Should education be designed as an Essential Service?

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Abstract
Governments around the world are increasingly inclined to designate public education an "essential service" and, as a consequence, restrict teachers' right to strike. In contrast, the International Labour Office (ILO) argues that education is not "essential" in the way we typically think of this concept and, therefore, teachers should retain the right to strike. This paper normatively discusses the possibility of designating public formal primary education an essential service. It argues that while there are a number of problems with the justification of a complete prohibition on teachers’ freedom to strike, there is nevertheless a compelling case to be made for changing the status of primary education from non-essential to essential during periods of time when teachers’ strikes induce prolonged interruption of service. I develop a defense of the essentialness of education according to the harm-based criterion and, furthermore, discuss why a teachers’ strike, in certain contexts, will indeed cause harm to the population at large. I close by defending my context contingency idea against potential objections.
1. Introduction

Essential services are commonly defined as those services whose interruption might inflict substantial harm on the population at large. For example, police, firefighters, and emergency medical professionals are paradigmatic cases of essential services providers. In recent years, however, some governments have resolved that primary formal education should be added to this list of essential services.\(^1\) The two main justifications behind this initiative are that, first, any prolonged *interruption* in the provision of primary education violates children’s right to such an education (which is typically, in turn, accorded status as a basic human right); and, secondly, that the *conflictual nature* of the strike itself causes morally significant harm to children and their families. The immediate practical implication of designating education an essential service is that workers tasked with providing this service will face new limitations, or even outright prohibitions, on their freedom to strike. As a consequence, we have the potential for a situation where the rights of workers are at odds with the rights of the population at large.

It is far from clear how we should settle conflicts between these sets of rights and, somewhat surprisingly, the normative literature on this subject is almost nonexistent. With very few exceptions, the ethics of workers strikes is itself an under-researched topic in normative political theory (MacFarlane 1981, Locke 1984, Smart 1985, Pérez Muñoz 2014, Gourevich 2016, Borman 2016). This scholastic oversight is even more noticeable if we look specifically at the academic discussion dealing with the case of workers’ strikes in the education sector. Furthermore, what academic debate does exist on that topic is predominantly developed in legal or economic, rather than normative, terms.\(^2\) This paper aims to fill this gap in the normative

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\(^1\) Whether education should be considered an essential service is a debate that takes place in varied contexts. To take an example: in some jurisdictions of Canada such as British Columbia and Quebec, public school teachers have a restricted right to strike based on this essential service justification. Similar arguments for limiting teachers’ right to strike have recently been put forth in other countries like Argentina, South Africa and Uruguay. For instance, in 2010, South Africa experienced a traumatic teachers’ strike that seriously affected the provision of public education. This event generated fierce political and academic debate on whether the government should designate public education as an essential service, therefore restricting teachers’ right to strike. Similarly, in 2015, in response to an ongoing teachers’ strike, the Uruguayan government issued a decree that designated public education an essential service. More recently, at the beginning of 2017, the Argentinean government appealed to the same arguments when discussing the possibility of limiting teachers’ right to strike.

literature on workers’ rights and essential services. It normatively discusses the possibility of designating public formal primary education an essential service.\(^3\) It argues that while there are a number of problems with the justification of a complete prohibition on teachers’ freedom to strike, there is nevertheless a compelling case to be made for changing the status of primary education from non-essential to essential during periods of time when teachers’ strikes induce prolonged interruption of service.

The main reason for this conclusion is that educators’ participation in strikes can negatively affect – in both the short and long term – children’s educational achievements. This effect will, in itself, beget negative follow-on consequences when it comes to children’s future access to other valuable goods and positions in society. Therefore, although this type of harm is not directly commensurate with the potential for immediate and irreparable harm resulting from the interruption of essential services as traditionally defined (e.g. police, health care), the interruption of education at the primary level may nevertheless result in morally significant harm that should be prevented. This argument is a provocative one in that it contradicts both the official position of the International Labour Office (ILO) as well as many pending and recently implemented pieces of legislation in countries around the world. It also clashes with most normative defenses of workers’ unrestricted right to strike.

The remainder of the article is divided into four sections. In Section 2, I dispense with some conceptual and definitional issues surrounding public education, the right to strike, and what we mean by the “essential” nature of a service. In particular, I examine both the right-based and the harm-based approach to understanding the concept of essentialness. I also somewhat briefly scrutinize and, ultimately, reject the right-based approach to understanding the essential nature of public education. In Section 3, I deal at length with the harm-based approach and outline how a prolonged teacher strike can in some contexts create harm for the population at large. This context contingent aspect of a strike’s harm-causing tendencies in the public education sector serves as a sort of fulcrum with which we can arbitrate between the starker examples of the economic debate see Baker (2013), Belot and Webbink (2010), Cowen and Strunk (2015), Frandsen (2016), Hall, Lacombe and Pruitt (2017), Johnson (2011), and Lovenheim and Willen (2016).

\(^3\) In this paper I use “education” and “formal schooling” synonymously. My focus is on the question of whether or not the state should guarantee the provision of uninterrupted schooling at the primary level. It is a truism, however, that schooling is only a part of children’s education. For a brief discussion on the key differences between schooling and education see Brighouse (2006, pp. 6-9)
absolute positions on either side of this debate: the first being that public education is straightforwardly essential and the right to strike for teachers is thereby always forfeit; and the second being that education is non-essential and teachers should always have the leeway to strike in the pursuit of better professional opportunities, training, and compensation. I close in Section 4 by offering rejoinders to some potential objections to my argument.

