

Tailoring the Taylor Law: Restoring a Balance of Power to Bargaining

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In December 2005, 34,000 New York City transit workers went on strike following the breakdown of contract negotiations with the Metropolitan Transportation Authority (“MTA”) over retirement, pension, and wage increases. The strike lasted only sixty hours but captured substantial media and political attention in a city that had not seen a transit strike since 1980. The striking workers and their union, the Transport Workers Union (“TWU”) were penalized under New York State’s Taylor Law. The Taylor Law prohibits public sector strikes on the grounds that health and safety will be jeopardized if police, firefighters, sanitation workers, civil service workers, teachers, and others in the public employ have the right to stop working. By depriving workers of the ability to strike, however, the Taylor Law disrupts the very balance of bargaining power it purports to establish. It allows employers to be recalcitrant in their bargaining without fear of repercussion, and deprives workers of their most potent bargaining tool. Strike deterrence is achieved, but to the detriment of workers and the bargaining process itself. This Note proposes two ways to reform the Taylor Law and restore a balance of power to negotiations, while maintaining the public order. First, the ban on public sector strikes should be limited to only those workers who perform “essential services” as defined by the International Labour Organization (“ILO”). Second, the Taylor Law’s requirement that parties bargain in good faith should be enforced so that it is truly meaningful.

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I. INTRODUCTION

In December 2005, nearly 34,000 members of the Transport Workers Union, Local 100 (“TWU”) went on strike after contract negotiations over retirement, pension, and wage increases with the Metropolitan Transportation Authority (“MTA”) broke down.¹ Most transit workers observed the strike, effectively halting all subway and bus service for sixty hours and affecting millions of commuters.² This was the third ever strike against New York City’s Transit Authority, and the first since 1980.³ Although the strike was short lived, it had lasting repercussions on relations between the MTA and the TWU.⁴ It also renewed calls to reform the Taylor Law, the principal law regulating labor relations in New York State.⁵

The Taylor Law applies to most public employees within New York State, whether they work for the state or for counties, cities, towns, villages, school districts, public authorities, or certain special service districts.⁶ It grants public employees the right to or-

1. Jennifer Steinhauer, *Strike Halts New York Subways and Buses*, N.Y. TIMES, Dec. 21, 2005, at A1.

2. See Timothy Williams & Sewell Chan, *State Mediators’ Plan Clears Way to Resolve 60-Hour Ordeal*, N.Y. TIMES, Dec. 22, 2005, available at <http://www.nytimes.com/2005/12/22/nyregion/22cnd-strike.html>.

3. See Sam Roberts, *Even with a Script, Ending a Strike Can Be Difficult*, N.Y. TIMES, Dec. 22, 2005, at B9.

4. For example, as an unintentional consequence of the strike, many TWU members were unable to vote in an election to replace union president and strike leader Roger Toussaint. See Pete Donohue, *Voting for Leader of the Tracks*, N.Y. DAILY NEWS, May 29, 2009, at 4 (“About 16,200 bus and subway workers violated long-standing union rules by failing to pay monthly dues covering an entire 18-month period when automatic payroll deductions were suspended [by a judge] to punish Transport Workers Union Local 100 for the December 2005 strike that crippled the transit system for three days.”), available at http://www.nydailynews.com/news/2009/05/29/2009-05-29_voting_for_leader_of_the_tracks.html.

5. See, e.g., Gary Schoichet, *The Taylor Law: Time for a Change?*, METRO N.Y. LAB. COMMS. COUNCIL (Dec. 10, 2009), <http://metrolabornyc.org/the-taylor-law-time-for-a-change>.

6. The Taylor Law defines a “public employee” as “any person holding a position by appointment or employment in the service of a public employer.” N.Y. CIV. SERV. LAW § 201(7)(a) (McKinney 2010). Excluded from this definition are “judges and justices of the unified court system, persons holding positions by appointment or employment in [the National Guard], and persons who may reasonably be designated from time to time as managerial or confidential upon application of the public employer.” *Id.*

The term “public employer” means

(i) the state of New York, (ii) a county, city, town, village or any other political subdivision or civil division of the state, (iii) a school district or any governmen-

ganize and to be represented by the employee organizations of their choice, and requires public employers to negotiate and enter into agreements with these organizations regarding the terms and conditions of their employment.⁷ It establishes procedures for the resolution of impasses in collective bargaining disputes and creates a state agency, the Public Employment Relations Board (“PERB”), to administer the law.⁸ But the Taylor Law is best known for its prohibition on strikes by public employees — an aspect of the law that has been controversial since its implementation in 1967.⁹

The penalties the Taylor Law establishes for a striking union are severe. A striking union faces suspension of its “dues check-off,” which provides for the automatic deduction of union dues from member paychecks.¹⁰ When a union is deprived of this means of support, it must set up an administrative mechanism to

tal entity operating a public school, college or university, (iv) a public improvement or special district, (v) a public authority, commission, or public benefit corporation, (vi) any other public corporation, agency or instrumentality or unit of government which exercises governmental power under the laws of the state, or (vii) in the case of a county sheriff’s office in those counties where the office of sheriff is an elected position, both the county and the sheriff

CIV. SERV. § 201(6)(a).

7. See N.Y. CIV. SERV. LAW § 200 (McKinney 2010).

8. See *id.* The Taylor Law’s policy statement states:

The legislature of the state of New York declares that it is the public policy of the state and the purpose of this act to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government. These policies are best effectuated by (a) granting to public employees the right of organization and representation, (b) requiring the state, local governments and other political subdivisions to negotiate with, and enter into written agreements with employee organizations representing public employees which have been certified or recognized, (c) encouraging such public employers and such employee organizations to agree upon procedures for resolving disputes, (d) creating a public employment relations board to assist in resolving disputes between public employees and public employers, and (e) continuing the prohibition against strikes by public employees and providing remedies for violations of such prohibition.

Id.; *cf.* 29 U.S.C. § 151 (2006). Unlike their peers in the private sector, public employees enjoy neither organizational rights nor collective bargaining under the federal National Labor Relations Act, 29 U.S.C. §§ 151–69 (2006), which does not protect employees of “the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof.” 29 U.S.C. § 152(2) (2006).

9. See RONALD DONOVAN, ADMINISTERING THE TAYLOR LAW: PUBLIC EMPLOYEE RELATIONS IN NEW YORK 41–47 (1990).

10. See N.Y. CIV. SERV. LAW § 210(b) (McKinney 2010) (citing N.Y. CIV. SERV. LAW § 208 (McKinney 2010)); *see, e.g., supra* note 4.

have funds paid directly to it or face the interruption of its day-to-day operations.¹¹ In addition, the costs of direct dues collection are exacerbated by the characteristically hefty fines that unions face for violating court injunctions not to strike.¹² The fine for an individual worker is twice the striking employee's salary for each day the strike lasts.¹³ Additionally, union leaders whose members strike in violation of the law face imprisonment.¹⁴

By effectively depriving public sector workers of their most potent bargaining tool without similarly handicapping employers, the Taylor Law tips the balance of power in negotiations, giving more bargaining clout to the employer.¹⁵ This is problematic because the Taylor Law, like many laws regulating labor-management relations, represents the New York State legislature's attempt to "delicately balance the rights of public employees against those of their employers."¹⁶ However, when an

11. See Erin Audra Russ, Note, *Strike Three — You're Out! Revamping the New York State Taylor Law in Response to Three Transport Workers' Strikes*, 9 CARDOZO J. CONFLICT RESOL. 163, 195 (2007); see also James Pope, Professor, Rutgers Sch. of Law, Remarks at Columbia Law School's Human Rights Institute Panel: The Right to Strike for Public Sector Workers in New York State — New York City Transit Workers in Global Context (Nov. 19, 2009). Loss of the automatic dues deduction is a collective punishment that attacks the union, not the workers who actually violated the law. For example, the union could have had an intervening election, and the leadership who wanted the strike could have been voted out of office. This measure is about destroying unions, not punishing people who are providing essential services. *Id.*

12. See Russ, *supra* note 11, at 195.

13. See CIV. SERV. § 210(2)(f); see also Pope, *supra* note 11. Receipts from the two-for-one penalty go to the struck employer, not to the city or to a public fund, which may actually incentivize an employer to drive its workers out on strike. See Pope, *supra* note 11.

14. See, e.g., *N.Y.C. Transit Auth. v. Transp. Workers Union of Am., Local 100*, 822 N.Y.S.2d 579, 589 (App. Div. 2006) (criminal contempt penalties, including "a fixed sentence of imprisonment imposed retrospectively for a completed act of disobedience," are available under New York's Judiciary Laws for violations of the Taylor Law).

15. See Thomas J. Lueck, *Transit Union Leader Sentenced to 10 Days in Jail over Strike*, N.Y. TIMES, Apr. 11, 2006, at B1. ("Before the sentences were announced, Mr. Toussaint made an impassioned plea to the court, acknowledging that the strike was illegal but arguing that it was a necessary form of civil disobedience to defend the union from bad-faith bargaining by the transit authority."); see also James T. O'Reilly & Neil Gath, *Structures and Conflicts: Ohio's Collective Bargaining Law for Public Employees*, 44 OHIO ST. L.J. 891, 893 (1983) ("Since the single most potent weapon of employees in the collective bargaining situation is the strike, it was very difficult for Ohio's public sector unions to accomplish effective bargaining with public employers in the absence of a legal right to strike." (footnote omitted)).

16. See *Caso v. Dist. Council 37, Am. Fed'n of State, Cnty. & Mun. Emps.*, 350 N.Y.S.2d 173, 176 (App. Div. 1973); cf. Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1477

employer can be recalcitrant in its bargaining without fear of driving employees to strike, the resulting labor agreements are, more often than not, on the employer's terms.¹⁷ This outcome is antithetical to legitimate bargaining.

This Note advocates for a modification of the Taylor Law to restore the balance of power between employers and workers while simultaneously maintaining the public order. It proposes two reforms to the Taylor Law. First, the current blanket prohibition on strikes should be limited to those employees who provide "essential services."¹⁸ For the purposes of the Taylor Law, an essential service should be defined according to International Labour Organization ("ILO") guidelines.¹⁹ This argument has been advanced before, including by the TWU itself.²⁰ Second, this Note argues that the requirement of good faith bargaining currently provided for in the Taylor Law should be given teeth and enforced so that it is truly meaningful.

This Note is structured into three parts. Part II discusses the current state of the Taylor Law, including the procedures it establishes for resolving an impasse in negotiations, and the events surrounding the 2005 Transit Strike — the most recent public sector strike in New York.²¹ Part III presents criticisms of the

(1993) ("Workplace social norms of equality, equity, and fair division are pervasively deployed in the process of collective bargaining." (internal quotation marks omitted)).

17. See Janny Scott & Sewell Chan, *Stakes Climb on Day 2 of Strike; Jail Threat for Union Leaders*, N.Y. TIMES, Dec. 22, 2005, at A1 ("Other union leaders called for changes to the Taylor Law, arguing that it unfairly allows for large penalties against unions and workers while doing little to punish cities that drag out contract negotiations for years."); see also Lueck, *supra* note 15 ("But Roger L. Green, a Democratic state assemblyman from Brooklyn, who attended the hearing in support of the union, said Mr. Toussaint's jail sentence would provoke fresh calls to amend or eliminate the Taylor Law, which many union leaders believe gives an inevitable upper hand to management.").

18. The ILO defines essential services as "those the interruption of which would endanger the life, personal safety or health of the whole or part of the population." See INT'L LABOUR ORG., *infra* note 19, ch. V.

19. See INT'L LABOUR ORG., LABOUR LEGISLATION GUIDELINES ch. V ("National legislation frequently places some form of limitation on the right to strike in certain activities, usually defined as essential services. In this respect, the ILO's supervisory bodies have taken the position that it is admissible to limit or prohibit the right to strike in essential services, defined as those the interruption of which would endanger the life, personal safety or health of the whole or part of the population." (citation omitted)), available at <http://www.ilo.org/public/english/dialogue/ifpdial/llg/main.htm>.

20. See Complaint submitted to the Int'l Labor Org. Comm. on Freedom of Association, *Transp. Workers Union of Greater N.Y., Local 100 v. United States* (Aug. 2009).

21. There have been no public sector strikes in New York State since the TWU strike in 2005. However, in late 2010, New York City Mayor Michael Bloomberg and New York

blanket prohibition on strikes currently in place under the Taylor Law. Finally, Part IV sets out this Note's solutions and evaluates the potential for reform.

