized labor." *Id.* at 73-76.

67. VT. STAT. ANN. tit. 21, § 1735 (1978).

68. The full text of the provision is set out at note 14, *supra*.

69. VT. STAT. ANN. tit. 21, §§ 1726(b)(5), 1735 (1978). The text of the former provision, in pertinent part, reads as follows:

> It shall be an unfair labor practice for an employee organization or its agents . . . to engage in, or to induce or encourage any person to engage in a strike or a refusal in the course of his employment to use, transport or otherwise handle or work on any goods, articles, materials or commodities, or to perform any services . . . .

another section, not expressly applied to teacher labor relations but applicable to all other municipal labor relations, striking is given limited protection and is permitted at final impasse.[70] The Municipal Act does not, however, provide for finality. Instead, it provides for interest arbitration and permits a strike to resolve differences remaining after fact-finding[71] if arbitration is not elected by the parties.[72] This limited right to strike is not specifically made applicable to teachers.

Recently, both the Vermont Labor Relations Board and the trial courts with jurisdiction[73] have interpreted these statutes in cases involving teachers strikes. In these cases finality was not formally an issue and, therefore, was not specifically interpreted.

In *Board of School Commissioners v. Rutland Education Association*,[74] a case involving teachers who had gone on strike eight days after the fact finder's report had been issued, the superior court granted a preliminary injunction to the school board, ordering the teachers back to work.[75] This is the only case in which the Vermont courts have confronted the issue of a teachers strike at final impasse. Applying the anti-injunction provision of the Teacher Labor Relations Act, and viewing it as procedural rather

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70. VT. STAT. ANN. tit. 21, §§ 1730, 1735 (1978). The text of section 1730 reads as follows:

> A strike shall not be prohibited unless: (1) It occurs sooner than 30 days after the delivery of a factfinder's report to the parties pursuant to subsection (e) of section 1732 of this title; (2) it occurs after both parties have voluntarily submitted a dispute to final and binding arbitration, or after a decision or award has been issued by the arbitrator; or (3) it will endanger the health, safety or welfare of the public. A municipal employer may petition for an injunction or other appropriate relief from the court of equity jurisdiction within the county wherein such strike in violation of this section is occurring or is about to occur.

71. *See* VT. STAT. ANN. tit. 21, §§ 1730, 1732(e) (1978).

72. *See id.* § 1730(2) (1978). Voluntary interest arbitration is also available to the parties and, since arbitration obviates the strike threat, municipal employers are encouraged to submit to arbitration under this statutory framework.

73. Jurisdiction to entertain cases involving labor relations for teachers would rest with the superior courts in Vermont, *id.* tit. 4, § 113 (1972).

74. No. S 371-79 Rc (Rutland Super. Ct. Sept. 6, 1979).

75. *Id.* at 7.

than substantive in nature,[76] the court found that the school board carried its burden of proof by showing a clear and present danger to a sound program of education and was therefore entitled to a preliminary injunction.[77]

This decision, on the request for a preliminary injunction, was ultimately reversed by the same trial court at final hearing.[78] Again concentrating predominately on the factual issues in the case, the court held that because missed school days could be made up during the summer, and state and federal aid to the schools had not actually been jeopardized, there was no "clear and present danger."[79] The court did not effectively define the parameters of the "right" to strike, but it denied a permanent injunction.

Both parties to the *Rutland Education Association* dispute also filed complaints with the Labor Relations Board,[80] which had heard another case involving teacher strikes, *Green Mountain Union High School Board of Directors v. Chester Education Association,*[81] earlier that same year. The Labor Board attempted to interweave the provisions of the two applicable statutes[82] and deal conclusively with the "right" to strike.[83] The basic rule emerging

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76. The court focused its concern on the additional burden of proof required by the "clear and present danger" language rather than the underlying policy of an anti-injunction provision.

77. Board of School Commissioners v. Rutland Educ. Ass'n, No. S 371-79 Rc (Rutland Super. Ct. Sept. 6, 1979) at 7-8.

78. Board of School Commissioners v. Rutland Educ. Ass'n, No. S 371-79 Rc (Rutland Super. Ct. Sept. 6, 1979).

79. *Id.* at 31-32.

80. Board of School Commissioners v. Rutland Educ. Ass'n, 2 V.L.R.B. 250 (1979).

81. 2 V.L.R.B. 90 (1979). The *Green Mountain* case did not involve a walkout, but rather involved the job action of "working to the rule," in which teachers performed contracted duties but refused to engage in extra- or co-curricular activities which, but for the master contract difficulties, would be done. The Labor Board held that this job action is a strike. *Id.*

82. The Teachers Labor Relations Act and the Municipal Labor Relations Act contain different provisions on a number of points, but perhaps the crucial difference in this context is the confrontation of the anti-injunction provision with the definition of striking as an unfair labor practice. *Compare* VT. STAT. ANN. tit. 16, § 2010 (Cum. Supp. 1979) *with* VT. STAT. ANN. tit. 21, § 1726(b)(5) (1978).

83. This is clearly a proper endeavor for a Labor Relations Board, even if the result reached by the Vermont Board is inadequate. *See, e.g.,* NLRB v. Erie Register Corp., 373 U.S. 221 (1963); NLRB v. Truck Drivers Local Union No. 449, 353 U.S. 87 (1957).

from these cases is that teachers have the same limited right to strike as other municipal employees,[84] and that this right arises at the same time finality can be exercised by the school board, which the Labor Board defined as being thirty days after issuance of the fact finder's report.[85]

Although they have not been subject to review by the Vermont Supreme Court,[86] these decisions cloud the picture of what options are available to the parties when they reach final impasse and are, in many respects, in serious conflict.