2. Definitions and Concepts

Before undertaking the normative analysis, there are three major concepts to clarify: what constitutes the right to strike; what forms of education will be taken into consideration; and what do we mean by the “essentialness” of a service, whether in terms of its potential to infringe on the rights of the population at large or its potential to inflict harm on this same group.

2.1. Right to Strike

The first concept is the freedom or right to strike. Because the standing literature offers a sufficient conceptual and analytical basis for the purposes of this paper (MacFarlane, 1981; Locke, 1984; Gourevich, 2016), I will be brief. The right to strike can be defined as “the right that workers claim to refuse to perform work they have agreed to do while retaining a right to the job” (Gourevich 2016, p. 309). Three key elements define this right. First, workers possess the freedom to withhold their work; that is, under specific circumstances, workers are free to stop performing their jobs. Second, this right implies that workers have the freedom to withhold their labor without losing their job (Locke 1984, p.178, 181). Finally, the right to strike is typically understood to be a collective, not an individual right. As MacFarlane (1981, p. 20) points out, “an individual can neither decide to strike, nor take strike actions except in association with others.” It is a right that can only be exercised collectively (Locke 1984; Waas 2014, p. 14).

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4 For the purposes of this paper I use the terms “freedom” and “right” interchangeably. However, it is important to keep in mind that the legal literature distinguishes between both terms. For a discussion of this distinction see, in particular, Novitz (2003) and Waas (2014).

5 However, as Waas (2014, p.8) suggests, legal scholars disagree about who, exactly, bears the right to strike. For instance, it is not clear “whether the right of a trade union derives from the right of individual workers to strike or whether, on the contrary, the right of workers to strike is derived from the trade union’s right” (p. 8).
In legal terms, the definition of the right to strike varies from jurisdiction to jurisdiction. Many jurisdictions do not legally define strike actions in explicit fashion (Waas 2014, pp.3-5). However, there are two fundamental elements that appear in several statutory definitions around the world: stoppage of work and concerted action. While some definitions do not take into consideration the purpose of the action, others assume that the objective is to induce “employers to accept or reject terms or conditions of employment” (Waas 2014, p.4). In some other jurisdictions (i.e. Austria, Finland, Germany, Hungary, Israel, Italy, and Spain) there is no statutory definition of strike. Instead, the definition is developed through the accumulation of case law. It is worth noticing that jurisdictions vary somewhat considerably in terms of the range of legally permissible motivations for strike activities. While in some countries (i.e. Uruguay) strikes can legally pursue almost any purpose, in other countries (i.e. United Kingdom) strikes are legally protected only for specific objectives such as a trade dispute.

2.2. Education

Education, or more specifically schooling, is a service with singular characteristics. There are three aspects that are relevant for this paper. First, public primary education is a service with a wide (almost universal) scope in most countries (UNESCO, 2012). This fact differentiates public primary education from other public services with more limited coverage and lower frequency of usage by the citizenry. For instance, the momentary suspension of activities in the service of civil registry and identification will certainly produce inconveniences for an important number of people. But the proportion of the population ultimately affected by employers of the civic registry office is much smaller than the one affected by strikes in public primary schools. Second, primary education is mandatory in most countries (UNESCO, 2012). Generally speaking, it consists of at least six years of schooling and children are expected to attend school daily. Third, and related to the previous point, compulsory education is believed to have several important consequences for key quality-of-life variables. Let me mention just a few examples: while some studies suggest that compulsory education increases economic growth (Eckstein and Zilcha 1994), annual adult earnings (Angrist and Krueger, 1991; Acemoglu and Angrist, 2001) and life expectancy (Lleras-Muney, 2005), others argue that it may contribute to reduce wage
dispersion (Brunello et al., 2009) and even reduce the probability of incarceration (Lochner and Moretti, 2004). All these characteristics make education a crucial service for contemporary societies.

2.3. Essential Services: two justifications

According to the International Labor Office (ILO), essential services are those “services whose interruption could endanger the life, personal safety or health of the whole or part of the population” (ILO 2006, p. 112). For example, a stoppage of police service or emergency health services is likely to produce serious and immediate problems for the whole or part of the population. In order to identify an essential service, it is crucial to determine whether or not there exists a “reasonable probability and not a mere possibility” that the interruption of a service produces serious harm or violates a person’s rights (Pillay 2012, p. 807). While many democratic governments have declined to designate education as being essential – thereby protecting the right of teachers to strike – some others take the view that strikes in the education sector interfere with the regular provision of important services to children. Proponents of this latter position have adopted either of two justifications for this essential designation, the first of which conceives of “essentialness” as being tied to the protection of the rights of the population at large.