II. THE TAYLOR LAW

A. THE ORIGINS OF THE TAYLOR LAW

On New Year's Day, 1966, New York City's bus and subway system fell silent as 35,000 transit workers walked off their jobs.²² The transit workers struck in defiance of the Condon-Wadlin Act, a New York State law that prohibited strikes by government workers on penalty of dismissal.²³ Under Condon-Wadlin, striking workers could be reinstated only if they received no economic benefit from the strike, were placed on probation for five years, and were denied raises for three years.²⁴

The transit workers struck for only twelve days, but their strike had a far-reaching impact on public sector labor-

Governor David Paterson called for an investigation into allegations that city workers had intentionally dragged out the cleanup of the December 26 blizzard as a way to protest cuts to the city budget. Patrick McGeehan, *Bloomberg Is Criticized on Storm Response as He Tours the City Beyond Manhattan*, N.Y. TIMES, Dec. 31, 2010, at A18. Because New York City sanitation workers are public sector employees, an intentional slowdown would have been a violation of the Taylor Law. See Editorial, *A Mutiny for Mike*, N.Y. POST, Dec. 31, 2010, at 24, available at http://www.nypost.com/p/news/opinion/editorials/mutiny_mike_d5LiOZ2NOu1cKW5vDpq7bK.

22. See DONOVAN, *supra* note 9, at 19.

23. *Id.*

24. Condon-Wadlin's penalties were seldom enforced. See Joseph A. McCartin, *Unexpected Convergence: Values, Assumptions, and the Right to Strike in Public and Private Sectors, 1945-2005*, 57 BUFF. L. REV. 727, 734 (2009); see also DONOVAN, *supra* note 9, at 6-13. From 1948, the year Condon-Wadlin was implemented, until 1964, there were twenty-one strikes. DONOVAN, *supra* note 9, at 6. However, the law was invoked only seven times, and only eighteen striking employees were dismissed across the state. *Id.* In 1963, to improve enforcement of Condon-Wadlin, the New York State legislature revised the penalties for striking to (1) a six-month pay freeze to reinstated employees (instead of three years); (2) a one year probation without tenure (instead of five years); (3) two days of pay deducted for each day on strike. *Id.* at 9-11. In addition to these revised penalties, private citizens were given the right to file suit against a local government that did not implement the law or enforce the penalties. *Id.* However, these changes to the law did not prevent public sector strikes. *Id.* at 12. In 1965, 6000 Department of Welfare workers struck for twenty-eight days. *Id.* Less than one year later, the transit workers struck for twelve days, costing an estimated \$100 million each day. *Id.* at 18-20. Facing the prospect of a continued strike, the state legislature passed an amnesty bill exempting all strikers from Condon-Wadlin penalties. *Id.* at 19-20.

management relations in New York State.²⁵ Three days after the transit workers returned to work, then–New York Governor Nelson Rockefeller appointed a panel to “make legislative proposals for protecting the public against the disruption of vital public services by illegal strikes, while at the same time protecting the rights of public employees.”²⁶ George W. Taylor, a professor of industrial relations at the University of Pennsylvania and a prominent arbitrator of industrial disputes, chaired the panel.²⁷ In March 1966, Taylor issued an eponymous report whose recommendations would become the core of the 1967 Public Employees’ Fair Employment Act, also known as the Taylor Law.²⁸ While it maintained the ban on strikes by public employees established by Condon-Wadlin, the Taylor Law reconfigured the penalties for striking to make them more enforceable²⁹ and established a labor relations structure to resolve disputes before they escalated.³⁰

Since 1967, the Taylor Law has been the principal law regulating labor relations in New York State.³¹ The Taylor Law defines strike activity broadly, making it a crime for public employees and their unions to “cause, instigate, encourage or condone a strike.”³² An employee is presumed to be on strike if he or she “is absent from work without permission” or “abstains wholly or in part from the full performance of his duties in his normal manner” during a strike.³³

In the event that collective bargaining negotiations between a union and its public sector employer reach an impasse, the Taylor

25. See DONOVAN, *supra* note 9, at 23.

26. *Id.*

27. *Id.* at 24.

28. *Id.* at 31–40.

29. See *supra* note 24 for an example of how enforceability was improved.

30. DONOVAN, *supra* note 9, at 40.

31. See *City of New York v. De Lury*, 23 N.Y.2d 175 (1968), in which the New York Court of Appeals held that the Taylor Law’s no-strike provision did not deny public employees equal protection under the law. The Court of Appeals based its decision on the findings of the Taylor Report and on its own conclusion that “legislative differentiation between public and private employees, insofar as restrictions on their right to strike and to jury trials are concerned, is reasonable.” *Id.* at 187 (quoting *Rankin v. Shanker*, 23 N.Y.2d 111, 119 (1968)).

32. See N.Y. CIV. SERV. LAW § 210(1) (McKinney 2010).

33. See CIV. SERV. § 210(2)(b).

Law charts the appropriate course of action.³⁴ There are three impasse resolution systems: one for contracts involving police officers and firefighters; one for negotiations with employees of school districts, community colleges, the State University of New York, and the City University of New York; and one for contracts involving all other public employees.³⁵ In the third system, which applies to transit workers and is therefore the resolution system most relevant to this Note, mediation is the obligatory first step.³⁶ If mediation fails to resolve the impasse, the second step is fact finding.³⁷ The fact finder may attempt to resolve the dispute through further mediation.³⁸ If mediation fails to resolve the dispute, then for police, firefighters, and transit workers, the dispute will be subject to binding arbitration.³⁹ In addition to mandating a process that the union must go through if negotiations reach an impasse, the Taylor Law directs government officials to file for a court injunction against any union or individuals that “threaten” to violate the prohibition against striking.⁴⁰ Judges have the authority to levy fines against the union or individuals for ignoring a court order.⁴¹

34. See N.Y. CIV. SERV. LAW § 209(2)–(3) (McKinney 2010). Parties may reach an impasse in several ways. If they are unable to reach an agreement on a particular issue, they may agree to disagree and voluntarily declare an impasse. The parties will contact PERB in order to use the agency’s alternative dispute resolution procedures to resolve the disagreement. See, e.g., *City of Newburgh v. Pub. Emp’t Relations Bd. of N.Y.*, 470 N.Y.S.2d 799 (App. Div. 1983) (permitting firefighters frustrated with the collective bargaining agreement negotiations to file a declaration of impasse with PERB), *aff’d*, 471 N.E.2d 140 (N.Y. 1984). An impasse can also occur under involuntary conditions. See CIV. SERV. § 209 (2)–(3). Involuntary impasses often begin when a party walks away from the bargaining table, as is the case with an employer lockout or a union strike. See, e.g., *City of Newburgh v. Newman*, 69 N.Y.2d 166 (1987) (holding that PERB may require compulsory arbitration if police and fire unions are unable to reach a contractual agreement with management). The language of § 209(2) is set to change on July 1, 2011, but the alteration is immaterial to this Note. See 1990 N.Y. Sess. Laws 1452 (McKinney).

35. See ALBANY LAW SCH. GOV’T LAW CTR., *THE TAYLOR LAW: TWENTY-FIVE YEARS OF PUBLIC SECTOR COLLECTIVE BARGAINING: THE NEW YORK EXPERIENCE* 76 (1992).

36. See CIV. SERV. § 209(3)(a). Either or both parties may request mediation assistance by filing a “Declaration of Impasse” with PERB’s Director of Conciliation. See *id.* The mediator is appointed by the Director from PERB’s full-time staff or its panel of per diem mediators. See *id.* The mediator acts as liaison between the parties and seeks to effect a settlement through persuasion and compromise. See *id.*

37. See CIV. SERV. § 209(3)(b).

38. See CIV. SERV. § 209(3)(b)–(c).

39. See CIV. SERV. § 209(5)(a).

40. See N.Y. CIV. SERV. LAW § 211 (McKinney 2010).

41. *Id.*

B. THE TAYLOR LAW'S EFFECTIVENESS IN PREVENTING STRIKES

In the year after the Taylor Law took effect, nine unions across New York called strikes.⁴² In 1968, following a ten-day strike by New York City sanitation workers, Governor Rockefeller called for substantial revisions to the new law.⁴³ A year later, lawmakers removed the ceiling on union fines and introduced a penalty against individual strikers of two days' pay for each day on strike — what is now commonly known as the “two-for-one penalty.”⁴⁴

The next major strike, by transit workers, occurred in 1980 and lasted for eleven days.⁴⁵ The penalties faced by the striking union were markedly harsher than those incurred by the teachers and sanitation workers.⁴⁶ As a result of the strike, the Transport Workers Union lost its automatic dues check-off and had to pay a \$1.25 million fine, while individual strikers incurred two-for-one wage penalties.⁴⁷

Since 1980, the number of public employee strikes in New York State has dropped sharply.⁴⁸ With the exception of the TWU's strike in 2005, no New York City municipal union has mounted a large-scale strike in the past thirty years.⁴⁹ That decline has coincided with what, until recently, was a sustained period of economic growth and a nationwide weakening of union strength.⁵⁰ But the Taylor Law's penalties may also be working as a significant deterrent.⁵¹

42. See DONOVAN, *supra* note 9, at 69.

43. *Id.* at 106–10, 117–19.

44. *Id.* at 119–23.

45. See Roberts, *supra* note 3.

46. *Id.*

47. In the wake of the 1980 strike, the impasse resolution scheme was modified to its present form. See Arvid Anderson & Loren A. Krause, *Interest Arbitration: The Alternative to the Strike*, 56 FORDHAM L. REV. 153, 153–54 (1987). Following the MTA and the TWU's joint request that the New York State legislature enact short-term legislation authorizing PERB to appoint an arbitration panel to resolve any impasses that might arise in the 1982 contract negotiations, *id.* at 154, the legislature went one step further. In 1986, it amended the Taylor Law to require that the MTA and the unions representing its employees who are subject to the Taylor Law submit collective bargaining impasses to final and binding arbitration. *Id.* at 154–55.

48. *The History of the Taylor Law*, UNITED FED'N OF TCHRS. (June 9, 2005), <http://www.uft.org/print/2439>.

49. *Id.*

50. See Steven Greenhouse, *Worried About Labor's Waning Strength, Union Presidents Form Advisory Committee*, N.Y. TIMES, Mar. 9, 2003, at A1 (stating that, in 2002,

Taylor Law penalties are regularly enforced and can have a serious impact on a striking union. Since the passage of the Taylor Law, penalties have been imposed on striking unions and their members after most of the public employee strikes that have been called.⁵² The most common penalty is to temporarily suspend a union's ability to raise funds through automatic dues deductions from members' paychecks, imposing a costly and time-consuming burden on the union.⁵³ After the United Federation of Teachers struck for five days in 1975, it lost dues deduction privileges for three months, forcing the union to collect dues from each individual.⁵⁴ Union officials estimated that they lost \$2 million in revenue.⁵⁵ The TWU suffered similar losses after its automatic deduction was temporarily suspended in the aftermath of the 1980 strike.⁵⁶ After the eleven-day transit strike in 1980, the union was fined \$1 million, and individual workers were required to pay two days' salary for each day they were on strike.⁵⁷ The two-for-one penalty, which is imposed in the overwhelming majority of strikes,⁵⁸ not only substantially raises unions' and workers' strike costs but also lowers employers' strike costs through the receipt of penalties.⁵⁹ Thus the Taylor Law's impact on the parties' strike costs creates a situation in which the union's bargaining power is so weakened that it must concede to the employer.⁶⁰

only 13.2% for the percentage of workers were represented by unions; in the 1950s, thirty-six percent of workers were so represented); *see also* Steven Greenhouse, *In America, Labor Has an Unusually Long Fuse*, N.Y. TIMES, Apr. 5, 2009 (attributing the passivity of American workers to "reasons that range from fears of having their jobs shipped overseas to their self-image as full-fledged members of the middle class"), available at <http://www.nytimes.com/2009/04/05/weekinreview/05greenhouse.html>. *But see* Henry H. Drummonds, *Beyond the Employee Free Choice Act: Unleashing the States in Labor-Management Relations Policy*, 19 CORNELL J.L. & PUB. POL'Y 83, 96 (2009) ("Unions represent 40.7% of public employees, five times the rate of representation in the private sector.").

51. *See* Robert F. Worth, *The Taylor Law; A Powerful Tool to Use Against Striking Employees*, N.Y. TIMES, Dec. 13, 2002, at B13.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *See* DONOVAN, *supra* note 9, at 207.

59. Martin H. Malin, *Public Employees' Right to Strike: Law and Experience*, 26 U. MICH. J.L. REFORM 313, 329 (1993); *see also* DONOVAN, *supra* note 9, at 207.