C. *The Courts or the Labor Board: The Question of Concurrent Jurisdiction*

It would be inappropriate for litigation involving a teachers strike to be determined by the choice of forum made by one of the parties. Perhaps even more important is the unsettling effect which would be created by different forums treating the same subject matter in different ways. Such a result "is not one calculated to inspire public confidence in the judicial process,"[87] and thus diminishes the influence which the law has over the behavior of people. This factor is critically important when the subject is teachers strikes.

From the decisions reached in the cases presented with the issue to date, the matrix of rules relating to teachers strikes is as follows. A strike may be enjoined on a preliminary basis in court, but the injunction will likely be dissolved at final hearing.[88] A strike is an unfair labor practice only if engaged in prior to the expiration of the thirty day grace period after the fact-finding re-

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84. Green Mtn. Union High School Bd. of Directors v. Chester Educ. Ass'n, 2 V.L.R.B. at 100.

85. Board of School Commissioners v. Rutland Educ. Ass'n, 2 V.L.R.B. at 262.

86. The likelihood of review by the Vermont Supreme Court is small because of the doctrine of mootness, which the court has held applies to labor relations matters after contract settlement. North Country Educ. Ass'n v. North Country Bd. of Directors, 135 Vt. 451, 380 A.2d 60 (1977).

87. City of S. Burlington v. Vermont Electric Power Co., 133 Vt. 438, 443, 344 A.2d 19, 22 (1975).

88. Board of School Commissioners v. Rutland Educ. Ass'n, No. S 371-79 Rc (Rutland Super. Ct., Jan. 11, 1980).

port is made public.[89] As an unfair labor practice, such a strike will be enjoined unless it is a strike against an employer unfair labor practice, motivated in whole or in part by an unremedied unfair labor practice of the school board, in which case the strike will not be enjoined.[90]

Irrespective of how substantively sound any one of them is when considered separately, taken together these rules do not reflect a consistent position on striking. Where courts and administrative agencies have concurrent jurisdiction over the same subject matter and a case is presented to both forums, a rule has been adopted to avoid inconsistent decisions.[91] The tribunal first acquiring jurisdiction should exercise it, with the later tribunal deferring to the first, except where the second tribunal can afford remedies not available in the first.[92]

The exception clause in this doctrine should be governing in cases involving teachers strikes. Both the trial court and the Labor Board have subject matter jurisdiction to hear a complaint against a teachers strike. The Labor Board has, however, been given general statutory supervision over the collective bargaining process involving teachers and can take action and decide issues that the trial court cannot.[93] In addition, a labor board has traditionally been viewed as being better suited than the courts to decide mat-

89. Board of School Commissioners v. Rutland Educ. Ass'n, 2 V.L.R.B. 250 (1979).

90. Green Mtn. Union High School Bd. of Directors v. Chester Educ. Ass'n, 2 V.L.R.B. at 106, citing Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956) (employees may strike in response to an unremedied unfair labor practice of employer).

91. *Re* Petition of Pfenning, 136 Vt. 91, 385 A.2d 1070 (1978); City of S. Burlington v. Vermont Electric Power Co., 133 Vt. 438, 344 A.2d 19 (1975).

92. 136 Vt. at 94, 385 A.2d at 1072; 133 Vt. at 443, 344 A.2d at 22.

93. The statutory jurisdiction given to the Vermont Labor Relations Board with respect to labor relations for teachers is to act on unfair labor practice charges. VT. STAT. ANN. tit. 21, §§ 1726, 1727 (1978). Although this jurisdiction is more limited than the agency jurisdiction involved in *Re* Petition of Pfenning, 136 Vt. 92, 385 A.2d 1070 (1978), the similarities are sufficient to apply the same rule. The list of unfair labor practices is sweeping, and brings with it a body of federal law that is normally to be applied in Vermont. *See* Ohland v. Dubay, 133 Vt. 300, 336 A.2d 203 (1975). This body of federal labor board and federal court law, as well as the more flexible remedy-making power of the Labor Board, suggest that there are remedies available there that are not available in a court, and that the General Assembly intended the Labor Board to have general supervision over collective bargaining for teachers. *See* VT. STAT. ANN. tit. 21, § 1735 (1978).

ters involving labor policy, which is within its area of expertise.[94]

By extending the jurisdiction of the Labor Board to labor relations for teachers, the legislature appears to have given primary jurisdiction over certain claims, including claims relating to striking, to the Board. The failure of either the trial court or the Labor Board to address this issue in the *Rutland Education Association* case[95] is regrettable, and underlines the lack of adequate policy in this area. However, for purposes of analysis, the focus will be kept on what the Labor Board in fact did, because the doctrine of concurrent jurisdiction must ultimately be applied.

III. Drawing a Line Against Striking: A Rationale

The Labor Board has essentially put finality and the right to strike in balance, offsetting one against the other. Under the *Rutland Education Association* decision, the right to invoke finality and the right to strike arise at the same time.[96] The underlying theory seems to be that the right to strike is the quid pro quo of the right of the school board to make final decisions, and that the bargaining power of the two sides should be equalized at the point of final impasse.[97]

In these decisions, issues relating to the integrity of the political process in public-sector bargaining, which run through the common law cases on teachers strikes[98] and which underlie finality as a method of resolving a final impasse, are not adequately identified or resolved. The extent of analysis on this point occurred when the statutory requirement that the school board must fully comply

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94. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 480 n.12 (1951).

95. The Vermont Labor Board in Board of School Commissioners v. Rutland Educ. Ass'n, 2 V.L.R.B. 250 (1979), in a sense touched upon this issue by stating that Labor Board control ceases at the point where the parties can elect to strike and make final decisions, respectively, and "[t]he whole process is then subject . . . to court control." *Id.* at 272. But this "giving over" of jurisdiction makes little sense and is related to no statutory provision calling for such a relation between the Board and the courts. To the contrary, the Labor Board would seem to be shirking the jurisdiction affirmatively given to it by VT. STAT. ANN. tit. 21, § 1735 (1978).