In general, the right-based justification asserts that the right to service provision for the population at large allows for restrictions on essential service workers' freedom to strike. Our right to not be hurt or harmed by others justifies a complete restriction on, for example, policemen's freedom to strike. That particular right supersedes policemen's right to strike. Similarly, some argue that children's right to be educated – which enjoys a universal human right status – supersedes teachers' right to strike (Horsten and le Grange, 2012). Children's right

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6 There are two additional arguments in favor of regulating teachers’ right to strike that I will not consider here. The first one asserts that teachers’ strikes are “unprofessional.” That is, teachers’ strikes go against what the profession itself perceives as its main responsibility: to teach students. Strike actions can be “subversive of the teacher-pupil relationship, based as it is on the twin concepts of service and concern” (MacFarlane’s (1981, p.140). For a critical discussion of this argument see Lieberman (1965 and Liesch (1968). A second argument, says that public educators, by virtue of being public employees, should not have a right to strike. The thought is that public employees' special relationship to the state and the government justifies particular labour rights arrangements. The arguments cannot be developed here in detail, but are widely discussed in the literature (i.e. Burton and Krider, 1970; Malin, 1993; Novitz, 2003; Younger, 2008). In this paper, I focus on the harm-based and right-based arguments. I do this because the arguments for limiting workers’ right to strike in which I am the most interested are those based on essential service.
to education is recognized by various domestic, regional and international legal instruments ranging from international treaties and constitutional laws to accumulated case law developed in legal court proceedings. To see this, consider the multiple international agreements that have been signed and ratified by most countries around the world. The Universal Declaration of Human Rights (article 26) establishes that free education (elementary formal education, in particular) is a right for every person. Likewise, the United Nations Convention on the Rights of the Child (articles 28 and 29) states that all children have a right to basic education. In other legally binding treaties, the human right to education is understood as crucial and “indispensable” for the promotion of other human rights. Some authors believe that the 1966 International Covenant of Economic, Social and Cultural Rights (particularly its article 13) is the key international instrument promoting a right to education (Beiter 2006, p. 39). Among other things, this international instrument recognizes the “right of everyone to education”, that “primary education shall be compulsory and available free to all”, and that “the development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.” This covenant has so far been ratified by 165 countries and very similar provisions can be found in the constitutions of many individual countries as well.

Some believe that as long as teachers’ right to strike runs the risk of eroding children’s right to education, the former should be restricted. States have a positive duty to provide the necessary human and non-human resources to set up and maintain an education system (Beiter 2006, p.38). Nevertheless, there is considerable controversy surrounding the nature and determination of this right (Hodgson 1998; Spring 2000; Verheyde 2006; McCowan 2010, 2013). To begin with, it is a difficult normative task to identify the precise moral grounds; that is, to determine the basis of our moral entitlement to that right. Indeed, this is something an ongoing concern in the normative debate about human rights in general (Griffin 2008). Second, there is an important distinction to be made between the “right to education” and the “rights in education” as well as, furthermore, between these two formulations and the “rights through

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9 See http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx
education” (Verheyde 2006; McCowan 2010, p.510). The first refers to the right to “have access to educational experiences or institutions”, the second relates to those “rights that individuals hold within the educational experience or institution” and the third identifies these rights as “a necessary prerequisite to the exercising and defending of one’s own and others’ rights” (McCowan 2012, p.70). Across these distinctions rests a broader point: the potentially detrimental effects of teachers’ strikes are not limited only to children’s access to formal education, but also on the way they experience schooling and in how they may ultimately go on to exercise other human rights.

The second justification is harm-based. It asserts that a given service can be considered essential when its non-provision will likely cause significant harm. Work stoppages in essential services can likely lead to bodily or other personal harm to the population at large. If my house catches fire and firefighters are on strike, there is a high probability that I may suffer serious harm. A similar result is expected if I have a stroke during a neurologists’ strike, or if police cease patrolling the city where I live. Striking workers do not directly cause the harm, but their work stoppage does indirectly facilitate the occurrence of that harm. John Stuart Mill’s harm principle provides a simple account of both the perpetrated wrong as well as the grounds for penalizing these actions. According to Mill, “the only purpose for which power can be rightly exercised over any member of a civilized community against his will is to prevent harm to others.” The harm principle is what Feinberg delineates as a “liberty-limiting principle.” According to Feinberg (1984, p.215), harm “refers to those states of set-back interest that are the consequence of wrongful acts or omissions by others.” Only wrongful setbacks to an individual or group’s interests count as harmful. As Feinberg says, the prevention of harm to third parties – or the harm to others principle – always constitutes a morally relevant justification of state coercion. Differences and difficulties, however, emerge when it comes to determining whether harm constitutes the “only valid liberty-limiting principle” (Feinberg 1999, p. IX).

Work stoppages in essential services do not constitute necessary and sufficient conditions for harm. A policemen’s strike is neither a necessary nor a sufficient condition for the occurrence

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of crime. Likewise, emergency doctors’ strikes do not necessarily and sufficiently lead to patients’ death in emergency care. However, these are facilitating factors for the occurrence of harm. Because an unrestricted freedom to strike for police officers can potentially produce mobs and other social problems that affect the security and well-being of the population at large, we place a moral obligation on those who provide those services.