60. Malin, *supra* note 59, at 329.

This outcome is obviously prejudicial to workers, and the weakening of the union's bargaining position vis-à-vis that of the employer is also inimical to legitimate collective bargaining itself. Collective bargaining's very objective is to provide for a more equal playing field in negotiations between labor and management.⁶¹ It seeks to accomplish this by promoting a balance of power between the two sides.⁶² This balance is upended, however, when workers are deprived of the right to strike — their most effective means of realizing their contractual rights and gaining new economic benefits.⁶³ While strike deterrence may be achieved, it comes at substantial cost to the bargaining process.⁶⁴

C. THE 2005 TRANSIT STRIKE

On December 10, 2005, more than 6000 transit workers voted to authorize a strike if an agreement with the MTA was not reached by midnight on December 15 — the deadline for the expiration of the collective bargaining agreement between TWU Local 100 and the New York City Transit Authority and Manhattan and Bronx Surface Transit Operating Authority, both agencies within the MTA.⁶⁵ On December 12, with no agreement in sight

61. Collective bargaining developed due to the reality that individual workers have limited leverage when dealing with their employers; this is especially true with unskilled laborers, who are easily replaceable. However, as a collective, workers are more powerful and are better equipped to secure for themselves favorable terms and conditions of employment. See ARCHIBALD COX ET AL., *LABOR LAW CASES AND MATERIALS* 69–77 (4th ed. 2006). See also Barenberg, *supra* note 16, at 1423 (“While the diminished bargaining power of individual workers vitiated the normative force of the voluntary choice to submit to the authority of the large-scale enterprise, collective bargaining would empower workers sufficiently to cleanse that choice of duress. Workers would cross the normative line — between false and genuine democratic consent to authority, between duress and actual liberty of contract, between unjust inequality and just equality of bargaining power — when empowered to bargain collectively rather than individually.” (footnote omitted)).

62. See *Lodge 76, Int'l Ass'n of Machinists and Aerospace Workers v. Wis. Emp't Relations Comm'n*, 427 U.S. 132, 146 (1976) (quoting *Local 20, Teamsters Union v. Morton*, 377 U.S. 252, 258–59 (1964)).

63. See Andrew M. Short, Note, *Express No-Strike Clauses and the Requirement of Clear and Unmistakable Waiver: A Short Analysis*, 70 *CORNELL L. REV.* 272, 283 (1985).

64. *Id.* at 329; see also McCartin, *supra* note 24, at 743 (“The threat to strike informs the bargaining process with that element necessary to bring about a bargain.” (quoting noted labor lawyer and mediator Theodore Kheel) (internal quotation marks omitted)).

65. See Sewell Chan & Steven Greenhouse, *M.T.A. and Union Clash on Pensions and Roving Conductors as Deadline Closes In*, *N.Y. TIMES*, Dec. 7, 2005, at B3; see also Steven Greenhouse & Sewell Chan, *Transit Union Calls for Strike in Divided Vote*, *N.Y. TIMES*, Dec. 20, 2005, at A1.

and a strike imminent, the Attorney General of New York, Eliot Spitzer, prompted by the MTA and in accordance with the Taylor Law, sought an injunction against any strike by the TWU.⁶⁶ A day later, Justice Theodore T. Jones Jr., then of the New York Supreme Court in Brooklyn, granted the injunction.⁶⁷

On December 14, the final day of negotiations for a new contract, the MTA modified its earlier wage proposals, dropped its demand for concessions on health benefits, and abandoned its call for an increase in the retirement age from 55 to 62.⁶⁸ Hours before the strike deadline, however, Peter S. Kalikow, the MTA's chairman, put forth a surprise demand.⁶⁹ Seeking to rein in the MTA's pension costs, he asked that new transit workers pay six percent of their wages into the pension fund — up from the two percent that current workers were paying.⁷⁰ The union rejected the proposal.⁷¹ On December 20, five days after the contract expired, TWU Local 100 and Local 726 and Local 1056 of the Amalgamated Transit Union went on strike.⁷²

Part of the reason for the union's decision to strike was perceived bad faith on the part of the MTA. For example, the MTA's demands that the TWU accede to a two-tier pension system came at a time when the agency had a billion-dollar surplus.⁷³ According to TWU President Roger Toussaint, "[The MTA] demanded arbitration before even trying to resolve the contract and hours

66. See Steven Greenhouse, *City Seeks Stiff Fines for Workers and Transit Union If They Strike*, N.Y. TIMES, Dec. 14, 2005, at A1.

67. See N.Y.C. Transit Auth. v. Transp. Workers Union, Local 100, 822 N.Y.S.2d 579, 582 (App. Div. 2006); Timothy Williams, *Judge Issues Injunction Against Transit Strike*, N.Y. TIMES, Dec. 13, 2005, available at <http://www.nytimes.com/2005/13/nyregionspecial/13cnd-mta.html?hp>.

68. See Steven Greenhouse, *In Final Hours, M.T.A. Took Big Risk on Pensions*, N.Y. TIMES, Dec. 21, 2005, at B1.

69. *Id.* The MTA's pension proposal would have saved it less than \$20 million over the following three years — seemingly a small figure, given that the city said that every day of the strike would cost businesses hundreds of millions of dollars in lost revenues. *Id.*

70. *Id.*

71. See Steven Greenhouse & Sewell Chan, *Transit Talks Pass Deadline for a Strike*, N.Y. TIMES, Dec. 16, 2005, at B1.

72. See PETER S. KALIKOW, N.Y.C. TRANSIT AUTH., & KATHERINE N. LAPP, MANHATTAN & BRONX SURFACE TRANSIT OPERATING AUTH., PUBLIC REPORT RE STRIKE COMMENCING DECEMBER 20, 2005 AND CONTINUING THROUGH DECEMBER 22, 2005, at 1–4 (2006), available at http://www.mta.info/mta/pdf/nyct_report.pdf.

73. See Joshua B. Freeman, *Anatomy of a Strike: New York City Transit Workers Confront the Power Elite*, 15 NEW LAB. F., Fall 2006, at 8, 11.

before the contract expired, the MTA spent its one billion dollar surplus.⁷⁴ From the perspective of the TWU, other indicators of bad faith included the MTA's submission of an economic proposal just days before the TWU contract was set to expire, its appointment of representatives with no actual bargaining power to negotiate on its behalf, and its sending of an employer representative without plenary bargaining authority to appear at negotiations one hour before the expiration of the contract.⁷⁵

Although the Taylor Law prohibits strikes by public sector employees on the basis that the public health and safety will be jeopardized, the transit strike did not have this effect. While it is true that the transit strike changed the daily routine of many New Yorkers, and had the greatest impact on low-income minorities, and in particular on low-income Queens residents,⁷⁶ the real victim was the economy. The strike occurred during the Christmas shopping season; city businesses lost an estimated \$16,700,000 each hour the strike lasted.⁷⁷

Yet, although editorials in the *New York Times*, the *New York Sun*, and the *New York Daily News* castigated the striking workers, their union, and its president, the strike was peaceful and orderly and did not imperil the public safety in the way contemplated by the Taylor Law.⁷⁸ Even New York City Mayor Michael

74. See Roger Toussaint, *Toussaint: TWU Local 100 on Strike*, TRANSIT WORKER (Dec. 20, 2005, 3:16 AM), <http://twulocal100.blogspot.com/2005/12/toussaint-twu-local-100-on-strike.html>; see also Sewell Chan, *Transit Strike Deadline: The Surplus; How Extra Money Complicates Transit Pay Negotiations*, N.Y. TIMES, Dec. 15, 2005, at B9.

75. See Complaint submitted to the Int'l Labor Org. Comm. on Freedom of Association at 5, Transp. Workers Union of Greater N.Y., Local 100 v. United States (Aug. 2009). The MTA spent its surplus following the issuance of an injunction against a strike on December 13, 2005. See Chan, *supra* note 74.

76. See Scott & Chan, *supra* note 17 ("The burden of the strike fell unevenly upon New Yorkers of different classes. For many living in Manhattan, the strike remained an inconvenience, not a hardship. Some, like Dave Halman, a 35-year-old Wall Street banker, worked from home the first day. Yesterday, he was out on West 96th Street waiting for a company shuttle. . . . But for many more, the impact was harsher. Stan Decker said he had walked nearly seven miles from Bensonhurst, Brooklyn to Jamaica, Queens. 'They're hurting the ordinary people, they're not hurting the big shots,' Mr. Decker, 59, said of the union."); see also Alan Feuer, *Thrown Together in a Crisis, Strangers Share Cars and Life Stories*, N.Y. TIMES, Dec. 21, 2005, at B1.

77. See Steve Fishman, *How Roger Toussaint Won the Transit Strike*, N.Y. MAG., Jan. 1, 2006, available at <http://nymag.com/nymetro/news/people/columns/intelligencer/15465/>.

78. See Editorial, *An Unnecessary Transit Strike*, N.Y. TIMES, Dec. 21, 2005, at A38; Editorial, *The Transit Strike*, N.Y. SUN, Dec. 20, 2005, available at <http://www.nysun.com/editorials/transit-strike/24744/>.

Bloomberg, a vocal critic of the strike and the TWU, admitted in the aftermath of the strike that “we did what we had to do to keep this City running and running safely. Public safety was our first priority and it never was in jeopardy.”⁷⁹ News sources reported that, while many public transit riders were forced to adopt alternative modes of transportation, such as walking, private buses, and ride-sharing, the strike “fell far short of the all-out chaos that many had feared,”⁸⁰ and New York City was “functioning, and functioning well.”⁸¹ While these comments could conceivably be understood as empty words from a politician and press seeking to reassure the public, the fact that both were unabashedly on the side of the MTA during the strike, and thus had little incentive to cast the striking workers in anything but the most negative light possible, is evidence that the strike did not truly jeopardize the public safety. Moreover, New Yorkers’ attitude toward the strike also indicates that it did not have a critical effect on essential services.⁸² Contrary to media speculation that

79. See Press Release, N.Y.C. Mayor Michael Bloomberg, Statement by Mayor Bloomberg on End of Illegal Transit Strike (Dec. 22, 2005) (internal quotation marks omitted).

80. Associated Press, *Judge Fines NYC Transit Union \$1 Million a Day*, MSNBC.COM (Dec. 20, 2005), http://www.msnbc.msn.com/id/10466982/ns/us_news-life/.

81. *Id.* (quoting Mayor Michael Bloomberg).

82. See, e.g., Laura Colby, Letter to the Editor, *They Walked, We Walked: Tales from the Strike*, N.Y. TIMES, Dec. 21, 2005, at A38 (“I woke up this morning to disturbing news of the New York transit strike. More disturbing, however, were the public responses by our governor and mayor demonizing the striking workers.”); Sarah Eisenstein, Letter to the Editor, *They Walked, We Walked: Tales from the Strike*, N.Y. TIMES, Dec. 21, 2005, at A38 (“As a New Yorker, I’m grateful to the transit workers, who get me and millions of other New Yorkers to work every single day. It’s unbelievable that the city would resort to forcing these workers back to work with threats. Instead of hiding behind the Taylor Law, the Metropolitan Transit Authority should pay the transit workers what they’re worth. . . . The mayor promised that he would look out for the needs of the city’s workers and middle class. He can start by getting the M.T.A. to negotiate in good faith and helping everyone get back to work.”); Philip Richman, Letter to the Editor, *They Walked, We Walked: Tales from the Strike*, N.Y. TIMES, Dec. 21, 2005, at A38 (“We must not lose sight of what is really bringing this crisis about. The Metropolitan Transit Authority, the mayor and soon the governor will claim that it is the intransigence of the Transport Workers Union. They will repeat their mantra ‘illegal strike’ and cite all the inconvenience and dire consequences of the strike. The real reason for the deadlock is a Republican-inspired sense of prerogative to undermine the last vestiges of government responsibility for retirement and medical obligations to its citizens. The M.T.A., the mayor and the governor are willing to shut down the greatest city in the world not because of hard budget numbers but out of sheer arrogance in insisting on the right to deprive future workers of the same benefits as current T.W.U. workers.”); Charles Siegel, Letter to the Editor, *They Walked, We Walked: Tales from the Strike*, N.Y. TIMES, Dec. 21, 2005, at A38 (“To the Transport Workers Un-

New Yorkers would never side with workers wanting to retire at age 55, and in spite of editorials excoriating the striking workers and the TWU,⁸³ two independent polls conducted before and during the strike showed that the majority of New Yorkers polled sided with the union, not the MTA.⁸⁴

On December 20, Justice Theodore T. Jones Jr., of the New York Supreme Court in Brooklyn, rejected the TWU's claim that the strike was provoked by the MTA and declared the strike in violation of the court's order.⁸⁵ The court imposed a \$1 million-a-day fine on the union; the striking workers were already confronting a forfeiture of two days' pay for each day on strike.⁸⁶

The strike ended on December 22, following the MTA's abandonment of its insistence on reducing the pension benefits of future employees — a precondition the TWU had demanded for ending the strike.⁸⁷ At a news conference on the evening of December 27, Toussaint announced an agreement with the MTA that kept pensions the same, increased salaries for the following three years by 3%, 4%, and 3.5%, respectively, and provided for a new contribution by the MTA of 1.5% of wages toward health care.⁸⁸ In addition, workers were given Martin Luther King, Jr. Day as a paid holiday.⁸⁹

ion, I say: Bravo. Stand up against the relentless attempt to grind down your wages and pensions in the face of tax cuts for the mayor and his billionaire cronies.”)