96. 2 V.L.R.B. at 272.

97. *Id.*

98. See text accompanying notes 54-66, *supra*.

with other statutory procedures before finality may be invoked[99] was held by the Labor Board to indicate that there must be time to permit "public opinion to be brought to bear on the parties to conclude a settlement"[100] after the fact-finding report is issued.[101] The error in relying on public opinion in response to the disclosure of the fact finder's report to protect the democratic principles implicated in public sector bargaining, however, is that, in a representative democracy, the public speaks at the polls and not in an unorganized manner after a fact finder's report is issued.

The Labor Board ignores settled law on this point that holds that the school board, once elected, is not bound by mid-term votes or other ad hoc expressions of the will of the electorate.[102] Similarly, the teachers union owes its allegiance to the teachers. Since public opinion can have no real effect at this time, it seems that a lengthy post-fact-finding grace period can serve no purpose other than to needlessly exacerbate tensions which will already be running high in the community and between the parties.

The Labor Board's reasoning on this point is quixotic: it suggests a basic deviation from the orderly method of decisionmaking established in the public sector. This result also runs against the fundamental labor law policy of encouraging peaceful labor relations. The "full compliance" requirement should be construed to permit review of the school board's conduct in negotiations, to the extent of preventing surface bargaining[103] or other unfair labor practices. It does not imply that negotiations should be subject to unorganized public intervention in the bargaining process.[104]

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99. See text accompanying notes 28-29, *supra*.

100. Board of School Commissioners v. Rutland Educ. Ass'n, 2 V.L.R.B. 250, 270-71.

101. *Id.* at 273.

102. *See* Buttolph v. Osborn, 119 Vt. 116, 119 A.2d 686 (1956). *See also* Vermont Educational Bldg. Fin. Agency v. Mann, 127 Vt. 262, 247 A.2d 69 (1968); Dresden School Dist. v. Norwich Town School Dist., 124 Vt. 277, 203 A.2d 598 (1964).

103. "Surface bargaining" refers to a bargaining technique of "going through the motions" without any real desire to reach agreement. *See* NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131 (1st Cir. 1953). In context, this provision prohibits the school board from bargaining with an eye towards ultimately invoking finality.

104. In effect, such a rule would serve to make outspoken persons third parties to the bargaining process. There should be no policy encouraging such a result.

The Labor Board's construction of the "full compliance" requirement does, however, help to explain its conclusion that finality and the right to strike are compatible. If local control over educational policy were, in fact, safeguarded by the "full compliance" requirement, the function of finality would become relatively unimportant. However, "full compliance" was not intended to serve such a function, and the Labor Board's interpretation of it can only lead to disorganization and increased tension in negotiations.

The central problem, which the Labor Boad never clearly addressed, is that finality and the right to strike may be incompatible. To couple the right of the school board to make final decisions with the right of teachers to strike is largely self-defeating. The purpose of a strike is to bring pressure to bear on an employer, with the aim of extracting concessions and resolving a bargaining impasse in favor of the employees. It seems clear that a decision by the school board on issues in impasse cannot be "final" if it is subject to pressure for change arising from a strike. To achieve its purpose, finality must terminate the contract-making process.[105]

A. *In Pari Materia: Tying the Statutes Together*

If finality and the right to strike are incompatible, what is the purpose of the anti-injunction provision[106] in the Teacher Labor Relations Act? This question obviously concerned the Labor Board in both the *Green Mountain*[107] and *Rutland Education Association*[108] decisions. Additionally, the Labor Board acknowledged that all other municipal employees have strike rights and expressed concern about treating teachers differently. However, its statement that "[t]here is no statutory evidence of legislative intent to make teachers the sole class of municipal employees without strike

105. The contract so made would bind the parties until a successor were negotiated. *See* VT. STAT. ANN. tit. 16, § 2003 (Cum. Supp. 1979); Chester Educ. Ass'n v. Chester-Andover School Bd., 1 V.L.R.B. 426 (1978).

106. VT. STAT. ANN. tit. 16, § 2010 (Cum. Supp. 1979).

107. Green Mtn. Union High School Bd. of Directors v. Chester Educ. Ass'n, 2 V.L.R.B. 90 (1979).

108. Board of School Commissioners v. Rutland Educ. Ass'n, 2 V.L.R.B. 250 (1979).

rights"[109] ignores many important factors.

First, the Municipal Labor Relations Act does not include a finality provision. This is probably attributable to the fact that, compared with education, regulation of police and firefighters does not involve as many policy questions that should be subject to local control. The Municipal Act does provide for interest arbitration.[110] The right to strike arises only if interest arbitration is not elected by the parties. It is clear that the choice of finality in the Teacher Labor Relations Act represents a substantial difference in policy for final impasse resolution.[111]

Second, and perhaps most obviously, the amendment to the Municipal Labor Relations Act making parts of the Act applicable to teacher labor relations does not include the section permitting certain strike activities.[112] The amendment states that "sections 1726-1729 of this title"[113] shall apply to labor relations for teachers. Section 1726(b)(5) unambiguously prohibits strikes.[114] Section 1730 gives limited protection to strikes.[115] However, section 1730 is not one of those specifically enumerated sections which are applicable to teacher labor relations.[116] Section 1730 was imported into section 1735 by decision of the Labor Board; and, to be realistic, it must be admitted that its absence from those sections specifically enumerated in the amendment[117] is evidence of a legislative intent not to permit teachers to strike.

Instead of attempting to bring the labor rights of teachers and other municipal employees in line, the Labor Board should have employed the methodology used in other cases where different statutes address the same subject matter. In these cases, the stat-

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109. *Id.* at 272.