The harm principle does not need to demonstrate that the non-prohibition of a given action will always produce considerable harm. Rather, it simply needs to show that banning a particular action will prevent potential damages. It is possible to identify, for instance, a police or firefighters strike that does not lead to tragic results. But unique cases do not invalidate the general rule that limitations on the right to strike by firefighters and police will prevent harm. This is what Ripstein (2006, p.222) calls an "indirect strategy". That is, a strategy for allowing the harm principle to justify general prohibition of a particular course of action even when we can find examples of that actions that do not produce actual harm. The high probability that a given action causes harm is a sufficient reason to regulate or prohibit such action in order to keep risk levels at morally acceptable levels.\footnote{Ripstein (2006 and 2007, p. 195) argues that the indirect strategy is underinclusive by failing to “identify a significant class of wrongs that a liberal state would want to prohibit: harmless trespasses against person and property.” Given the scope of this manuscript, it is impossible to examine this possibility in detail. For a reply to Ripstein’s argument, see Bird (2007, pp. 181-182). For my present purpose, it suffices to say that strikes in essential services are analogous to the case of dangerous driving and not to harmless trespasses against persons and property. I can drive home under the influence of alcohol or drugs without causing any harm. But that specific instance, where I did not cause harm at all, does not invalidate a general prohibition on dangerous driving. As Ripstein (2006, p. 222) recognizes, “the only practicable way of reducing the harm caused by dangerous driving is to prohibit it outright, rather than waiting for harm to actually occur.” Nonetheless, Ripstein believes that this kind of situation cannot be generalized to justify coercion over harmless wrongdoing.}

On the subject of teachers’ strikes, in particular, the case could be made that there are two types of harm inflicted upon students, both in the short and long terms. On the one hand, teachers’ strikes have an immediate negative impact on people’s lives. For example, the consequences of children not attending school because of a strike go beyond the straightforwardly deleterious educative effects. Schools, especially for poor parents, also serve as a form of childcare that is crucial for parents to participate in the labor market. Without school activities, many children are destined to stay at home by themselves or obligate their parents to withdraw from the labor market in order to take care of them (Appleton 1984, p.870). As Horsten and Le Grange (2012, p. 521) argue, shuttered schools may have negative implications
on “children’s physical health and social well-being” since that situation leaves many children without supervision. Strikes in essential services typically have the worst impact on those who cannot afford alternative services (Morris 1986, p. 9; Pillay 2012, p.819).

On the other hand, we could argue that the main harm is a cumulative one that mounts over time. Children who are exposed to continued loss of classes and who are, therefore, not receiving education during sustained periods of time, will be permanently handicapped upon the completion of their studies: the lacunae is set. That will negatively affect their opportunities in the future. In particular, this is problematic when the strikes take place in the public system because large swathes of every society are typically not in possession of the resources required to send children to private or parochial schools. MacFarlane (1981, p.140) summarizes these ideas as follow: “though the withdrawal of education-facilities has no physical adverse effects, its seriousness cannot be doubted. In some cases it may result in children failing to achieve the academic standards. They require qualifying for further education or for particular jobs, to their permanence disadvantage. In others, children with working mothers or with only one parent, may be forced to spend strike days on the streets or their parents to take time off from work.” This interpretation indicates that teachers’ strikes might produce a morally relevant type of harm that should not be easily dismissed.

To compare directly, note that these two justifications – right-based and harm-based – are not equally compelling as foundations for arguing for the essentialness of a given service. Although both face a problem of indeterminateness, this difficulty is particularly acute for the right-based justification. A first concern focuses on the indeterminateness of the relationship between human rights and education. It is uncertain what each child is owed by virtue of holding a right to education. Yet more uncertain is how teachers’ strikes might precisely affect that right. It is plausible that teachers’ strikes disrupt regular children’s access to education. But that does not necessarily then imply that their right to education is violated or disrespected (Gibson 1983, p.114). We require some additional metric with which to assess when work stoppages do (and do not) constitute a violation of children’s right to education. To offer an example: it is uncertain how long a teachers’ strike should last before it can be reasonably labeled an impermissible disruption of children’s right to education.
Secondly, we should be concerned that the indeterminateness of human rights in education may not only fail in providing guidance for action, but may also create an environment of limited demands. Like other important human rights, the right to education must specify, at least in approximate terms, at what level of education we are entitled. Otherwise, when weighed against other – perhaps competing – rights, this right becomes too indeterminate to prioritize (Griffin 2008, p.100). There are myriad important social goals and the right to education must be evaluated in comparison to these other valuable goals. The right-based approach, given these problems of indeterminateness, does not constitute a suitable foundation upon which to delineate education an essential service.

Instead, I would venture the harm-based argument as the more plausible perspective on how teachers’ strikes may likely cause morally significant harm to other persons. After all, the prevention of harm is an important and popular reason that the state uses to justify restrictions on some workers’ right to strike. Only two things need to be determined in order to satisfy the harm principle (Bird 2007, p.181). First, we need to establish that a failure in enforcing a prohibition of this kind of action will cause serious harm. Second, we need to ensure that the enforcement of this prohibition will not cause a greater harm. In what follows I will focus mainly on the harm-based justification for essential services.

3. Harm, Context Contingency, and the Right to Strike

In this section of the paper, I weigh whether a strike of education workers is capable of producing morally relevant harm (and, in particular, if this level of harm supersedes any ancillary benefits of the strike itself) as well as whether there are particular contexts in which a strike’s potential to inflict harm is larger than in others. Ultimately, I will argue for a more fluid understanding of the essentialness of education (rooted in the harm-based justification) and the rights of teachers than either of the extreme positions outlined in the introductory section.
4.1. Do Strikes in Education Produce Harm?