83. See, e.g., *supra* note 78.

84. According to a NY1 News poll, 41% of New Yorkers thought both the MTA and the TWU were to blame for the strike; about 27% only faulted the MTA, while 25% blamed the TWU. *Exclusive NY1 Poll: New Yorkers and the Strike*, NY1 (Dec. 22, 2005), <http://www.ny1.com/?ArID=55816&SecID=1000>. Fifty-four percent of New Yorkers thought the TWU's demands were fair, compared to 36% who did not. *Id.* According to a WWRL poll, 71% of respondents blamed the MTA, and only 14% blamed the transit workers. David Hinckley, *Nothing Can Beat Radio Info During Strike*, N.Y. DAILY NEWS (Dec. 21, 2005), http://www.nydailynews.com/archives/entertainment/2005/12/21/2005-12-21_nothing_can_beat_radio_info_.html.

85. See Associated Press, *Judge Fines Union \$1 Million per Day for Strike*, N.Y. TIMES, Dec. 20, 2005, available at <http://www.nytimes.com/2005/12/20/nyregionspecial3/20wire-judgestrike.html>.

86. *Id.*

87. See Williams & Chan, *supra* note 2.

88. See Sewell Chan, *Was It Worth It? For Transit Workers, Strike Is Open for Debate*, N.Y. TIMES, Dec. 29, 2005, at B8; Steven Greenhouse, *Pull of Union in Transit Pact*, N.Y. TIMES, Dec. 29, 2005, at A1.

89. The inclusion of the Martin Luther King, Jr. holiday was seen as very important because many of the transit workers are African-American, Caribbean, Asian, and Hispanic. See Diane Cardwell, *Race Bubbles to the Surface in Standoff*, N.Y. TIMES, Dec. 22, 2005, at B1; see also Williams & Chan, *supra* note 2.

On April 19, 2006, Justice Jones ruled that the TWU would be fined \$2.5 million for its sixty-hour strike, that individual employees would lose two days' wages for every day of the strike, and that the TWU would have to forfeit its automatic dues deduction, as provided for in the Taylor Law.⁹⁰ On April 24, 2006, Toussaint went to prison to serve a ten-day sentence for his role in violating the injunction.⁹¹

III. THE TAYLOR LAW HURTS WORKERS AND THE BARGAINING PROCESS

It would be difficult to overstate the importance of the right to strike. Not only does it have independent value — workers have significant dignity, liberty, and autonomy interests in being able to strike legally⁹² — it is also closely tied to other rights. By im-

90. See *N.Y.C. Transit Auth. v. Transp. Workers Union*, No. 37469/05 (N.Y. Sup. Ct. Apr. 19, 2006), available at <http://www.courts.state.ny.us/whatsnew/pdf/pdf>; see also William Neuman, *Judge Deals Transit Union a Blow on Collecting Dues*, N.Y. TIMES, Nov. 9, 2007, at B3 (“The ability to deduct dues directly from members’ paychecks is highly important to the union, which has said its collections have declined more than \$1 million because of the inability to make deductions.”). In November 2008, following Toussaint’s submission of an affidavit saying that the TWU had no intention to strike “now or in the future,” Justice Bruce M. Balter agreed to restore the dues check-off. William Neuman, *Judge Restores Transit Union Dues Deduction*, N.Y. TIMES CITY ROOM BLOG (Nov. 10, 2008, 5:17 PM) (internal quotation marks omitted), <http://cityroom.blogs.nytimes.com/2008/11/10/judge-restores-direct-dues-collection-for-transit-union/>.

91. See *N.Y.C. Transit Auth. v. Transp. Workers Union, Local 100*, No. 37469/05, 2006 N.Y. Misc. Lexis 4046, at *21–23 (Sup. Ct. Apr. 26, 2006) (imposing fines, dues forfeiture, and contempt sanctions, including imprisonment of Toussaint), *aff’d*, 832 N.Y.S.2d 209 (App. Div. 2007); see also Lueck, *supra* note 15. The TWU appealed the fine and the imposition of the dues check-off but was unsuccessful. See *N.Y.C. Transit Auth.*, 832 N.Y.S.2d 209; see also Sewell Chan, *Transit Union Fights Effort to Restrict Dues Collection*, N.Y. TIMES, Jan. 28, 2006, at B1. When the TWU struck, New York City demanded that the union be fined \$1 million per day and \$25,000 per day per striker. See Thomas J. Lueck, *City to Drop Lawsuit Against Transit Strikers*, N.Y. TIMES, May 17, 2006, at B5. The city and the union subsequently settled on a \$2.5 million fine. *Id.* Justice Theodore T. Jones, then of the State Supreme Court in Brooklyn, held that as part of the settlement agreement between the city and the TWU, the union could collect funds directly from worker paychecks. *Id.*

92. See Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 655, 721 (2008); see also James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957*, 102 COLUM. L. REV. 1, 99 n.507 (2002) (quoting William Green, president of the AFL, that the cooling off period is “an unjustified invasion of an essential liberty, the right to strike”); C. Scott Holmes, Comment, *From Workers’ State to Work Without Pay: Labor Law Reform in the Russian Federation*, 23 N.C. J. INT’L L. & COM.

posing a blanket prohibition on strikes, “a concerted stoppage of work,” or even a “slowdown” in the public sector,⁹³ the Taylor Law deprives workers of full enjoyment of a socio-economic right — the right to join trade unions and to derive from them the full benefits of membership.⁹⁴ The view of the ability to strike as part of this socio-economic right is premised on the understanding that there is an imbalance in bargaining power between employer and worker such that in the absence of a strike right, “collective bargaining would amount to collective begging.”⁹⁵ The right to strike represents workers’ most potent means of enforcing those economic rights that are provided for in an existing contract, or of realizing economic advancement in a future contract.⁹⁶

The right to strike can also be viewed as a civil liberty. It has been argued that “the freedoms claimed by workers. . . are among the oldest liberties in our tradition of liberal democratic social relations.”⁹⁷ There is a logical connection between the right to

REG. 341, 373 (1998) (“The ILO recognizes the right to strike as the fundamental essence of labor organizational autonomy and freedom of association.”).

93. See N.Y. CIV. SERV. LAW § 201(9) (McKinney 2010).

94. The right to join trade unions is recognized in Article 8 of the International Covenant on Economic, Social and Cultural Rights, the primary international legal source of economic, social, and cultural rights. See International Convention on Economic, Social and Cultural Rights art. 8, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]. The understanding of the right to join a union as a socio-economic right is also recognized in the National Labor Relations Act, which grants workers the rights to organize and bargain collectively on the basis that in the absence of such rights, industrial strife or unrest may cause “diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.” See 29 U.S.C. § 151 (2006).

95. See TONYA NOVITZ, INTERNATIONAL AND EUROPEAN PROTECTION OF THE RIGHT TO STRIKE 50 (2003).

96. See CIV. SERV. § 201; N.Y. CIV. SERV. LAW § 210 (McKinney 2010); *Andreucci v. Kinzler*, 381 N.Y.S.2d 116 (App. Div. 1976) (mem.) (holding that courts may infer from an unusually high absentee rate a form of work stoppage or strike that violates the Taylor Law); *Bellmore-Merrick Cent. High Sch. Dist. v. Bellmore-Merrick United Secondary Teachers, Inc.*, 378 N.Y.S.2d 881 (Sup. Ct. 1975) (holding that teachers violated Section 210 of the Taylor Law because they did not attend a parent-teacher conference night, even though this activity was not included in the teachers’ collective bargaining agreement). *But see City of Buffalo v. Mangan*, 370 N.Y.S.2d 771 (App. Div. 1975) (mem.) (holding that so long as fire department responded to emergency calls and fulfilled regular shift requirements, the suspension of a voluntary call-in system constituted neither a public harm nor a violation of the Taylor Law); see also *McCartin*, *supra* note 24, at 728 (explaining that in the wake of President Reagan’s replacement of the striking members of the Professional Air Traffic Controllers Organization and similar actions by a number of other private sector employers, “the strike — *workers’ most reliable tool of leverage* — was disappearing from labor’s arsenal”) (emphasis added).

97. See NOVITZ, *supra* note 95, at 65 (quoting Beatty, D., and Kennet, S.).

strike and established civil liberties, such as freedom of association, freedom from forced labor, and freedom of speech.⁹⁸ By impairing workers' ability to strike, the Taylor Law prevents workers from fully exercising these associated rights.

Some argue, however, that the Taylor Law's provision for interest arbitration is a fair exchange for a strike right.⁹⁹ That is, by giving up the right to strike, workers have gained something of equal value in their ability to submit collective bargaining impasses to an arbitrator, who will render a final, binding decision.¹⁰⁰

However, there are several flaws with this argument. First, interest arbitration is institutionally biased.¹⁰¹ Second, it is a

98. For example, the freedom of association allows workers to form unions, which in turn provide the basis for collective bargaining. Collective bargaining permits workers to overcome the limitations inherent in individual employment contracts and to use the force of their numbers to participate in decision-making that affects their lives and their society. To the extent that the right to strike assists workers in achieving these goals, it is the logical extension of the freedom of association in the workplace. With respect to the freedom from forced labor, injunctions forcing workers to return to work or suffer criminal sanctions could be regarded as unreasonable violations of human liberty. See James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude,"* 119 YALE L.J. 1474 (2010). The Supreme Court has yet to adopt and apply a standard for assessing labor rights claims under the involuntary servitude component of the Thirteenth Amendment. *Id.* at 1479. Pope suggests one might be found in the Supreme Court's decision in *Pollock v. Williams*, 322 U.S. 4 (1944). Pope, *supra*, at 1480. Under *Pollock*, a claimed right should be protected if it is necessary to provide workers with the "power below" and employers the "incentive above to relieve a harsh overlordship or unwholesome conditions of work." *Pollock*, 322 U.S. at 18. However, the Supreme Court in *Pollock* only concluded that the Thirteenth Amendment guarantees the individual right to quit in isolation from other workers, see Pope, *supra*, at 1503 ("The Court has thus far declined, however, to use *Pollock* as a standard for assessing other rights claims. For example, the Court failed to apply *Pollock* — or any other standard — to the labor movement's claim of a Thirteenth Amendment right to strike."), a result that misses the point of the right to quit. It would be very difficult indeed for workers to obtain the "power below" by quitting independently of each other.

99. See Anderson & Krause, *supra* note 47, at 153 ("An alternative to the right to strike exists and . . . that alternative is final and binding interest arbitration.")

100. In the wake of the 1981 transit strike, the Taylor Law's impasse resolution scheme was modified to its present form. Following the MTA and the TWU's request that the New York State legislature enact short-term legislation permitting PERB "to appoint an arbitration panel to resolve any impasses that might arise in the 1982 contract negotiations," *id.* at 154, the legislature went one step further. In 1986, it amended the Taylor Law to require that the MTA and the unions representing its employees who are subject to the Taylor Law submit collective bargaining impasses to final and binding arbitration. *Id.* at 154–55.

101. Most advisory bodies in the United States are created by executive order and exist at the will of the appointing power. See Suzanne C. Lacampagne, *The Public Sector Right to Strike in Canada and the United States: A Comparative Analysis*, 6 B.C. INT'L & COMP. L. REV. 509, 514 (1983). As a result, public workers may feel that a recommendation by

fundamentally undemocratic means of resolving a conflict. This is because in interest arbitration, the outcome is imposed by a third party who has no investment in the history of the conflict or its outcome. This is different from typical collective bargaining, in which workers have an interest in and ownership of the end result. It also ignores the fact that a strike right is important not only in the context of collective bargaining over terms and conditions of employment, but because it empowers workers to promote and defend their more broadly defined economic and social interests.¹⁰² Arbitration is not an adequate alternative to such a right, which can be exercised both in protest of decisions of the employer and government policy.¹⁰³ Interest arbitration is also undemocratic because its substitution for the right to strike means that the union does not mobilize to achieve a desired result. Instead of rallying workers and mobilizing them to affirmatively support its position, the union exists merely as a bureaucratic entity that provides services. Ultimately, this alienates workers from the union, which loses its strength and meaning if it cannot inspire strong feelings of loyalty and devotion.¹⁰⁴

By denying public sector workers the right to strike, the Taylor Law undermines the balance of power that labor agreements traditionally seek to establish between management and labor. A balance of power between labor and management underlies collective bargaining.¹⁰⁵ Laws governing labor-management rela-

such an advisory body is biased. *Id.* In New York, an executive act establishes the procedure for appointing arbitrators. The act provides that PERB, upon the joint request of the MTA, the Manhattan and Bronx Surface Transit Operating Authority, and the union representing their employees, appoint a panel consisting of the three impartial members of the New York City Office of Collective Bargaining's Board of Collective Bargaining, with the Chairman of the Board serving as the panel's chair. *See Anderson & Krause, supra* note 47, at 154.