110. VT. STAT. ANN. tit. 21, § 1733 (1978).

111. *See* text accompanying notes 31-37, *supra.*

112. VT. STAT. ANN. tit. 21, § 1735 (1978). The full text is set out in note 14, *supra.*

113. *Id.*

114. VT. STAT. ANN. tit. 21, § 1726(b)(5) (1978). The text, in pertinent part, is set out in note 69, *supra.*

115. *Id.* § 1730. The text is set out in note 70, *supra.*

116. *Id.* § 1735 (1978).

117. *Id.*

utes are viewed as being in pari materia: the different statues are to be viewed as part of one system.[118] The one system here must place the labor rights of teachers in the broader context of public education.[119] The components of the system to be considered involve not only the Municipal Act and the Teachers Act but also the traditional powers given to the school board for the control and management of the educational process.[120]

When viewed as the components of a single system that regulates the relations between the school board and teachers, these statutes recognize the teachers' right of association up to the point where local control of educational policy is endangered. At that point the power of the school board to act on behalf of the community with respect to matters which cannot be agreed upon in negotiations is preserved by finality.[121]

On the other hand, the negotiating process is not to be one-sided. The anti-injunction provision of the Teacher Labor Relations Act[122] and the unfair labor practice section of the Municipal Act[123] assure this. Neither section creates a right to strike, although there may be some argument on this point insofar as the anti-injunction provision is concerned.[124] However, the historic policy underlying anti-injunction statutes is to exclude courts from making policy in this area and allying with employers to frustrate unions.[125] As noted, this purpose has been applied almost exclu-

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118. *E.g., In re* Preseault, 130 Vt. 343, 346, 292 A.2d 832, 834 (1972).

119. "The several statutes constituting our common school system are to be read together, and liberally construed to effectuate the general public good proposed in their enactment." Chittenden v. School District No. 1, 56 Vt. 551, 554 (1886).

120. *See* VT. CONST. ch. II, § 68 (Cum. Supp. 1979); VT. STAT. ANN. tit. 16, § 563 (1974 & Cum. Supp. 1979); *but see* Chester Educ. Ass'n v. Chester-Andover School Bd., 1 V.L.R.B. 426, 441 (1978), stating in dicta that, in the context of labor relations, the statute outlining school board duties, VT. STAT. ANN. tit. 16, § 563, is immaterial. At the least, this dicta is overbroad. The legal basis of the tradition of local control over education is central to the consideration of public-sector labor policy. *E.g.*, Dunellen Bd. of Educ. v. Dunellen Educ. Ass'n, 64 N.J. 17, 311 A.2d 737 (1973).

121. VT. STAT. ANN. tit. 16, § 2008 (Cum. Supp. 1979).

122. *Id.* § 2010.

123. *Id.* tit. 21, § 1726 (1973).

124. Board of School Commissioners v. Rutland Educ. Ass'n, 2 V.L.R.B. 250 (1979).

125. *See generally* F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION (1930).

sively to the private sector, where the overall objective of labor law is to equalize the comparative strengths of the parties and allow them to hammer out a settlement.[126] In the context of public sector bargaining, the anti-injunction provision should be applied cautiously.[127] The balance between the preservation of the political process and the neutrality of the courts is not disturbed by the jurisdiction of the Labor Board to act against strikes. This is true because the drawbacks of the labor injunction[128] are not significantly involved when the Labor Board is the forum. The factors supporting this conclusion are that the school board is not entitled to an immediate ex parte hearing,[129] the Labor Board has jurisdiction to inquire into the motivations of the strike to determine whether it is an unfair labor practice strike and thus protected,[130] the Labor Board can review the school board's behavior and order it to take actions to respect the rights of the teachers union,[131] and the Labor Board has a member representing the union point of view and is therefore sensitive to the union position.[132] Thus, there is no irreconcilable conflict between the restrictions placed on courts by the anti-injunction provision, and the literal terms of the amendment to the Municipal Act that compel the Labor Board to order teacher strikes to cease because they are unfair labor practices.

The terms of the anti-injunction provision of the Teacher Labor Relations Act were not intended to apply to the Labor

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126. *See* text accompanying notes 49-52, *supra*.

127. *See* Board of Educ. v. New Jersey Educ. Ass'n, 53 N.J. 29, 43-44, 247 A.2d 867, 875-76 (1968).

128. The reference to "labor injunction" is to an injunction issued by a trial court against a strike, and not to a cease-and-desist order of a labor board or to enforcement of such an order by a trial court.

129. *See* VT. STAT. ANN. tit. 21, § 1727 (1978); *but see* VT. STAT. ANN. tit. 16, § 2010 (Cum. Supp. 1979).

130. *See* Green Mtn. Union High School Bd. of Directors v. Chester Educ. Ass'n, 2 V.L.R.B. 90, 104-07 (1979).

131. *See* VT. STAT. ANN. tit. 21, § 1727(d) (1978).

132. *See id.* tit. 3, § 921 (1975). The Vermont Labor Relations Board has traditionally had one member who represents labor's point of view, and one member who represents management's point of view.

Board.[133] The section applying certain terms of the Municipal Act to teachers is clear on this point.[134] Furthermore, the underlying policy against the intervention of courts in labor disputes does not apply to labor boards.[135] The role of the courts in Vermont teacher labor relations should be limited, as directed by both the anti-injunction provision and the Municipal Act. Trial courts should only enforce labor decisions rendered by the Labor Board.

This policy, however, does not compel the conclusion that the Labor Board was correct in holding that there is a right to strike in the public sector. The Labor Board has reasoned that the anti-injunction provision expresses a general policy, and "converts" into a substantive right to strike when bargaining duties are suspended by impasse.[136] But this reasoning is unsound. The duty to bargain is not "suspended," but rather it is terminated when a contract is made that includes agreements of the parties and final decisions of the school board on matters that were not agreed upon. In this respect, finality has the same effect as interest arbitration[137] —a contract is made.