For advocates of the essentialness of education, the burden of the proof clearly lies with the possibility of demonstrating that teachers’ strikes may cause morally significant harm. To be able to do this, however, we require some heuristic or metric by which to judge whether or not the inconveniences and damages caused by a teachers’ strike sufficiently constitute morally relevant harm. To address this problem we must navigate a difficult empirical and moral terrain. On the one hand, we must be able to define at what point an inconvenience becomes a morally significant harm; on the other hand, we require some means of relating the act of the strike itself to the variables we might employ as proxies for this morally significant harm. Terry Moe, for instance, has repeatedly argued that teachers’ collective action in the U.S does not directly aid in fulfilling the purpose of a public school system, namely to “educate children.” Since this is the main point of public schools, “everything about the public schools, from how they are organized to how they are staffed to how they are funded, should be decided with the best interests of children in mind” (Moe 2006, p. 79). Without taking a position on the ongoing debate about what the orienting goal of education should be, it is safe to assume for present purposes that justice in education at least demands elevating students to a certain level of educational achievement.

Although there is a growing empirical literature on the effect that teachers’ collective action on these educational achievement outcomes, research on the particular effect of teachers’ strikes on students is still scarce. The studies of Belot and Webbink (2010), Johnson (2011) and Baker (2013) constitute three efforts to estimate that effect; they all conclude that strikes have deleterious consequences for student achievement. In their evaluation of the long-term effects of teachers’ strikes in Belgium, Belot and Webbink (2010) found strikes that lasted from May to November of 1990 in the Francophone community negatively affected the development of the students involved, leading to higher grade-level repetition rates. Similarly, Johnson (2011) and Baker (2013) show that primary teachers’ strikes (on average 10 days) in the province of Ontario, Canada, had a significantly negative effect on the scores of students in both reading and math who experienced the strikes. Johnson (2011) suggests that the negative impact of 10-days strikes (or longer) is significantly higher for students who come from households with lower educative levels. Baker (2013, pp.1015-1016) shows that strikes that last 10 instructional days or
more have significant negative effects on student performance in math, where “the impact of a strike in grade 6 is a reduction in test scores of 29% of the standard deviation of scores across school/grade cohorts.” As Baker (2013, p. 1019) correctly points out, these findings are consistent with what we know about teacher absenteeism and student achievement (Miller, Murnane, and Willett, 2008; Herrmann and Rockoff, 2012; Roby, 2013; Tingle et al, 2012). For instance, Miller, Murnane, and Willett (2008, p.196) find a non-trivial effect of teacher absences. They estimate that “10 additional days of teacher absence reduce student achievement in fourth-grade mathematics” and this effect is “large enough to be of policy relevance.” Likewise, Tingle et al (2012, p.377) found a negative relationship between teacher absences and standardized achievement scores: “the more teacher absence, the lower their student standardized achievement scores.”

Other types of heuristics or metrics are equally helpful. For example, the conflictual nature of strikes – not only at the hands of teachers, but across all types of workers – allow for the potential of disorder and violence. Under certain circumstances strikes can produce some acts of violence among striking and non-striking workers as well as confrontations between striking workers and the police (Horsten and Le Grange 2012, p.514). Another form of potential harm produced by educators’ strikes is related to childcare problems that result when teachers strike. Many public schools provide children not only with education, but also childcare and food assistance (Appleton 1984, p.870; MacFarlane 1981, p.140). Educators’ strikes affect the childcare arrangements of schoolchildren to the point that they can be costly for families (in particular for single, employed mothers). In sum, it seems reasonably clear that the cessation of education services will, indeed, produce harm in the population at large.

Advocates for the non-essential nature of education, however, would argue that strikes also produce benefits and these benefits may well overwhelm the harm. From this perspective, there are four main benefits to children’s education associated with educators’ freedom to strike. First, strikes are a useful instrument to improve educators’ working conditions, which indirectly

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12 These more recent empirical findings argue against an older literature that asserts teachers’ strikes are never sufficiently detrimental to the population at large. Wellington and Winter (1970, pp. 442), for example, claim that “a strike by teachers may never create an immediate danger to public health and welfare” while Appleton (1984, pp. 855-856) argues that strikes in public education produce “massive inconvenience without immediate emergency.” From the presentation of the more empirically-minded studies above as well as additional examples to follow, I hope to demonstrate that these older dismissals are perhaps too categorical in their assertions.
may help to improve children’s education. The protection of children’s right to education is not well served by prohibiting teachers from using the collective bargain instrument to secure better working conditions (Gibson 1983, p.114). The thought here is that better working conditions for educators will translate in better educational conditions for students (Lindy 2011, p.1143). Another potential benefit of teachers’ strikes is that this form of collective action is an important and effective instrument to oppose reforms in the educative curricula that are detrimental to students’ education (Lindy 2011, p. 1144). Put differently, strikes are powerful instruments to resist educational reforms that are driven by non-educational motives.

Third, because strikes have been historically associated with fights for social rights and better living conditions for people in general, they may, in themselves, be considered an educative instrument; that is, as an opportunity to teach students how to fight for their rights. In this view, the example of a strike teaches students important values and useful lessons such as how to organize against regulation and policies that might be unfair. Finally, strikes in general can be thought of as a crucial instrument in the fight against social domination and arbitrary power (Hall 1987, p.165; Gourevitch 2016). According to Gourevitch (2016, p. 308), a right to strike should be understood as a “right of human freedom claimed against the social domination that the typical modern worker experiences.” Drawing on the republican tradition, Gourevitch believes that this right is fundamentally a political right to resist social domination. It is a right to resist being subject to the “uncontrolled or arbitrary power of another” (Gourevitch 2016, p. 312). From recognizing a right to strike, Gourevitch (2016, p.316) says, we should not conclude that “employers have not right to use their property to pursue their own interests. It just means employers have not rights to use their property in ways that allow them to exploit workers.” Since it is impermissible to exploit workers, a right to strike is justified as an instrument to resist arbitrary power in the workplace and in the labor market in general. It is a powerful and immediate instrument to contest employers’ arbitrary power. Strikes in education sector are not an exception to that idea; rather, they are a potentially powerful tool that militates against domination.13