102. *See* NOVITZ, *supra* note 95, at 325.

103. *Id.*

104. *See* McCartin, *supra* note 24, at 745 ("If the inherent purpose of a labor organization is to bring the workers' interests to bear on management, the right to strike is, historically and practically, an important means of effectuating that purpose. A union that never strikes, or which can make no credible threat to strike, may wither away in ineffectiveness." (quoting *United Fed'n of Postal Clerks v. Blount*, 325 F. Supp. 879, 885 (D.D.C. 1971) (Wright, J., concurring))).

105. *See* Harry L. Browne, *The Impact of Supreme Court Decisions on Free Collective Bargaining*, 51 A.B.A.J. 137, 137 (1965) (arguing that "[e]quality of bargaining power" is the fundamental objective of governmental intervention in the field of labor-management relations" and describing the National Labor Relations Act as "legislation intended to promote 'equality of bargaining power'").

tions, at both the national and state level, emphasize the importance of a balance of power.¹⁰⁶ This is because when a union has the power to advance or obstruct an agreement, the employer has little incentive to throw a wrench in the works by being unduly intransigent or making meaningless offers. But since the Taylor Law forbids workers from striking, it allows employers to be recalcitrant in their bargaining, without fear of repercussion. The labor agreements that result from this arrangement are, not surprisingly, often on the employers' terms.¹⁰⁷

It is true that the Taylor Law has been credited for decreasing the number of public sector strikes in New York State.¹⁰⁸ However, there is some question whether this is really the result of the law's antistrike penalties, or whether it is more properly attributed to other factors that have led to a diminishment of labor's power.¹⁰⁹ In either case, even if the Taylor Law is the reason for the reduction in the number of strikes in New York State since 1967, this does not offset the damage the law wrecks on the legitimate bargaining process. The availability of a strike right in the private sector goes a long way toward giving workers and employers parity in the bargaining relationship.¹¹⁰ Even in contract negotiations that end in settlement without a strike, the right of workers to strike, and their willingness to do so if necessary, is often indispensable to winning an acceptable contract.¹¹¹ Because of the Taylor Law's antistrike provision, the balance of power is tipped in favor of the governmental employer.¹¹² As a result, the employer may act in ways that would not be possible were there true equality between the parties — it may delay unduly, or submit proposals that are not meaningful, all the while

106. *Id.*

107. See Scott & Chan, *supra* note 17 (“Other union leaders called for changes to the Taylor Law, arguing that it unfairly allows for large penalties against unions and workers while doing little to punish cities that drag out contract negotiations for years.”); see also Lueck, *supra* note 15 (“But Roger L. Green, a Democratic state assemblyman from Brooklyn, who attended the hearing in support of the union, said Mr. Toussaint’s jail sentence would provoke fresh calls to amend or eliminate the Taylor Law, which many union leaders believe gives an inevitable upper hand to management.”).

108. See Worth, *supra* note 51.

109. See *supra* note 50.

110. See *supra* note 64.

111. See *Restore the Right to Strike*, UE POLICY, http://www.ueunion.org/policy_sr.html (last visited Apr. 2, 2011).

112. See Thomas J. Lueck, *Council Hears Labor Chiefs Denounce Anti-Strike Law*, N.Y. TIMES, Mar. 31, 2006, at B3.

confident that the union will not strike.¹¹³ The parties, placed in a situation in which one wields disproportionate influence over the bargaining process, grow suspicious of each other, thus impairing future bargaining and standing in the way of a cooperative relationship.¹¹⁴

Some argue, though, that when it comes to public sector workers, the balance of power provided by a strike right is outweighed by the fact that the government “provides essential services which must not be interrupted.”¹¹⁵ This essential services argument has several well-known incarnations, among them then-Governor Calvin Coolidge’s exhortation during the 1919 Boston police strike that “[t]here is no right to strike against the public safety by anybody, anywhere, at any time.”¹¹⁶ The essential services argument is weakened, however, by the fact that not all services protected by anti-strike provisions are equally essential.¹¹⁷ Even the Taylor Law, which defines all public services as essential, has a special impasse resolution scheme for police officers, firefighters, and transit workers, suggesting that a work stoppage by those classes of workers poses a more immediate threat to the public safety than a work stoppage by teachers, nurses, and state government workers.¹¹⁸

At least one court has found flaws with the essential services argument. In 1985, the California Supreme Court found that public employees do not have such extraordinary power that they should be denied the right to strike, and held that a common law prohibition on strikes in the public sector violated the state constitution.¹¹⁹ In finding that a tort action could not apply to a

113. *Id.*

114. *Id.*

115. See Anne M. Ross, *Public Employee Unions and the Right to Strike*, MONTHLY LAB. REV., Mar. 1969, at 14, 15; see also Merton C. Bernstein, *Alternatives to the Strike in Public Labor Relations*, 85 HARV. L. REV. 459, 462 (1971).

116. See Ross, *supra* note 115, at 15 (internal quotation marks omitted).

117. *Id.*

118. See N.Y. CIV. SERV. LAW § 209 (McKinney 2010). Subsection 5, which applies to transit employees, is set to expire on July 1, 2011. CIV. SERV. § 209(5). Other amendments to this statute will become effective on July 1, 2011; those alterations are immaterial to this Note. In lieu of the right to strike, the Taylor Law provides for compulsory arbitration in the event that PERB finds that a voluntary resolution of a contract cannot be effected. The right to arbitrate is granted to police, fire, and transit employees, but not to any other categories of workers. See also DONOVAN, *supra* note 9, at 220.

119. See *Cnty. Sanitation Dist. No. 2 v. L.A. Cnty. Emp. Ass’n., Local 600*, 699 P.2d 835, 844–48 (Cal. 1985) (en banc).

strike by a union representing public employees, the court held that a strike by public employees was not, in fact, illegal.¹²⁰ Pointing out that many public employees do the same work as private employees, the court dismissed the city's essential services justification for a strike ban.¹²¹

The California Supreme Court's argument is one that resonates for many classes of public employees in New York. This is because public sector workers in New York, who are prohibited from striking, do the same work as private sector workers elsewhere. Yet, an essential services argument is not used to keep these private sector workers from striking. For example, although transit and water are services provided by public sector workers in New York City, this is not the case everywhere. In London, the rapid transit system, the London Underground, operates as a public-private partnership.¹²² Unlike New York's transit workers, who cannot strike legally, London's transit workers are permitted to strike — and do. They have exercised this right as recently as December 26, 2010, when the Associated

120. *Id.* In finding that there should not be a wholesale proscription on the right to strike, the court invoked the Taylor Law as an example of legislation that is too far reaching; the court quoted Theodore W. Kheel, who criticized the Taylor Law as follows:

It would be unfair to place upon the legal machinery sole responsibility for these interruptions of critical services on which the welfare of New York depends. But the fact remains that the machinery — including the prohibition on strikes with attendant penalties and the fact-finding boards with their power to make recommendations — did not work to settle these disputes or stop the strikes, slow-downs, or threats. In fact it is probable that the Taylor Law exacerbated these conflicts. For one thing, it made subversive a form of conduct society endorsed for private workers. It encouraged unions to threaten to strike to achieve the bargaining position participants in collective bargaining must possess. It made the march to jail a martyr's procession and a badge of honor for union leaders In simple point of fact, it did not and is not likely to work as a mechanism for resolving conflicts in public employment relations through joint determination, whether called collective bargaining or collective negotiations.

Id. at 847 (quoting Theodore W. Kheel, *Strikes and Public Employment*, 67 MICH. L. REV. 931, 936 (1969)).

121. *Id.* at 845.

122. See *London Underground Public Private Partnership*, PRICEWATERHOUSECOOPERS, <http://www.pwc.com/gx/en/transportation-logistics/london-underground-public-private-partnership.jhtml> (last visited Apr. 11, 2011). In 2010, the London Underground carried 28 million passengers and covered a total distance of 249 miles. See *Key Facts*, TRANSPORT FOR LONDON, <http://www.tfl.gov.uk/corporate/modesoftransport/londonunderground/1608.aspx> (last visited April 11, 2011). In 2009, the New York City transit system carried 1,579,866,600 passengers. *Subway and Bus Ridership: Statistics 2009*, MTA, <http://www.mta.info/nyct/facts/ridership/index.htm> (last visited Apr. 11, 2011).

Society of Locomotive Engineers and Firemen (“ASLEF”), the union representing London subway drivers, went on strike following a dispute over holiday pay.¹²³ Additionally, in September 2010, the Rail, Maritime and Transport (“RMT”) and the Transport Salaried Staffs Association (“TSSA”) unions engaged in a series of twenty-four hour strikes in protest of London Underground’s plans to eliminate 800 jobs in Underground ticket offices.¹²⁴

Furthermore, a public sector worker may provide a service in one city that a private sector worker provides in another. This further erodes the argument that there is something intrinsically essential about the services performed by public sector workers. For example, Con Edison, which provides New York City with electricity, gas, and steam service, is a private, investor-owned energy company.¹²⁵ Its employees are not covered by the Taylor Law and can strike.¹²⁶ The last Con Ed strike occurred in 1983, when 16,500 workers walked out for nine weeks.¹²⁷ The strike delayed repairs of an electrical substation knocked out by a fire and caused a three-day blackout in the Garment District — Macy’s was forced to rely on an emergency generator.¹²⁸ Since then, Local 1-2 of the Utility Workers of America, the union representing Con Ed workers, has come close to striking several times, most recently in 2008, when contract talks with the utility stalled.¹²⁹

Some advocates of a strike ban for public sector workers argue that when the government provides a service, such as law enforcement, fire fighting, public transit, or first-class mail delivery, it typically enjoys a monopoly in that field. Often, society will tolerate such a monopoly because it is a “natural” one, meaning that there is market space for only one provider. For example,

123. See Talia Kayali, *London Subway Strike over Pay Disrupts Busy Shopping Day*, CNN.COM (Dec. 26, 2010), http://articles.cnn.com/2010-12-26/world/uk.train.strike_1_subway-strike-drivers-plan-london-underground?_s=PM:WORLD.

124. See *London Underground Workers Begin 24-Hour Strike*, BBC NEWS (Sep. 6, 2010), <http://www.bbc.co.uk/news/uk-england-london-11196317>.

125. See *About Us*, CONED, <http://www.coned.com/aboutus/> (last visited Mar. 9, 2011).

126. See Ken Belson, *As Managers Gird for Duty, Hope Seen in Con Ed Talks*, N.Y. TIMES, July 2, 2008, at B2.

127. *Id.*; Matthew Sweeney, *Macy’s, Gimbel’s Went Dark During ’83 Con Ed Strike*, A.M. NEW YORK, July 29, 2008, available at <http://www.amny.com/urbanite-1.812039/macy-s-gimbel-s-went-dark-during-83-con-ed-strike-1.896927>.

128. See Sweeney, *supra* note 127.

129. See Belson, *supra* note 126.

there is no room in New York City for directly competing subway systems or competing power lines. In exchange for being allowed to exist as a monopoly, the government submits to regulations that prevent it from treating its customers as a monopolist normally would. This is most apparent in utility regulation, where the prices consumers pay are kept reasonable. In exchange for getting to work for an employer who faces no market competition, the argument goes, workers in these areas should not expect the same rights as private-sector workers.

This argument has resonance in some areas, such as public transit, where a subway rider lacks, by virtue of the government monopoly on the service, recourse to an alternative provider. However, even during a subway strike, it cannot be said that the public is actually without options. During the 2005 transit strike, New Yorkers continued to get where they had to go, relying on carpools, taxi service, bicycles, and walking.¹³⁰ Nor can it be said that the New York City government, Taylor Law notwithstanding, truly regards consumers who do not have access to public transit as without other options. For example, during the December 26, 2010 snowstorm, Mayor Bloomberg issued a predawn message urging city workers to stay at home and off the roads, noting the suspension of bus services.¹³¹ However, on January 31, 2011, the mayor's office issued a memo stating that tens of thousands of New York City employees who did not report for work during the snowstorm could lose a day of leave.¹³² Moreover, the government monopoly argument fails in those fields where the private sector does provide an alternative to the government provision of the services — for example, in nursing, where there are many non-state-owned hospitals. Finally, the government monopoly argument does not address the dignity, liberty, and autonomy interests workers have in being able to strike legally.