IV. Finality and the Rule Against Unilateral Action

As noted,[138] unilateral action by either party during contract negotiations has generally been deemed impermissible because it precludes meaningful, bilateral bargaining.[139] In the final analysis,

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133. Vt. Stat. Ann. tit. 21, § 1735 (1978) excludes the anti-injunction provision, Vt. Stat. Ann. tit. 16, § 2010 (Cum. Supp. 1979), from consideration by a court enforcing a Labor Board order. *See also* Green Mtn. Union High School Bd. of Directors v. Chester Educ. Ass'n, 2 V.L.R.B. 90 (1979), where the Labor Board stated that "[i]f a court in an enforcement proceeding under § 1729 is not subject to the provisions of 16 V.S.A. § 2010, it would be illogical to say that this Board must apply the criteria set forth in § 2010 in reaching its decision." *Id.* at 102.

134. Vt. Stat. Ann. tit. 21, § 1735 (1973).

135. *See Labor Injunctions, supra* note 66, at 71-76.

136. *See* Board of School Commissioners v. Rutland Educ. Ass'n, 2 V.L.R.B. 250, 268 (1979).

137. Interest arbitration is ordinarily binding, and is usually coupled with a prohibition against striking. *E.g.*, City of Biddeford v. Biddeford Teachers Ass'n, 304 A.2d 387, 389-90 (Me. 1973).

138. *See* text accompanying notes 31-32 *supra*.

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

however, finality is a grant of power to the school board to engage in the unilateral action of making a "final decision."[140] But the suggestion that finality establishes an entirely new principle of labor relations, which nullifies the meaningful participation in collective bargaining implicitly promised to teachers by the Teacher Labor Relations Act, is not sound.

At the outset it must be recognized that unilateral actions[141] have not, historically, been prohibited under all circumstances. The leading case considering the permissibility of unilateral actions taken by an employer during bargaining, *NLRB v. Katz*,[142] held that unilateral action presumptively violates the duty to bargain.[143] The policy underlying the rule in *Katz* is that unilateral action is not generally consistent with the objective of achieving industrial peace through consensual agreement. The scope of this rule, however, depends upon full applicability of the duty to bargain in the circumstances presented.[144] For example, unilateral action by the employer, in the form of the imposition of terms or conditions of employment, is permissible after impasse has been reached, so long as the action taken does not manifest bad faith.[145] Similarly, it has been held that striking by employees in the face of a no-strike clause suspends the employer's duty to bargain and justifies unilateral action.[146]

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140. VT. STAT. ANN. tit. 16, § 2008 (Cum. Supp. 1979).

141. Unilateral actions are actions taken by one party to negotiations that are outside the framework of collective bargaining. The most frequent context in which such actions are examined by the courts arises when an employer, without the consent of the union, either improves or reduces the benefits to employees during negotiations. *See* Schatzki, *The Employer's Unilateral Act—A Per Se Violation—Sometimes*, 44 TEXAS L. REV. 470 (1966).

142. 369 U.S. 736 (1962).

143. *Id.* at 743, 747-48. Although the NLRB has adopted a per se rule against unilateral actions, *Katz* only established a presumption against the validity of unilateral actions, which can be overcome by the employer, as stated emphatically in NLRB v. Cone Mills Corp., 373 F.2d 595, 599-600 (4th Cir. 1967).

144. *See* NLRB v. Burns Int'l Sec. Serv., Inc., 406 U.S. 272, 294-96 (1972).

145. *See* NLRB v. Crompton-Highland Mills, Inc., 337 U.S. 216, 224-25 (1949); Bradley Washfountain Co., 89 N.L.R.B. 1662 (1950), *enforcement denied*, NLRB v. Bradley Washfountain Co., 192 F.2d 144, 153-54 (7th Cir. 1951).

146. *See* Valley Furn. Co., 110 N.L.R.B. 1589, 1592 (1954); Phelps Dodge Copper Products Corp., 101 N.L.R.B. 360 (1952); United Elastic Corp., 84 N.L.R.B. 768 (1949).

The unilateral action of finality does not impose a harsh and unique burden upon teachers unions. On the contrary, there is historical support for permitting unilateral action to be taken by an employer when the parties have reached impasse, which is the circumstance under which the right to invoke finality arises. When final impasse has been reached and finality has been invoked, the policy of the statute is no longer the encouragement of consensual agreement by the parties. Therefore, the duty to bargain no longer applies, and unilateral action may be expected under traditional principles of labor law.[147]

The difference between finality and other examples of permissible unilateral action is that finality precludes a bilateral agreement on the terms and conditions which are imposed. Unilateral actions which have been permitted are justified as temporary or "stop-gap" measures which are necessary to protect the business interests of the employer.[148] Finality cannot be justified on the same basis. However, the rationale for finality is, if anything, stronger. Instead of recognizing the interest of an individual employer, finality recognizes the public interest in preserving local control over educational policy. In order to achieve this purpose, the application of finality must be broad, and the unilateral action that it sanctions must represent the establishment of a contract. The teachers union will, of course, immediately seek to begin negotiating a new contract,[149] but the relations between the parties will be set and not undefined while bargaining recommences.

The limitations on finality—that it be invoked only at final

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147. "Finality" cannot be invoked until mediation and fact-finding—preliminary impasse resolution procedures—have been exhausted. VT. STAT. ANN. tit. 16, § 2008 (Cum. Supp. 1979).

148. Professor Schatzki has stated that

> Once an impasse has been reached, the unilateral change is justified because (1) it may break the impasse and (2) the employer should not be frozen permanently from making changes merely because the parties, acting in good faith, have been unable to reach agreement. Certainly this rule—that unilateral changes consistent with bargaining proposals are appropriate after impasse—is unassailable.

Schatzki, *supra* note 141, at 495-96.