Although highly relevant, these objections to the harm-causing potentiality of teachers’ strikes can each be straightforwardly countered. For example, in order to be persuasive, the idea

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13 It is unclear how the ideal of non-domination can be applied in the provision of education. See Macleod (2015) for a philosophical discussion of the relationship between freedom from domination and educational justice.
that strikes can themselves constitute an educational device needs to do more than merely illustrate that the implementation of strikes requires significant collective efforts as well as values and personal virtues. It must also explain on a fundamental level why these values and personal virtues are achievable and most effectively transmitted only through the indirect and direct participation in strikes. But that is highly unlikely. We should expect that participation in various other social movements and forms of political participation should just as easily transmit lessons and values that are very similar to those gleaned from strikes.

Similarly, it is unclear that students’ education is improved as a by-product of teachers achieving better working conditions through strikes and other forms of collective bargaining. There are several studies aimed to estimate the impacts of collective action on short and mid-term variables such as district expenditures, teacher salaries, achievement tests and graduation rates. In a recent review of studies on teachers’ unions in the United States, Cohen and Strunk (2015, p.1) found that “teacher unionization and union strength are associated with increases in district expenditures and teacher salaries, particularly salaries for experienced teachers.” According to these authors, the empirical evidence supports the rent-seeking hypothesis. That is the idea that “teachers' unions prefer different inputs than parents do because the union's objective is not purely maximization of student achievement” (Hoxby 1996, p.676-675). Some authors believe that teachers’ unions goal of negotiating increases in their own salaries and other working conditions (smaller classes, fewer courses, friendlier methods of evaluation, etc.) can come at the expense of students’ interests (Moe 2009, 2011). For example, in a recent study, Lovenheim and Willén (2016) analyze the effect of teacher collective bargaining on the long-run labor market and student achievement. Their estimates show that exposure to duty-to-bargain laws may cause negative long-term labor market consequences for students. In particular, they find that teacher collective bargaining negatively affects students’ future labor market outcomes: “exposure to a duty-to-bargain law for all of one’s grade school years lowers earnings by $800, or 1.95%” (Lovenheim and Willén 2016, p.29). Although the literature is not entirely conclusive, the argument that strikes and collective bargaining have a beneficial impact on student achievement is highly tenuous.

There is also a straightforward objection to the non-domination benefits of strikes. According to that argument, strikes constitute an important against social domination. But it is
fairly obvious that strikes can also produce arbitrary interference. In contrast to Gourevich, we can argue that a conception of justice as minimizing domination (or maximizing non-domination) provides good reasons to worry about potential misuse of the right to strike. Gourevitch’s argument is compelling for those situations in which work stoppage exclusively affects employers; in this case, workers’ stoppage results in nothing more than a lack of profitability for the employer. The right to strike is a mechanism to limit employers’ arbitrary interference. But the situation is dramatically different when workers fight employers’ arbitrary interference by arbitrarily interfering with other parties. The right to strike imposes inconveniences on people who are not party to the direct labor dispute between workers and employers (MacFarlane 1981, p.126). This is particularly true for the case of the provision of essential services and any other bargaining situation in which there are third parties affected by the exercise of the right to strike.

As regards essential services, we could argue that access to essential services is vital in order to minimize domination in the population at large. A population that does not have access to some essential services is likely to be dominated by others. Since essential services are crucial for our lives, those who provide those services may seriously interfere in our lives by interrupting the provision of those services. To take an example: emergency doctors have the ability to produce arbitrary interference and, as a consequence, may inadvertently dominate many people if they decide to stop providing emergency services. Similarly, the freedom to strike in the education sector may work in both ways. While under certain circumstances it can help to minimize domination, in other situations it can create some forms of arbitrary interference that are difficult to justify. I now turn to a consideration of context as a way of parsing out the tradeoffs between the harm of a strike and the right of the workers.

4.2. Context Contingency and Teachers’ Rights

In light of the foregoing discussion, let us assume that teachers’ do, indeed, result in harm to students’ educational achievement. The question is, then, what does this type of harm justify? In practical terms, to what extent does this fact justify a restriction on teachers’ right to strike? I would argue that it does not, in principle, justify an absolute restriction. Despite the evidence presented to this point, it is still difficult to argue that the type of harm associated with teachers’ strikes on public primary education is commensurate with those paradigmatic cases of essential
services such as firefighters, police and emergency doctors. Strikes in education do not produce an immediate and irreparable harm. However, they may cause considerable harm for the opportunities of many children, particularly the most socioeconomically vulnerable. Because there may be considerable costs associated with prolonged teachers’ strikes, in particular, primary public education may at times verge out of non-essential status and into essential status. This might mean that governments should be able to regulate – but perhaps not restrict outright – teachers’ ability to strike once the collective bargaining process turns harmful for children’s education. Put differently, governments should regulate teachers’ strikes in some contexts, but not in others. I now turn to what I call a context contingency defense of education as an essential service and, following from that, argue for the regulation of strikes in the provision of this service.