Some proponents of a strike ban for public employees argue that giving public employees the right to strike would unfairly disadvantage governmental employers. They contend that the rights of public employees cannot be fairly analogized to those of private employees, as private employees are exercising an eco-

130. See Russ, *supra* note 11, at 163.

131. See Sharon Otterman, *City Workers Face Penalty After Storm*, N.Y. TIMES, Feb. 2, 2011, at A18.

132. *Id.*

conomic right in striking, while public employees are exercising a political one.¹³³ That is, unlike in private employee strikes, where the employer is motivated to end the strike by loss of sales, the governmental employer is pressured by citizens' expressions of their need for public services.¹³⁴ Critics of a strike right for public employees argue that by striking, public sector employees will unduly distort the normal political process, as a disgruntled public will focus its anger on those elected officials it sees as responsible for providing continuous service.¹³⁵

But the line between a worker's exercise of a political right and his exercise of an economic right is not always clear.¹³⁶ For example, it is not accurate to say that public sector workers are exercising a right that is purely or mostly political, given that economic factors are often what motivate a governmental employer to bring an end to a strike. While it is true that the MTA, as an institution, is not in danger of being replaced by a competitor, as a private employer might be, it is also true that much of the discourse during the 2005 transit strike was framed not in terms of the public's desire to see services restored, but in terms of the strike's economic cost to the city.¹³⁷ Likewise, private sector employers can also be susceptible to the "political pressure" of public sentiment. An example of this is the divestment of Gener-

133. See NOVITZ, *supra* note 95, at 83–84.

134. See Bernstein, *supra* note 115, at 464–65. During a strike, the public employer continues to collect taxes and other revenues and saves the wages it would have paid to striking workers. *Id.* at 464. Thus, unlike in the private sector, loss of revenue does not motivate a public employer to settle a strike. Rather, it is the interruption of government services and its political cost that motivate the employer to settle on terms more favorable to the union. *Id.*

135. *Id.* at 462.

136. See, e.g., William G. Haemmel, *Government Employees and the Right to Strike — The Final Necessary Step*, 39 TENN. L. REV. 75, 75 (1971) (characterizing the right to strike as the "ultimate economic weapon").

137. See, e.g., Julia Levy, *Debate Begins over Who Won Transit Strike, Union or MTA*, N.Y. SUN, Dec. 29, 2005, at 1; Henry J. Stern, Editorial, *Held Hostage*, N.Y. SUN, Dec. 21, 2005, at 6; Dan Arnall, *MTA Strike Threatens New York Economy*, ABC NEWS (Dec. 15, 2005), <http://abcnews.go.com/Business/ChristmasCountdown/story?id=1409221>. It is also telling that while a number of private suits were brought against the TWU for economic losses incurred by the strike, no suits were brought alleging physical or psychic harm. See, e.g., *Russian Samovar, Inc. v. Transit Workers' Union*, 847 N.Y.S.2d 164 (App. Div. 2007) (holding that the Taylor Law did not give rise to a private cause of action against the MTA for damages arising from a strike); *Loakman v. Transp. Workers Union of Greater N.Y.*, 816 N.Y.S.2d 336 (Civ. Ct. 2006) (holding that a claimant had no private right of action against public transportation workers union under the Taylor Law).

al Motors from South Africa in 1986, following the condemnation of apartheid by a large part of the American public.¹³⁸

Finally, some argue that giving public sector workers the right to strike will harm the public interest, not only because it could result in the deprivation of important services, but also because it will give workers more bargaining leverage, ultimately passing on greater costs to taxpayers.¹³⁹ Recent debate in Ohio and Wisconsin has concerned the desirability of reforming those states' collective bargaining laws to eliminate public employees' right to strike and engage in binding arbitration.¹⁴⁰ This debate has been fueled by the growing public perception that public sector workers have become enriched at the expense of their private sector counterparts.¹⁴¹

There are reasons to believe, however, that giving effect to a right to strike is important from the point of view of the public interest. That is, the ordinary mechanisms of representative government put officials in power who keep a good eye on the bottom line, but strong unions are needed in order to bargain for fair wages and good working conditions, so as to attract the most qualified workers. It is in the public's interest to have capable, professional workers operating its trains and buses.¹⁴² Moreover, the fact that most New Yorkers polled supported the striking transit workers in 2005 indicates that citizens are uncomfortable with a law that circumscribes the ability of workers and their

138. See Nicole Itano, *G.M. Returns 10 Years After End of Apartheid*, N.Y. TIMES, Jan. 30, 2004, at W1.

139. See TERRY O'NEIL & E.J. MCMAHON, *TAYLOR MADE: THE COSTS AND CONSEQUENCES OF NEW YORK'S PUBLIC-SECTOR LABOR LAWS (2007)*, available at http://www.empirecenter.org/AboutUS/news_releases/2007/10/TaylorMadeNewsRelease.cfm.

140. See Steven Greenhouse, *Strained States Turning to Laws to Curb Labor Unions*, N.Y. TIMES, Jan. 4, 2011, at A1; Andy Kroll, *Wisconsin GOP Bill Allows State to Fire Employees for Strikes, Walk-Outs*, MOTHER JONES (Mar. 10, 2011), <http://motherjones.com/mojo/2011/03/wisconsin-walker-union-republican-senate-budget-bill>.

141. *Id.*; see also Sam Hananel, *Union Campaign to Boost Image of Public Workers*, ASSOCIATED PRESS (Jan. 14, 2011) ("These lawmakers are hiding behind the guise of fiscal austerity and budget cuts in order to move a conservative corporate agenda that seeks to weaken the power of workers to organize and bargain collectively for better wages and a better quality of life." (internal quotations marks omitted)), <http://abcnews.go.com/US/?id=12616899>.

142. New York City has the highest rate of public transportation use of any American city. See Les Christie, *New Yorkers Are Top Transit Users*, CNN MONEY (June 29, 2007), http://money.cnn.com/2007/06/13/real_estate/public_transit_commuters/index.htm. In 2005, fifty-five percent of workers used public transit to commute.

unions to adequately represent themselves.¹⁴³ Even if this imputes too broad a reading to New Yorkers' support for the transit workers, unions serve an important function in voicing public concerns, such as service cuts and reduced transit routes.¹⁴⁴ Recent events involving the MTA, in which the members of the public have protested against proposed layoffs out of fear that this will lead to a less safe transit system, demonstrate that the interests of the public can often mirror those of the transit workers.¹⁴⁵ Although this might not be true in every case — for example, taxpayers might resist the union's salary demands if such raises necessitated fare hikes — it is another reason to afford workers the full opportunity of representing themselves.

IV. RESTORING THE BALANCE OF POWER, MAKING BARGAINING MEANINGFUL

A. GIVE PUBLIC-SECTOR WORKERS ENGAGED IN NON-ESSENTIAL SERVICES A BROAD STRIKE RIGHT

Any solution that seeks to reform the Taylor Law must give effect to a right to strike. This result is necessary because the right to strike is an independent value that is worth protecting.¹⁴⁶ It is also necessary in order to equalize the parties' position at the

143. See *supra* note 84.

144. The TWU also joined the Straphanger's Campaign and other groups in a lawsuit against the MTA after the agency sought to sell the railroads at 11th Avenue and 33rd Street to the New York Jets for \$250 million. See Tom Robbins, *Remember the Stadium? Unions Do, RUNNIN' SCARED* (Dec. 21, 2005, 3:36 PM), http://blogs.villagevoice.com/runninscared/archives/2005/12/remember_the_st.php. The lawsuit alleged that the deal shortchanged both riders and workers, as an MTA appraisal had previously put the value of the site at \$923 million.

145. See Heather Haddon, "They Saved My Life": Rider Hacked by Power Saw-Wielding Madman in '06 Battles MTA Layoffs, A.M. NEW YORK, Mar. 4, 2010 ("[Passenger Michael Steinberg is] now fighting to keep the agents in the system as the cash-strapped MTA plans to fire 450 of them by May to save \$21 million a year."), available at <http://www.amny.com/urbanite-1.812039/they-saved-my-life-rider-who-was-attacked-in-subway-station-protests-layoffs-1.1791593>; see also Michael M. Grynbaum, *Keeping Hope That a Voice Can Reduce Transit Cuts*, N.Y. TIMES, Mar. 3, 2010, at A24.

146. See Jeremy Smerd, *Kalikow Warns Talks May Be 'Futile'*, N.Y. SUN, Dec. 22, 2005, at 1. On December 22, 2005, Toussaint addressed reporters, saying, "There is a higher calling than the law and that is justice and equality. . . . Had Rosa Parks had answered the call of the law instead of the higher call of justice, many of us who are driving buses today would instead be at the back of the bus." *Id.* (internal quotation marks omitted).

bargaining table, thereby ensuring a legitimate bargaining process.¹⁴⁷

In some instances, the need to maintain public order may justify narrowing the right to strike. Any such limitations, however, “should be narrowly tailored to minimize the chance for abuse.”¹⁴⁸ This Note proposes that the Taylor Law be modified so that only those employees who provide essential services be restricted in their ability to strike, and that what constitutes an essential service be defined in accordance with ILO standards.

This is not a new idea. In November 2009, Local 100 of the TWU filed a complaint against the United States government with the ILO’s Committee on Freedom of Association.¹⁴⁹ In its complaint, the TWU argued that by permitting New York to legislate and adjudicate in ways that undermine associational and collective bargaining rights for public sector workers — namely, by allowing the Taylor Law to be implemented and enforced — the United States has failed to meet its obligations under ILO Conventions 87 and 98.¹⁵⁰ That is, the problem with the Taylor Law is that it impermissibly extends its reach beyond a narrowly defined group of essential workers and essential services, instead barring all workers, in all areas of the public sector, from striking.¹⁵¹ The TWU proposed that the Taylor Law be narrowed accordingly and that the ILO’s definition of essential service be incorporated into the Taylor Law.¹⁵²

The ILO defines an essential service “as those the interruption of which would endanger the life, personal safety or health of the whole or part of the population.”¹⁵³ By this standard, services that may be treated as essential include “the hospital sector, electricity services, water supply services, the telephone service, and

147. See Drummonds, *supra* note 50, at 109 (“The balance of economic power generally favors employers. Most students of labor law can readily understand the temptation for employers to purposefully pursue an impasse strategy in negotiations, especially in the fragile situation of a new bargaining relationship, since the remedies for bad faith bargaining are minimal.”).

148. Jared S. Gross, *Yet Another Reappraisal of the Taft-Hartley Act Emergency Injunctions*, 7 U. PA. J. LAB. & EMP. L. 305, 328 (2005).

149. Complaint submitted to the Int’l Labor Org. Comm. on Freedom of Association, *Transp. Workers Union of Greater N.Y., Local 100 v. United States* (Aug. 2009).

150. *Id.* at 2.

151. *Id.* at 8–9.

152. *Id.*

153. See INT’L LABOUR ORG., *supra* note 19, ch. V (citation omitted).

air traffic control.”¹⁵⁴ This definition would exempt many of the public sector workers currently covered by the Taylor Law’s anti-strike provision.¹⁵⁵

The ILO definition of essential services is appropriate because it is consistent with the public safety exception in place in the nine states that allow public sector strikes.¹⁵⁶ It is also in harmony with the Taylor Law’s stated purpose for prohibiting strikes — to protect the public.

The Taylor Law does not use the word “essential” in describing the classes of public sector employees it prohibits from striking.¹⁵⁷ Nor does it use analogous language to indicate that all the public sector employees in its purview are performing crucial duties.¹⁵⁸ Nevertheless, the policy statement of the Taylor Law states that its purpose is “to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government.”¹⁵⁹ There is, then, the idea that the services provided by

154. See Gross, *supra* note 148, at 333. Non-essential services include radio and television, the petroleum sector and ports (loading and unloading), banking, computer services for the collection of excise duties and taxes, department stores and pleasure parks, the metal and mining sectors, *transport generally*, refrigeration enterprises, hotel services, construction, automobile manufacturing, aircraft repairs, agricultural activities, the supply and distribution of foodstuffs, the Mint, the government printing service and the state alcohol, salt and tobacco monopolies, the education sector, metropolitan transport, and postal services.

Id. (emphasis added). *But see* Toronto, Ont., City Council Decision to Designate Toronto Transit Commission an Essential Service (Dec. 16, 2010), *available at* <http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2011.EX1.8>. In December 2010, the Toronto City Council decided to formally request that the Ontario government designate public transit in Toronto an essential service. *Id.* If the government passes the legislation, labor strikes will no longer be legal for Toronto Transit Commission workers.

155. For those workers who are deemed to provide essential services, the ILO view is that any restriction on the right to strike should be proportionate. For instance, in cases where a strike could result in serious consequences for the public, introduction of a minimum level of service, rather than a total ban, may be appropriate. See NOVITZ, *supra* note 95, at 306.