149. *See* VT. STAT. ANN. tit. 16, § 2003 (Cum. Supp. 1979).

impasse,[150] that it not manifest bad faith,[151] and that the terms imposed be subject to renegotiation during the following school year[152] —make it analogous to the unilateral actions historically permitted in the private sector. The difference between finality and private-sector unilateral actions—that finality terminates the pending negotiations—reflects the difference in the interest being protected. A private employer is required to bargain to agreement by the underlying policy of the governing labor statute.[153] A school board, on the other hand, should be able to effectuate the will of the voters if bargaining is unsuccessful.

V. The School Board's Response: Implications for Future Policy

Perhaps the most serious flaw in the decisions under discussion relates to their probable consequences on a practical level. The focus here is not on the practical implications of the right to strike. Concern may be expressed for the disruption in education suffered by schoolchildren, for the risk of losing funding assistance because of lost school days, or for the administrative difficulties resulting from the need to modify schedules. These concerns, however, may be overcome or avoided without undue burden to the community.[154] The focus should rather be on the advice the school board will receive and the response it may make to the possibility of a strike over issues of educational policy.

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150. *See* note 147 *supra*.

151. See text accompanying notes 39-42 *supra*.

152. Although this precise question has not been litigated in any forum in Vermont, the Teachers Labor Relations Act permits teachers unions to request resumption of bargaining 120 days prior to the school district's annual meeting. Vt. Stat. Ann. tit. 16, § 2003 (Cum. Supp. 1979). It is unlikely that a school board could impose a contract of longer duration than the year in which finality is invoked. However, until a new contract is reached, the terms of the old contract govern. *See* Chester Educ. Ass'n v. Chester-Andover School Bd., 1 V.L.R.B. 426 (1978).

153. The policy of the Labor Management Relations Act, 29 U.S.C. §§ 141-144 (1976 & Supp. II 1978), is that peaceful labor relations are best achieved when the parties agree on a contract. *E.g.*, American Ship Building Co. v. NLRB, 380 U.S. 300 (1965).

154. *See* Bellafonte Area Educ. Ass'n v. Board of Educ., 9 Pa. Commw. Ct. 210, 304 A.2d 922 (1973); Armstrong Educ. Ass'n v. Armstrong School Dist., 5 Pa. Commw. Ct. 378, 385-86, 291 A.2d 120, 124-25 (1972).

If finality is to be subject to a simultaneous teachers strike, and if the public is invited to make its views known to the parties after the fact-finding report is issued,[155] the school board may be advised to limit the subjects over which the parties will bargain insofar as it is permissible under law.[156] In Vermont, the school board is not restricted in this approach by broad statutory language requiring bargaining over "terms and conditions of employment."[157] The Teacher Labor Relations Act requires only that the school board bargain "on matters of salary, related economic conditions or employment, [and] procedures for processing complaints and grievances relating to employment."[158] The school board is permitted to negotiate on other matters mutually agreed upon, if to do so does not violate state law.[159]

This last caveat—that the school board not negotiate where to do so violates state law—is particularly interesting because it could require the school board to refrain from placing issues relating to educational policy, such as teacher evaluation, classroom size, or reductions in staff, on the negotiating agenda.[160] The rationale for such a requirement would be that the school board has a responsibility under state law to protect the principle of local control over educational policy.[161] This responsibility, it could be argued, cannot be kept without a strong reading of finality. In view of the construction given to finality by the Labor Board, the school board

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155. *See* text accompanying notes 98-104 *supra*.

156. VT. STAT. ANN. tit. 16, § 2004 (Cum. Supp. 1979) reads as follows:

> The school board, either directly or through authorized representatives shall, upon request, negotiate with representatives of the recognized organizations on matters of salary, related economic conditions of employment, procedures for processing complaints and grievances relating to employment, and any mutually agreed upon matters not in conflict with the statutes and laws of the state of Vermont.

157. This is the language of the federal law, and of many state laws, and has received broad construction in order to achieve the purpose of placing labor and management on an equal footing. *See* Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 204 (1964).

158. VT. STAT. ANN. tit. 16, § 2004 (Cum. Supp. 1979).

159. *Id.*

160. *See* Dunellen Bd. of Educ. v. Dunellen Educ. Ass'n, 64 N.J. 17, 25-26, 311 A.2d 737, 741 (1973); City of Biddeford v. Biddeford Teachers Ass'n, 304 A.2d 387, 402-03 (Me. 1973).

161. 64 N.J. at 25, 311 A.2d at 741; 304 A.2d at 402.

might be advised not to place matters relating to educational policy on the agenda.

Even if the school board were not required to narrowly read the agenda provision for negotiations, it is likely to be the preferred course of action because it protects the principle of local control, which may be the foremost concern of the board. Furthermore, the school board's decision on what matters to place on the agenda, other than the required items that relate to economic issues, appears to be unreviewable.[162]

Thus, the consequences of the decisions of the Labor Board could retard the interests of all parties. In similar circumstances, the New Jersey Supreme Court noted that "[p]eaceful relations between the school administration and its teachers is an ever present goal and though the teachers may not be permitted to take over the educational policies entrusted by the statutes to the Board they, as trained professionals, may have much to contribute toward the Board's adoption of sound and suitable educational policies."[163] This language wisely urges recognition of the fact that, in the proper context, negotiations themselves can inform the school board about educational policy.

The prospect of a broad movement by school boards to restrict the agenda for negotiations may be the most undesirable aspect of the decisions that have been rendered in this area. Society at large will lose the input of teachers into educational policy that occurs through negotiation, even in the absence of the right to strike over these matters. In addition, the policy of encouraging peaceful labor relations is undermined because of the tension created at the outset over the scope of the negotiating agenda. The only gain under this construction of the law is the teachers' relatively stronger position in connection with the narrow economic issues that must be bargained over.