I begin with the idea that for many types of public services, the essential vs. non-essential dichotomy is too stark and unrealistic; put differently, I would suggest we think of essentialness in dynamic terms. If the essentialness of a given service always depends on its potential to inflict harm on the population at large (ILO 2006, Pillay 2012), then we must wrestle with the fact that external environments or contexts mechanically shape this potentiality. Consider, for example, one important context: the temporal. A non-essential service’s provision can switch into essential status when its prolonged interruption endangers the personal safety of part or the whole population (ILO 2006, p. 119). In this respect, there exists a classical example: garbage collection. The interruption of this particular service is a major sanitary hazard – but only if it is discontinued for a sufficiently lengthy period of time. There are no major problems if garbage collection workers decide to strike for a day or two, but a prolonged non-provision can quickly become hazardous to people's health. There is a point of inflection in the essential nature of this service. Contingent upon the context of time, garbage collection verges out of the non-essential and into the essential category.

Another example of context dependency is jurisdictional. As Morris (1986, p.8) suggests, there can be very large differences between countries (or states, cities, municipalities, etc.) when defining which services count as essential and which do not. The reason for this is simple: there are services whose provision is more essential in some jurisdictions than for others. Among other things, this context depends on variations in terms of population, environment, geography, and
technology. In consequence, as Pillay (2012, p.808) correctly suggests, “whether a service is essential is a question of facts” derived from a setting’s context. Interpreting different sets of contextual facts can lead analysts to differing conclusions about the essentialness of a given service in different – and dissimilar – jurisdictions. Across the United States, for example, certain types of flood relief may be essential across the southern coastline of Louisiana, but inessential in the mountains of Colorado. Emergency earthquake assistance may be considered essential in parts of California that are especially susceptible to earthquakes, but inessential throughout large swaths of Midwestern states, where earthquakes tend not to occur or, when they do, cause comparatively less extensive damage to property and homes.

Using this same reasoning, we could claim that the prolonged discontinuity of formal education harms people for multiple reasons. We could also argue that education’s importance and functions – and, thus, its essentialness – varies considerably across jurisdictions. The problem with the more traditional, dichotomous conception of essential service is that it does not take some serious measure of the contextual contingency of the action of striking. While it is true that teachers’ strikes do not cause immediate irreparable public harm, it may be also plausible that under certain circumstances this form of collective action does actually cause a form of non-life threatening irreparable public harm. What this possibility implies is that public education should neither be designed a priori as either an essential service or a non-essential one. Instead, it should be envisioned as an important service whose non-provision can cause morally significant harm to many people. Thus, if I am correct, ILO’s (2006, p. 127) more categorical argument that “education sector does not constitute an essential service” should be rejected.

While it seems logical to object to a full restriction on educators’ freedom to strike, it is well beyond the scope of this article to provide a concrete policy proposal to put this in practice. Some authors have already examined the problems associated with different forms of regulating the provision of essential services (i.e. Morris 1986, pp. 186-207). My goal is simply to explain why the essential service argument could in principle justify regulations – rather than all-out restrictions – on teachers’ freedom to strike. The normative implications associated with different forms of regulating that freedom is, however, a topic for another study. I now turn to a discussion of potential objections to my line of reasoning up to this point.
5. Addressing Potential Objections

So far I have argued that – both in principle and under certain circumstances – there is a compelling harm-based argument for designating primary public education an essential service. This does not imply that primary education should always be assigned that status; but rather, that primary education is a service that could move between the categories of non-essential and essential contingent on specific contexts. This position is susceptible to at least four objections. First, it might be said that this argument is guilty of the golden mean fallacy; that is, I might simply be striking a middle ground or mean position between two extreme positions, thereby creating the impression of reasonableness. I argued that either a full restriction on teachers’ right to strike or the absolute freedom to strike are both problematic. Since a partial restriction would sit between these two extremes, then, it seems valid more through its construction than its actual substance.

Notice, however, that this is not what I am trying to defend in this paper. I do not believe that the extreme positions (full restriction vs absolute freedom) are equally sound. My argument is not that the correct course of action must lie between these two opposing sides since offer positions of some merit. Put differently, I am not claiming that my argument implies a compromise between two extreme positions and that therefore it must be better than the two extremes. Rather, I am arguing that the harm-based justification is the substantive reason for accepting that mean position – not the averageness of the position itself. I have presented harm-based reasons to regulate teachers’ freedom to strike, although these reasons do not justify a complete restriction of that freedom or even a partial restriction in all cases; the extent of restrictions are contingent upon the level of harm resulting from teachers’ work stoppages. This line of reasoning is independent of the fact that the course of action suggested lies in the middle of two extreme positions.

A second objection might be that because there are plenty of factors affecting children’s education, it would be unfair to exclusively single out the potential negative effects arising from teachers’ strikes. Although it is indisputable that multiple factors affect children’s education, it does not follow from this supposition that we are somehow unobligated to deal with any factors we can alter in some positive and meaningful way. Any such alteration needs to be supported by the necessary weighing of benefits and costs, regardless of the action under consideration. To
justify regulations on teachers’ freedom to strike, all that is required to demonstrate is that this is a course of action where the benefits are likely to outweigh the costs.