156. Alaska, Hawaii, Illinois, Minnesota, Montana, Ohio, Oregon, Pennsylvania, and Vermont — the states with statutes that permit some groups of public employees to strike — all provide for strikes to be enjoined if they threaten the public health, safety, and/or welfare, a stance consistent with the ILO’s basis for distinguishing between the essentiality of services — that the public safety will not be endangered. See Peter Feuille, *Essential For What? Strikes and Essential Services in the United States*, in GRÈVES ET SERVICES ESSENTIELS 115, 116–17 (Jean Bernier ed., 1994); see also INT’L LABOUR ORG., *supra* note 19, ch. V (citation omitted).

157. See N.Y. CIV. SERV. LAW §§ 200–14 (McKinney 2010).

158. *Id.*

159. See CIV. SERV. § 200.

public sector workers, if not essential, at least implicate public safety. Furthermore, it is not just a certain class of public sector workers, like firefighters and police officers, who are covered by the Taylor Law's antistrike provision, but workers whose jobs do not as obviously or as immediately implicate the public safety, such as teachers and civil service workers.¹⁶⁰

A strike by public sector workers is bound to impose a hardship on some segment of the population. For some members of the public, such as working parents of modest means who lack the financial ability to secure childcare in the event of a teachers' strike, teachers may provide a service whose interruption poses a threat to public safety. On the other hand, it is difficult to argue that teaching is as essential to public safety as, for example, firefighting or police work. Similarly, while transit is a service that is of considerable importance to the daily lives of most city residents, the immediacy of the threat posed to the public by a work stoppage of EMTs, fire fighters, and police officers is much greater than the immediacy of the threat posed by striking transit workers. For while it can be difficult and distressing for commuters accustomed to taking public transportation to have to fall back on carpooling, taxis, private buses, walking, or bicycling, these alternatives exist — and were all exercised during the 2005 Transit Strike.¹⁶¹

Of course, giving public sector workers the right to strike means that the Taylor Law's mechanisms for ensuring meaningful bargaining will have to be improved, in order to minimize the likelihood of strikes and disruptions to public services. The Taylor Law, as it currently stands, does not support productive, good-faith bargaining. This Note proposes that the law's requirement that the parties negotiate in good faith be enforced vigorously and equally.

160. See CIV. SERV. § 201(7)(a).

161. See Russ, *supra* note 11, at 163.

B. ENFORCE GOOD-FAITH BARGAINING

The Taylor Law mandates that parties negotiate in good faith. According to the law,

[T]o negotiate collectively is the performance of the mutual obligation of the public employer and a recognized or certified employee organization to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.¹⁶²

However, the Taylor Law does not define what exactly is meant by “good faith.”¹⁶³ Nor does it establish specific consequences for a party who refuses to bargain in good faith.¹⁶⁴ As a result, the Taylor Law puts no pressure on the parties to negotiate contracts in a timely manner.¹⁶⁵ Municipal unions may go three or four years without a contract;¹⁶⁶ in New York State, it has become increasingly frequent that contracts are implemented only when they are on the verge of expiring.¹⁶⁷

While the Taylor Law purports to require good faith bargaining, it does not actually do so. This is because the Taylor Law places unequal burdens on employers and workers when it comes to bargaining in good faith. It directs government officials to file for a court injunction against any union or individual that threatens to violate the Taylor Law by striking.¹⁶⁸ When an employer fails to bargain in good faith, however, a union is left with little recourse. Although PERB has broad powers to impose penalties

162. See CIV. SERV. § 204(3).

163. *Id.*

164. See N.Y. CIV. SERV. LAW §§ 200–14 (McKinney 2010).

165. See Gary Schoichet, *The Taylor Law: Time for a Change?*, METRO N.Y. LAB. COMM. COUNCIL (Dec. 10, 2009) (quoting Randi Weingarten, former president of the United Federation of Teachers), <http://metrolabornyc.org/the-taylor-law-time-for-a-change>.

166. *Id.*

167. *Id.*

168. See CIV. SERV. § 211.

on a party that engages in bad-faith negotiations, employers are rarely sanctioned for bargaining in bad faith.¹⁶⁹

This Note proposes that a union, when faced with bad-faith bargaining, be empowered to go to a judge for a ruling that the employer is not bargaining in good faith. Armed with such a ruling, the union can then compel PERB to penalize the employer.¹⁷⁰ Another possibility is that the judge can, as he or she currently does for unions that threaten to strike, issue an injunction against future bad-faith bargaining. If the employer does not abide by the injunction, the judge will impose fines.

Although it is true that the line between what is bad faith and what is hard bargaining may be, at times, difficult to draw, this is not a problem unique to labor law. In many areas, legal tests abound for determining whether certain borderline conduct is licit or whether it crosses the line into illegal behavior. Moreover, the American political system recognizes judges as the parties who are best equipped to do this kind of line drawing. By looking at the cases brought before them and making decisions about the behavior of the parties, they can establish a body of law that goes beyond the standards that already exist for good faith bargaining. Conduct that is now widely recognized as legal, but injurious to bargaining, will get a second look.

169. In 2006, N.Y. Gov. Pataki vetoed legislation that would have reformed the Taylor Law, *see infra* note 184, because, according to the PERB, public employers, even ones involved in “negotiations [that] have remained unresolved for extended periods,” were generally acting in good faith. *See* Veto 364 from N.Y. Gov. Pataki to N.Y. Senate, Sept. 13, 2006.

170. Judges have made determinations about what constitutes good faith under the Taylor Law before. *See, e.g.,* *Russian Samovar, Inc. v. Transit Workers’ Union*, No. 117705/05, 2006 WL 6103222 (N.Y. Sup. Ct. Nov. 21, 2006), *rev’d*, 846 N.Y.S.2d 164 (App. Div. 2007). In *Russian Samovar*, Manhattan Supreme Court Justice Louis York allowed eleven businesses’ negligence claims, stemming from the 2005 transit strike, to go forward against the MTA. *Id.* at *6 (“The court finds that plaintiffs’ allegation that the MTA intentionally caused the strike by bargaining in bad faith despite its awareness of the likely impact on plaintiffs, when given the benefit of every favorable inference and factoring in the Draconian impact of the Taylor Law on public employee labor unions, is sufficient to withstand MTA’s motion to dismiss . . .”). On appeal, a panel of judges on the Appellate Division found that the plaintiffs had failed to state a cause of action, on the basis that there is no private cause of action against the MTA under the Taylor Law. 846 N.Y.S.2d 164 (App. Div. 2007). The judges held that “[e]ven if the unspecified intentional tort claim could be based upon employer conduct, it would be limited to unlawful conduct, and the actions of the MTA herein did not constitute such ‘extreme provocation’ as might detract from the union’s responsibility for engaging in the strike.” *Id.* at 165.

This approach has been successful in the private sector, where a body of law has developed that seeks to delineate what behaviors constitute bad-faith bargaining. Although good-faith bargaining remains a somewhat nebulous standard in the private sector, the body of law there provides more guidance than the Taylor Law as to what kind of bargaining conduct is acceptable. For example, when confronted with a possible instance of bad-faith bargaining, the National Labor Relations Board (“NLRB”) looks at the totality of each party’s conduct to determine whether, all things considered, it is making a legitimate effort to reach an agreement.¹⁷¹ Bad-faith bargaining is often characterized by surface bargaining — when a party goes through the motions of negotiating, but with no intention of reaching agreement.¹⁷² An important decision of the NLRB identifies seven distinct indicators of surface bargaining.¹⁷³ These are using delaying tactics;¹⁷⁴ proposing unreasonable bargaining demands;¹⁷⁵ implementing unilateral changes in conditions of employment;¹⁷⁶ direct-dealing, or implementing steps to bypass the union and deal directly with workers;¹⁷⁷ failing to designate an agent with sufficient authority to negotiate;¹⁷⁸ withdrawing proposals after tentative agreement has been reached on those items;¹⁷⁹ and arbitrary scheduling of meetings.¹⁸⁰ While these factors are not dispositive, they are a good summary of the types of behavior that will support a finding of surface bargaining.

The Taylor Law should be reformed so that the obligation to bargain in good faith is enforced equally and vigorously. This means encouraging public employees and their unions — or governmental employers, as the case may be — to go to a judge when the other party fails to negotiate in good faith. This will

171. See *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131 (1st Cir. 1953).

172. See *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676 (9th Cir. 1943).

173. See *ACL Corp.*, 271 N.L.R.B. 1600 (1984).

174. See *NLRB v. W.R. Hall, Distrib.*, 341 F.2d 359 (10th Cir. 1965).

175. See *Holmes Tuttle Broadway Ford, Inc.*, 186 N.L.R.B. 73 (1970), *enforced*, 465 F.2d 717 (9th Cir. 1972).

176. See *Fitzgerald Mills Corp.*, 133 N.L.R.B. 877 (1961), *enforced*, 313 F.2d 260 (2d Cir. 1963).

177. See *Cal-Pacific Poultry, Inc.*, 163 N.L.R.B. 716 (1967).

178. See *Billups W. Petroleum Co.*, 169 N.L.R.B. 964 (1968), *enforced*, 416 F.2d 1333 (5th Cir. 1969); *see also Hillard Dev. Corp.*, 345 N.L.R.B. 581 (2005).

179. See *Suffield Acad.*, 336 N.L.R.B. 659 (2001), *enforced*, 322 F.3d 196 (2d Cir. 2003).

180. See *Moore Drop Forging Co.*, 144 N.L.R.B. 165 (1963).

result in the establishment of a body of law that more closely defines what behaviors characterize good-faith bargaining — and what behaviors characterize bad-faith bargaining. It will also send the message that the Taylor Law’s provision for good faith negotiations is to be taken seriously, and will put responsibility on the parties for ensuring that it is. The Taylor Law should also be amended so that PERB must impose a mandated penalty for the failure to bargain in good faith.¹⁸¹ One possible penalty is the payment of restitution to offset any economic gains resulting from a party’s failure to bargain in good faith.¹⁸² Another possibility, one that takes into account the fact that it has become increasingly common for municipal unions to go several years without a contract, is to require a party that has failed to negotiate in good faith to pay interest on late payments owed the other party under the expiring contract.¹⁸³ Another suggestion — this one passed by the New York State Legislature in 2006, but ultimately vetoed by then-governor George Pataki — is to require the acceptance of a union’s last offer by an employer found to have negotiated in bad faith.¹⁸⁴ A more creative possibility is to require a party that has failed to negotiate in good faith to make a payment toward a public fund — thereby recompensing the general public for its failure to bargain responsibly.¹⁸⁵ This will incentivize parties to bargain conscientiously, resulting in the implementation of more timely contracts.

C. THE POTENTIAL FOR REFORM

This Note proposes ambitious reforms to the Taylor Law. In order for them to come to fruition, New Yorkers will have to see

181. In 2006, in the wake of the transit strike, more than a dozen bills giving public employee unions new rights under the Taylor Law passed the Senate and General Assembly. S.B. 3178 would have “reduced the penalties for illegal strikes and created automatic pay raises for workers if PERB determined that a public employer was not bargaining in good faith”; Governor Pataki vetoed the bill. See ROBERT B. WARD, *NEW YORK STATE GOVERNMENT* 235 (2d ed. 2006).

182. See Press Release, Sergeants Benevolent Ass’n, *Legislation Aims to Level the Playing Field by Penalizing State Employers for Failure to Bargain in Good Faith* (June 29, 2004), available at <http://www.businesswire.com/news/home/en/Benevolent-Association-Taylor-Law-Reform-Legislation>.

183. See Gary Schoichet, *supra* note 165 (quoting Randi Weingarten).

184. See S.B. 3177, 2006 Leg., Reg. Sess. (N.Y. 2006).

185. *Id.*

that giving workers the right to strike is both important and desirable. Most likely, such an understanding will come from a sense that amending the Taylor Law is both practical and fair. This is because abstract legal claims for an enhanced right to strike have not had much traction.¹⁸⁶ For this reason, it seems unlikely that the TWU's recent efforts seeking the ILO's condemnation of the Taylor Law will provoke the groundswell of support necessary to change the law.¹⁸⁷

On November 10, 2009, the TWU filed a complaint with the ILO's Committee on Freedom of Association against the United States government.¹⁸⁸ The complaint alleges that the Taylor Law, both on its face and in terms of its impact, constitutes a serious infringement of internationally recognized, core trade union rights as articulated in ILO Conventions 87 and 98.¹⁸⁹ However,

186. The Taylor Law has long been held constitutional. See, e.g., *Buffalo Teachers Fed'n, Inc. v. Helsby*, 676 F.2d 28, 29–30 (2d Cir. 1982) (finding that the fine assessed under the Taylor Law against a worker who participated in a strike did not violate the Equal Protection Clause); *Cheeseman v. Carey*, 623 F.2d 1387, 1389–93 (2d Cir. 1980) (reviewing previous unsuccessful constitutional challenges to the Taylor Law and finding that one Equal Protection claim “borders on the frivolous,” *id.* at 1393); *Margiotta v. Kaye*, 283 F. Supp. 2d 857, 863–65 (E.D.N.Y. 2003) (rejecting constitutional challenges to the Taylor Law); *N.Y. State Inspection, Sec. & Law Enforcement Emps., Dist. Council 82 v. N.Y. State Pub. Emp't Relations Bd.*, 629 F. Supp. 33, 54 (N.D.N.Y. 1984) (finding that the Taylor Law did not violate the First or Fourteenth Amendment); *O'Brien v. Bd. of Educ.*, 498 F. Supp. 1033, 1037–38 (S.D.N.Y. 1980) (rejecting constitutional challenges to the Taylor Law, including under the Eighth Amendment); *N.Y.C. Transit Auth. v. Transp. Workers Union, Local 100*, 822 N.Y.S.2d 579, 591–92 (App. Div. 2006) (rejecting challenges to the Taylor Law under the Sixth and Fourteenth Amendments); *Lawson v. Bd. of Educ.*, 315 N.Y.S.2d 877, 878–79 (App. Div. 1970) (mem.) (stating that the court did not “perceive any merit as to the . . . contentions in regard to the constitutionality” of the Taylor Law, *id.* at 879.).