It seems that it would be far better to begin with the variety

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162. VT. STAT. ANN. tit. 16, § 2004 (1969). The language of the provision requires "mutual agreement" in order for negotiations to proceed on such other issues.

163. Dunellen Bd. of Educ. v. Dunellen Educ. Ass'n, 64 N.J. 17, 31-32, 311 A.2d 737, 744 (1973).

of issues that are of concern to all the parties on the table, and let them be narrowed by negotiated agreement and, if necessary, finally decided by the school board, than to begin with the narrow list of issues statutorily required to be on the agenda, with the parties ultimately left to set the right of finality against the right to strike.

In terms of overall policy, it is fine to recommend a statutory plan that does not grant teachers the right to strike, but how shall we gauge the prospect of the illegal strike, and what does that prospect suggest for a sound and realistic approach to teacher labor relations?

VI. The Illegal Strike: Can Final Impasse Be Resolved Without It?

No analysis of policy for overcoming the final impasse in teacher labor relations is complete without facing up to the spectre of the illegal strike. Strikes by teachers in defiance of injunctions or cease-and-desist orders occur with greater frequency every year. The resolve of teachers unions to advance the interests of their members, using whatever tools are available, cannot be underestimated.

It is clear from the history of teachers strikes in the face of fines and jailings that punitive measures to enforce a prohibition against strikes are essentially ineffective. The only real bulwark against the illegal strike is a clear, fair, and reasoned position against strikes. To be effective, a teachers strike relies on two factors: the commitment of the teachers who are striking, and the ultimate support of the community, or a substantial part of the community.[164] These factors are most directly countered when the policy against strikes, which is embodied in statute, is elucidated and repeated to the public by the school board facing a strike or potential strike. If the reasoning underlying the statute gains widespread appreciation, and the public sees the teachers strike, particularly in the face of finality, as an assault on the principles of po-

164. The teachers union perceives this; it is the reason that striking is preceded and accompanied by picketing.

litical democracy, its value as a weapon will be reduced. Additionally, teachers may see that the implications of an illegal strike are broader than are suggested by the labor movement model painted for them. Unfortunately, it is the teachers unions and not the school boards that have been most adept at use of the media to date. To change this fact is one of the real challenges facing school boards at this time.[165]

A different perspective on this problem would place an emphasis on legitimizing striking. If strikes are engaged in by teachers with motivations that are acceptable on the part of private employees when they strike, there is some sense to the argument that prohibiting strikes in the public sector is hypocritical. However, the effect of a strike will not be altered if it is legalized. It will still distort the political process, not merely in municipalities in which striking is conducted, but in all municipalities, because the threat of a strike represents leverage no other interest group has at its disposal.[166] Moreover, it is simply not desirable policy to view a local governmental unit in the same way as a private employer, and subject it to the same pressures. A private employer may bargain away management rights, but a public employer should not because the voters are the true managers. Therefore, striking in the public sector should not be sanctioned merely because there is no ready solution for abolishing illegal strikes.

A. *Confronting the Illegal Strike*

The effort to discourage illegal strikes[167] by establishing and publicizing a strong policy against them is unlikely to abolish the problem altogether. The logic of trade unionism generated by the formation of a union and by the process of collective bargaining

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165. The efforts of teachers unions to publicize their positions during a teachers strike is evidence of the importance of public relations to teachers unions. If community feelings turned against striking teachers, there would be no substantial pressure on school boards to make concessions. However, care must be employed not to engage in an anti-union campaign, because that is an unfair labor practice. The publicity must be neutral and factual. *See, e.g.*, Tennessee Handbags, Inc. 175 N.L.R.B. 136 (1969).

166. See text accompanying notes 63-65 *supra*.

167. The term "illegal strikes" is used to designate strikes which are an unfair labor practice under VT. STAT. ANN. tit. 21, § 1726(b)(5) (1978).

will, in all probability, lead to some use of the strike weapon despite its illegality. If this is true, consideration should be given to what response the Labor Board and the courts should make when faced with an illegal strike by teachers.

When faced with a strike in the private sector, an employer may assert countervailing pressures against the union and the strikers. The employer may lockout or replace the striking employees with the aim of rendering the strike impotent.[168] The private employer may also sell or discontinue his business.[169] But these countervailing pressures, while available to the school board faced with a teachers strike,[170] are not appropriate. The school board could probably replace striking teachers because there are many unemployed teachers in the job market, but it is incumbent upon the school board to determine whether such action would be in the public interest. Merely exerting countervailing pressures against the teachers union is not enough to satisfy this criterion; the quality of the school faculty should be considered, and it is unlikely that faculty newly hired under the circumstances of a strike could match the faculty on strike. Similarly, the school board cannot decide to discontinue the operations of the school.[171]

When faced with an illegal teachers strike, the school board has the option of seeking a remedy from the Labor Relations Board.[172] When responding to an illegal strike, the Labor Board

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168. *E.g.*, American Ship Building Co. v. NLRB, 380 U.S. 300 (1965); Washington Post Co. v. District Unemployment Compensation Bd., 379 A.2d 694 (D.C. 1977). These cases, of course, apply federal law. It should also be noted that strikers cannot be denied reinstatement after the strike, absent substantial business justification. *Id.* at 697. The theory for this is that a strike is not intended to sever the employer/employee relation, but rather to induce compliance with a bargaining demand.

169. *See* NLRB v. Brown, 380 U.S. 278 (1965).

170. Because an illegal teachers strike is more analagous to a wildcat strike in the public sector than to a sanctioned economic strike, the rights of school boards to respond with countervailing pressure may be greater, and may, for example, include permanent replacement of strikers. *See, e.g.*, Pennsylvania Labor Relations Bd. v. Fortier, 395 Pa. 247, 150 A.2d 122 (1959).

171. The school board is under a duty to provide an education to the children of the district. VT. STAT. ANN. tit. 16, § 1071 (1974).