Third, it may be objected that we have created a slippery slope: once we designate education an essential service in certain contexts, perhaps now we run the risk of delineating a whole host of other inessential services as being potentially essential. With the same set of criteria we drew on to argue for the essentialness of education, we could extend the claim to a good number of other services whose interruption might adversely affect children’s future educational achievement and job prospects. Pushed to extremes, this type of reasoning could have terrible consequences on workers’ freedom to strike and even, perhaps, dovetail with other rights accorded to these workers. If potential harm is the criterion to distinguish essential from non-essential services, then we may end up incorporating many services into the former category.

However, in order to be persuasive, proponents of this "slippery-slope" objection would need to reject the entire harm-based justification for essential service. By definition, that justification only incorporates services into the essential category once a stoppage in the provision of a given service for a certain period causes – or it likely to cause – morally significant harm. In consequence, this criterion does not lead to a universal definition of which services are essential and which are non-essential. Numerous factors (i.e. geographical, environmental, technological, etc.) define when the continuous provision of a given service should be considered essential (Morris 1983, p.8). Recall that my argument here is not that primary public education should be included in the category of essential services in the same way that, say police or emergency services are included. Rather, my point is a much more modest one: contingent upon certain contexts of non-provision, it is justifiable to designate primary public education an essential service and, as a consequence, regulate teachers’ right to strike. The same reasoning applies to the provision of any other service that can produce significant harm. The justification advanced here always implies a balance between the costs and benefits of restricting workers’ freedom. For example, we have good reasons to believe that the essential service argument does not justify a complete restriction on people’s occupational freedom. Even if we may need more firefighters, it does not follow from the harm-based justification that the state may permissibly force people to serve as firefighters. The reason for
this being the costs associated with this type of policy likely outweigh the benefits of having marginally more firefighters. Similarly, the harm-based argument for restricting teachers’ freedom to strike is justified as long as the benefits of adopting that measure outweigh the costs of limiting teachers’ freedom.

Finally, it might be argued that instead of restricting teachers’ freedom to strike, states should adopt a scheme of minimum services. According to ILO (2006, para. 625), the declaration of minimum services for the education sector is allowable exclusively in the case of long duration strikes. In particular, ILO (2006, para.606) argues that the “establishment of minimum services in the case of strike action should only be possible” in the case of “essential services in the strict sense of the term” and in “services which are not essential in the strict sense of the term but where the extent and duration of a strike might be such as to result in an acute national crisis endangering the normal living conditions of the population.” Two elements define the notion of minimum services. First, a service is minimum when its workers should not normally face a complete prohibition on their right to strike. In other words, a prohibition of the freedom to strike would be unjustified in services that fell within the category of minimum services. Second, minimum services are those services that “without calling into question the right to strike of the large majority of workers, one might consider ensuring that users’ basic needs are met or that facilities operate safely or without interruption” (ILO, 2006, para 607). Minimum services are set to provide operations that are “strictly necessary to avoid endangering the life or normal living conditions of the whole or part of the population” (ILO, 2006, para 607).

However, the implementation of minimum services in the education sector is much more problematic than it appears at first sight. To begin, it is challenging to set a baseline operational threshold for primary public education that both grants a freedom to strike to a majority of teachers and also attends to children’s main needs. In other services it is easier to distinguish between operations that are strictly necessary for avoiding harm from less urgent ones. As Pillay (2012, p. 814) argues, “inevitably, services have essential, inessential and not always essential components.” For example, while some civil registry workers are on strike, others can still exclusively provide urgent services such as issuing passports or visas. But it is hard to imagine an adaptation of the minimum service logic to the education sector. One commonly suggested solution is that those schools whose educative activities are interrupted due to a teachers’ strike
continue delivering other services such as providing food for students and some form of childcare. Even though this decreases the costs of strikes for families, this type of minimum service does not address the educational deficits created by educators’ strike. Put another way, the implementation of a minimum services in the education sector does not protect children from the main harms from which we seek to protect them.

6. Discussion

This paper discussed to what extent the essential service argument could be applied to the case of primary educators’ strikes and, in particular, examined the merits of various arguments used in support and opposition. It argued that – contingent upon certain contexts – we might have good cause to apply the essential service justification in regulating the provision of public primary education. The crucial reason is that prolonged or recurrent primary public teachers’ strikes may negatively affect children’s educational achievement and, in consequence, their future opportunities. The essential service justification is empirically dependent on the likelihood of significant harm. Based on what we know about the effect of teachers’ strikes and teacher absenteeism on students’ achievement, we should be concerned about the effects that prolonged and recurrent strikes may have on students. This does not mean that primary education is comparable to other paradigmatic essential services such as police, firefighters or emergency doctors. Instead, it means that primary education – contrary to what ILO and others say – should be conceived as a non-essential service whose prolonged and recurrent interruption could verge into essential territory.

The freedom to strike has been historically defended and conceived as an instrument to further a progressive agenda. It plays a crucial role in the history of labour movements. By leveling the playing field of power between the employers and the employed, workers’ freedom to strike coincides with the redistribution of resources and the improvement of workers’ labour conditions. Although there are many good reasons to believe that labour unions and the exercise of the freedom to strike are favorable to the promotion of a more egalitarian and progressive agenda, this does not always need to be the case. As it happens with other instruments, a misuse of the freedom to strike can also militate against egalitarian and progressive goals. This is
particularly the case when strikes are adopted against the production or provision of some important services. Strikes in essential services can harm the population at large – in particular, some of its most vulnerable members.

References


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