187. See Tim Louris, Article, *The “Necessary and Desirable Counterpart”: Implementing a Holmesian Perspective of Labor Rights as Human Rights*, 28 LAW & INEQ. 191, 194 (2010) (“[L]abor rights are human rights and are recognized as such throughout the globe. The United States, while acknowledging this concept through its support of international treaties, has systematically failed to promote workers’ rights within its borders, with the ineffective remedies and commercial agenda of the NLRA largely to blame.”).

188. Complaint submitted to the Int’l Labor Org. Comm. on Freedom of Association, *Transp. Workers Union of Greater N.Y., Local 100 v. United States* (Aug. 2009).

189. *Id.* at 1. In its complaint, the TWU contends that the United States is expected to comply with Conventions 87 and 98 by virtue of its membership in the ILO. *Id.* at 2. Although the United States has not ratified Conventions 87 and 98, the Committee on Freedom of Association has previously assessed the United States’ compliance in fact with these Conventions, noting that the United States’ mandate to examine potential violations of trade union rights “stems directly from the fundamental aims and purposes set out in the ILO Constitution.” *Id.* (internal quotation marks omitted). In addition, Conventions 87 and 98, adopted in 1948 and 1949, respectively, are generally construed as elaborating the key founding principles of freedom of association and collective bargaining, as articu-

the United States has ratified only two of the ILO's eight core labor conventions — making it one of the least compliant nations in the world.¹⁹⁰ Additionally, the ILO has criticized the fact that over two million United States government employees are denied the right to strike and to bargain over hours, wages, or economic benefits.¹⁹¹ Yet the Taft-Hartley Act, which prohibits federal government employees from striking, remains in place.¹⁹² The United States' failure to live up to ILO standards and its refusal to change its ways even after condemnation by that body is exemplified by what has happened to the 45,000 airport screeners who work for the Transportation Security Administration ("TSA").¹⁹³ Although more than three years have passed since the ILO Committee on Freedom of Association concluded in November 2006 that the TSA had improperly denied the employees collective bargaining rights on national security grounds,¹⁹⁴ Congress

lated in the 1919 Constitution and applicable to all member states of the ILO, rather than as imposing new obligations. *Id.* The TWU argues that by allowing the Taylor Law to be implemented and enforced, the United States has failed to meet its obligations under Conventions 87 and 98. That is, the problem with the Taylor Law is that it impermissibly extends its reach beyond a narrowly defined group of essential workers and essential services, choosing to bar all workers, in all areas of the public sector, from striking. *Id.* at 9. Nor does the Taylor Law's provision for interest arbitration in place of the right to strike bring it into conformity with the principles of the Freedom of Association, as the Committee has held that compulsory arbitration is not an adequate substitute for the right to strike. *Id.*

190. See *The International Labor Organization Has Eight Core Conventions; the U.S. Has Ratified Two*, PROGRESSIVE POLY INST. (Apr. 2, 2003), http://www.ppionline.org/ppi_ci.cfm?knlgAreaID=108&subsecID=900003&contentID=251447; see also Steve Charnovitz, Editorial Comment, *The ILO Convention on the Freedom of Association and Its Future in the United States*, 102 AM. J. INT'L L. 90 (2008).

191. Ramapriya Gopalakrishnan, Lawyer, Madras High Court, Remarks at Columbia Law School's Human Rights Institute Panel: The Right to Strike for Public Sector Workers in New York State — New York City Transit Workers in Global Context (Nov. 19, 2009).

192. The Taft-Hartley Act prohibits strikes by government employees or workers in government-owned corporations. See 29 U.S.C. § 187 (2006).

193. See Eric Lipton, *Unions Can Bargain on Behalf of Airport Security*, N.Y. TIMES, Feb. 4, 2011, at A12.

194. See Mike Hall, *ILO: Bush Violated Airports Screeners' Basic Rights*, AFL-CIO NOW BLOG (Nov. 15, 2006), <http://blog.aflcio.org/2006/11/15/ilo-bush-violated-airport-screeners-basic-rights/>. AFGE has represented some TSA employees in the non-collective bargaining environment since the creation of TSA in 2001. *Id.*; see also James Parks, *AFGE's TSO Election Petition Moving Quickly*, AFL-CIO NOW BLOG (Mar. 12, 2010), <http://blog.aflcio.org/2010/03/12/afges-tso-election-petition-moving-quickly/>. In late March 2010, the AFGE petition to be the exclusive union representing TSA employees met the criterion of having made a prima facie case of having thirty percent of the TSA workforce declare interest in holding a union election. Press Release, Am. Fed'n. of Gov't Emps.,

has only now granted the airport screeners collective bargaining rights — although some issues, e.g., wages, will not be subject to negotiation.¹⁹⁵

Ultimately, practical considerations may provide the most powerful impetus for change. This appears all the more likely as New Yorkers come to see the costs of a strike not only in terms of lost Christmas sales and decreased productivity, but in an enfeebled union that, having been harshly penalized for striking, fears the consequences of vigorously representing its members' interests in the future.¹⁹⁶ A weak union can have undesirable consequences for the public's interests. In their book *Winner-Take-All Politics: How Washington Made the Rich Richer — And Turned Its Back on the Middle Class*, political scientists Jacob Hacker of Yale University and Paul Pierson of the University of California, Berkeley, argue that “the economic struggles of the middle and working classes in the [United States] since the late-1970s were not primarily the result of globalization and technological changes but rather . . . policy changes in government that overwhelmingly favored the very rich.”¹⁹⁷ According to Hacker and Pierson, an “organizational revolution” took place over the last three decades in which big business mobilized to become more active in Washington.¹⁹⁸ At the same time, organized labor, big business' nature counterbalancing force and the most effective

AFGE Petition for Exclusive Union Recognition Moves Forward as Second TSA Nominee Withdraws (Mar. 29, 2010), available at <http://www.afge.org/Index.cfm?PressReleases&PressReleaseID=1133&print=True>.

195. Lipton, *supra* note 193.

196. See Complaint submitted to the Int'l Labor Org. Comm. on Freedom of Association at 7, *Transp. Workers Union of Greater N.Y., Local 100 v. United States* (Aug. 2009). After the 2005 Transit Strike, the forfeiture of the automatic dues deduction from June 1, 2007, to September 1, 2007, cost the TWU over \$1,000,000 in lost revenue. *Id.* During the nineteen months before automatic dues deduction was restored on November 10, 2008, the TWU was forced to dedicate a large percentage of its curtailed budget and staff time to dues collection. *Id.* The impact of the suspension of the dues check-off on the national union is also worth noting: thirty percent of the TWU's revenue, which constitutes twenty-five percent of the national's revenue, is passed on to the TWUA. *Id.* As the MTA faces a budget crunch, it is increasingly making choices that are unpopular with its riders. See, e.g., Jeff Wilkins, *Subway Safety Fears*, N.Y. DAILY NEWS, Sept. 18, 2009, at 33. The MTA has reduced the number of station attendants — a change that riders fear will result in a less safe transit system. *Id.*

197. Bob Herbert, Op-Ed., *Fast Track to Inequality*, N.Y. TIMES, Nov. 1, 2010, at A31.

198. *Id.* (internal quotation marks omitted).

ally of the middle and working classes, became caught in “a spiral of decline.”¹⁹⁹

An appeal to New Yorkers’ sense of fairness could also play a role in their willingness to embrace a modification of the Taylor Law. New Yorkers could come to view the right to strike as one that should be available for all workers, regardless of whether they are in the private or public sector.²⁰⁰ This would be premised on their viewing the right to strike as a moral entitlement, as an integral part of the freedom of speech or the freedom of association. New Yorkers could also come to understand support for a strike right for public sector workers as part of their identity as citizens of one of the world’s great cities, one that has the character it does because of its middle class. Some idea of what is meant by this can be seen in the 2009 New York City mayoral campaign, in which incumbent Michael Bloomberg narrowly defeated Bill Thompson despite vastly outspending him.²⁰¹ Thompson’s strong showing was attributed to several factors, including Bloomberg’s successful effort to undo the city’s term limit laws and his extravagant campaign spending.²⁰² It was also attributed to the public perception that during his prior two terms as mayor, Bloomberg had ignored the welfare of working-class New Yorkers, and had instead favored his wealthy friends and developers.²⁰³ The perception that New York is the city it is because middle-class people like the transit workers send their children to the city’s public schools and choose to live there, rather than moving to the suburbs as is the case in places like Washington, D.C.,²⁰⁴

199. *Id.*

200. A recent survey indicated that hundreds of New York State’s 1300 judges favor the creation of a union-like group that would negotiate for judges on salaries and other terms and conditions of employment. See William Glaberson, *Angry over Pay, State Judges Want a Union-Like Group, a Survey Finds*, N.Y. TIMES, Jan. 12, 2011, at A18.

201. David W. Chen & Michael Barbaro, *Bloomberg Wins 3d Term as Mayor in Unexpectedly Close Race*, N.Y. TIMES, Nov. 4, 2009, at A1.

202. *Id.*

203. *Id.*

204. See, e.g., Steve Gilliard, *TWU Wins Major Victory*, STEVE GILLIARD’S BLOG (Dec. 29, 2005) (“What Bloomberg and many white New Yorkers forget is that the heart of the city’s revival is not the Eurotrash and hipsters of Billyburg, but the working class and middle class union workers of the city’s minorities. It is the TWU members and Con Ed and Verizon workers who not only keep this city running, but who also invest in the city’s neighborhoods, demand better schools and send their kids to the city’s colleges. They make New York work, where so many other cities failed. Unlike Washington DC, they didn’t flee to the suburbs, leaving behind only the poor. Even the city’s housing projects

seems to have been at work in the 2009 mayoral campaign. This suggests that appeals to New Yorkers' perception of themselves as part of a community in which everyone is invested in the middle class — and, by extension, in the rights of workers — could play a role in bringing about reform to the Taylor Law.

V. CONCLUSION

By depriving public sector workers of the right to strike, the Taylor Law gives disproportionate power to governmental employers in negotiations. This is problematic because the Taylor Law, like many laws regulating labor-management relations, attempts to “delicately balance the rights of public employees against those of their employers.”²⁰⁵ However, when an employer can be recalcitrant in its bargaining without fear of driving workers to strike, the resulting labor agreements are, more often than not, on the employer's terms.²⁰⁶ This outcome is antithetical to legitimate bargaining.

The Taylor Law should be reformed in a way that restores the balance of power between employers and workers, while simultaneously respecting the need to safeguard public safety. First, the current blanket prohibition on strikes should be limited to those workers who provide “essential services,” as defined by International Labour Organization guidelines. Second, the requirement of good-faith bargaining currently provided for in the Taylor Law should be given force and should be vigorously and uniformly applied.

have large numbers of working people.”), <http://stevegilliard.blogspot.com/2005/12/twu-wins-major-victory.html>.

205. *Caso v. Dist. Council 37, Am. Fed'n. of State, Cnty., and Mun. Emps.*, 350 N.Y.S.2d 173, 176 (App. Div 1973); *cf.* Barenberg, *supra* note 16, at 1477 (“Workplace social norms of ‘equality, equity, and fair division’ are pervasively deployed in the process of collective bargaining.”).

206. *See* Scott & Chan, *supra* note 17 (“Other union leaders called for changes to the Taylor Law, arguing that it unfairly allows for large penalties against unions and workers while doing little to punish cities that drag out contract negotiations for years.”); *see also* Lueck, *supra* note 15 (“But Roger L. Green, a Democratic state assemblyman from Brooklyn, who attended the hearing in support of the union, said Mr. Toussaint's jail sentence would provoke fresh calls to amend or eliminate the Taylor Law, which many union leaders believe gives an inevitable upper hand to management.”).