172. There is no case to date in which the trial courts have recognized the issue of whether to defer jurisdiction to the Labor Board on the subject of striking. *See* text accom-

should keep the motivations of the teachers union in mind. Teachers do not engage in an illegal strike because they enjoy breaking the law or because they are unmindful of the fact that penalties will be imposed as a result of their actions.[173] Rather, teachers engage in an illegal strike because it is viewed by the union as necessary in order for it to effectively participate in the collective bargaining process. In addition, teachers may feel that the imposition of fines or other penalties will end up galvanizing public support for their bargaining position. Such public support may influence the school board in their negotiations. The illegal strike is a bargaining tool, not a fatuous means of protest.

The other critical factor in considering how to respond to an illegal strike is the timing of the strike. If the strike is engaged in prior to completion of the statutory impasse resolution procedures,[174] the Labor Board should order the strike to cease and the teachers union to employ mediation and fact-finding, in order to effectuate the will of the legislature. After finality has been invoked, however, or in the event that the teachers union does not obey an order to follow the mediation or fact-finding provisions, the calculus changes. If a final decision[175] has been made, the negotiations should be ended. Any further pressure exerted by a teachers union on the decisions made by the school board defeats the statutory provision. Similarly, recalcitrance by a teachers union evidenced by its disregard for statutory impasse resolution procedures in the face of a cease-and-desist order seriously compromises

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panying notes 95-104 *supra*, outlining the proposition that such deferral is appropriate. The only real problem facing a school board seeking Labor Board intervention is the statutory provision for a fourteen-day period, under ordinary circumstances, between the filing of the complaint and the requirement that it be answered by the union, and a hearing be set to decide the question. VT. STAT. ANN. tit. 21, § 1727(a) (1978). However, the language in the amendment, *id.* § 1735, provides a mandate for the Labor Board to prevent unfair labor practices, which should provide the flexibility for the issuance of temporary cease-and-desist orders, pending a hearing. Such orders should be fully enforceable by the courts. *See* VT. STAT. ANN. tit. 21, § 1729(a) (1978).

173. Local teachers unions are generally affiliates of a larger organization—usually the National Education Association—that is extremely sophisticated in public-sector labor relations matters.

174. VT. STAT. ANN. tit. 16, §§ 2006-2007 (Cum. Supp. 1979).

175. *Id.* § 2008.

the union's claim to a right to bargain collectively.[176]

The labor injunction, in the form of a cease-and-desist order, enforceable in court by means of an injunction,[177] is the central remedy available. Fines and jail sentences may also be imposed against the union or against participating union leadership for violation of the cease-and-desist order.[178] These remedies, however, have not proven to be effective in deterring such strikes.[179] In order to affirm the authority of the courts, they should be employed only in conjunction with a civil or criminal contempt action in the event an injunction is violated.

A more preferable remedy would be to decertify the teachers union or deny it recognition as the exclusive bargaining agent of the teachers as of the time the teachers went on strike. Such a remedy should only be employed when there is no evidence that the union discouraged the strike, but was unsuccessful, resulting in a wildcat strike.[180] Decertification would emphasize the central fact that the negotiations have ended. The union would no longer have the power to bargain or to enter a master contract. And in order to represent the teachers in the future, new elections would have to be held. In addition, the Labor Board could require that any fines imposed by the court for contempt in the enforcement proceedings[181] be paid pro rata by the membership before recognition will be given back to the union.[182]

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176. *See* State v. Delaware State Educ. Ass'n, 326 A.2d 868, 874 (Del. Ch. 1974) (holding that the statutory right of public employees to organize is conditioned on the union's duty not to strike).

177. VT. STAT. ANN. tit. 21, § 1729 (1978). The scope of review of the court upon an enforcement petition from the VLRB is narrowed to the question of whether there is support for the Board's decision on the record. *Id.* § 1729(c).

178. *E.g., In re* Block, 50 N.J. 494, 496, 236 A.2d 589, 591 (1967).

179. The proof lies in the fact that illegal strikes are increasing in number and duration each year.

180. In the event of a true wildcat strike, there would be no purpose in punishing the union.

181. Enforcement proceedings are brought by the VLRB in superior court if the VLRB cease-and-desist order is not complied with. The superior court must enforce VLRB orders if they are supported by substantial evidence.

182. *See* National Educ. Ass'n, Inc. v. Lee County Bd. of Public Instruction, 467 F.2d 447, 451 (5th Cir. 1972).

The remedy of decertification should make the futility of continued striking apparent to both the public and the striking teachers. The possibility of galvanizing public sympathy to affect the bargaining process would be cut off. Furthermore, the union hierarchy would likely be concerned about the requirement of reestablishing the union as the bargaining agent of the teachers. A remedy for an illegal strike that is fashioned in this manner should be reasonably effective, both in addressing the issues presented by the strike and in deterring future unlawful strikes.

CONCLUSION

The final impasse in public-sector negotiations is where the real collision of interest occurs. The preliminary procedures for impasse resolution—good-faith bargaining, mediation, and fact-finding—should have universal support and frequently will result in contract settlements. But when disputes reach final impasse in Vermont, resolution consistent with the principle of public control of the educational process requires that finality terminate the negotiating process. A clear understanding of this provision will disclose that it does not denigrate the bargaining process, lead inevitably to surface bargaining, or call for the right to strike as a counterweight.[183] Public-sector labor law must avoid dominance by principles derived from the private sector. The current state of law in Vermont fails to recognize this fact and dangerous precedents have resulted. A clearer recognition of the real issues involved in public-sector labor law would go far towards obviating the teacher strike and placing education in a more effective and appropriate posture. At such time, Vermont will provide a very persuasive model for other states to follow in fashioning a framework for labor relations for teachers.

183. *See* text accompanying notes 35-42 *supra*.