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Collective Bargaining under the Meyers-Milias-Brown Act--Should Local Public Employees Have the Right to Strike

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Note

Collective Bargaining Under the Meyers-Milias-Brown Act—Should Local Public Employees Have the Right to Strike?

Public sector employment in California has expanded dramatically in recent years,[1] with corresponding increases both in public employee union membership[2] and in the number of public sector strikes.[3] Most strikes occur at the local level,[4] often curtailing the provision of essential public services and endangering the public health and safety.[5]

1. For example, in 1962, almost one of every six employed persons in California was a government worker, while in 1940 only one in ten, and in 1920 little more than one in 20 was so employed. O. POLAND, PUBLIC EMPLOYMENT IN CALIFORNIA 1 (1964). From 1963 to 1968 public employment rose 14% in California municipalities, 42% in California school districts, and 37% among state and local employees. de Gialluly, *Employment, Employee Organization, and Strike Trends in California Public Service*, 5 CAL. PUB. EMPLOYEE REL. 1, 1 (1970). By August 1983, the state employed 294,500 workers, while local governments at the city, county, and district level employed 999,700 workers. EMPLOYMENT DATA & RESEARCH DIV., EMPLOYMENT DEV. DEP'T, HEALTH & WELFARE AGENCY, CALIFORNIA LABOR MARKET BULLETIN: STATISTICAL SUPPLEMENT 6 (1983).

2. *See, e.g.*, de Gialluly, *supra* note 1, at 4 (from 1950 to 1962 union membership among state and local employees in California more than doubled); DIV. OF LAB. STATISTICS & RESEARCH, DEP'T OF INDUS. RELATIONS, UNION LABOR IN CALIFORNIA 1981 at 4 (1982) (between 1979 and 1981, California public employees' unions increased by 2,600 members to 193,100).

3. Although the number of public sector strikes in California has not increased in *every* year, statistics reflect a fairly steady overall increase. For example, 17 strikes occurred in the public sector in 1968 and 26 strikes occurred in the first nine months of 1969. de Gialluly, *supra* note 1, at 11. Three hundred and eighty-eight public sector strikes occurred between 1970 and 1980. Bogue & Stern, *An Analysis of 1979-80 Strikes in California's Public Sector*, 48 CAL. PUB. EMPLOYEE REL. 2, 3 (1981). In 1979 and 1980 there were, respectively, 83 and 51 strikes by public sector employees. DIV. OF LAB. STATISTICS & RESEARCH, DEP'T OF INDUS. RELATIONS, WORK STOPPAGES IN CALIFORNIA 1980 AND 1981 at 6 (1983) [hereinafter cited as WORK STOPPAGES IN CALIFORNIA].

4. In 1976, approximately 94% of public employee strikes were by local government employees. Comment, *Strikes by Public Employees: The Consequence of Legislative Inattention*, 20 SANTA CLARA L. REV. 945, 951 (1980). Only seven of the 83 public sector strikes in 1979, and two of the 51 in 1980, involved state employees. WORK STOPPAGES IN CALIFORNIA, *supra* note 3, at 6.

5. For example, San Diego public employees responsible for the maintainance of streets, electrical systems, and sewage and refuge disposal went on strike in 1970. *See* City of San Diego v. American Fed'n of State, County & Mun. Employees, Local 127, 8 Cal. App. 3d 308, 87 Cal. Rptr. 258 (1970). In 1976, a public employee strike in San Francisco

The common law clearly recognized the right of the sovereign to prohibit work stoppages or strikes by public employees.[6] California appellate courts have adopted this common law rule and insist that in the absence of an authorizing statute, public employees have no right to strike.[7] Using this approach, these courts have generally prohibited strikes by public employees.[8] In contrast, the California Supreme Court has explicitly declined to decide whether strikes by public employees are illegal.[9]

The court now faces another opportunity to resolve the issue in *County Sanitation District v. Los Angeles County Employees Association*.[10] Following a three-day strike by sanitation district employees, the superior court assessed tort damages against the union to compensate the district for overtime paid to employees who performed the

shut down the city's transit system. *See* City & County of San Francisco v. Evankovich, 69 Cal. App. 3d 41, 137 Cal. Rptr. 883 (1977). In addition, threatened or actual teacher strikes have interfered with the school year in many local districts. *See, e.g.,* San Diego Teachers Ass'n v. Superior Court, 24 Cal. 3d 1, 593 P.2d 838, 154 Cal. Rptr. 893 (1979).

6. *See, e.g.*, City of Detroit v. Division 26, Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees of Am., 332 Mich. 237, 248, 51 N.W.2d 228, 233 (1952) ("Under the common law . . . there is no right to strike on behalf of public employees."); City of New York v. De Lury, 23 N.Y.2d 175, 179, 243 N.E.2d 128, 131, 295 N.Y.S.2d 901, 905 (1968), *appeal dismissed*, 394 U.S. 455 (1969); City of Cleveland v. Division 268, Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees of Am., 41 Ohio Op. 236, 239, 90 N.E.2d 711, 714 (1949) ("For many years, strikes against the Government have been outlawed by special legislation and by common law."). For an extensive list of jurisdictions following the common law, see City of San Diego v. American Fed'n of State, County & Mun. Employees, Local 127, 8 Cal. App. 3d 308, 311, 87 Cal. Rptr. 258, 260 (1970).

7. Trustees of the Cal. State Colleges v. Local 1352, San Francisco State College Fed'n of Teachers, 13 Cal. App. 3d 863, 867, 92 Cal. Rptr. 134, 136 (1970) (California follows the common law rule that public employees do not have the right to strike in the absence of a statutory grant). *See* City & County of San Francisco v. Evankovich, 69 Cal. App. 3d 41, 49, 137 Cal. Rptr. 883, 888 (1977) (following *Crowley* and issuing an injunction); Crowley v. City & County of San Francisco, 64 Cal. App. 3d 450, 454, 134 Cal. Rptr. 533, 535 (1976) ("absent an authorizing statute, public employees in California do not have the right to strike").

8. *See, e.g.,* Stationary Eng'rs, Local 39 v. San Juan Suburban Water Dist., 90 Cal. App. 3d 796, 800, 153 Cal. Rptr. 666, 668 (1979) (refusing to reinstate striking workers discharged after failing to return to work); City & County of San Francisco v. Evankovich, 69 Cal. App. 3d 41, 49, 137 Cal. Rptr. 883, 888 (1977) (upholding trial court's issuance of preliminary injunction prohibiting strikes); City of San Diego v. American Fed'n of State, County & Mun. Employees, Local 127, 8 Cal. App. 3d 308, 317-18, 87 Cal. Rptr. 258, 264 (1970) (reversing trial court's denial of temporary injunction against strike); Almond v. County of Sacramento, 276 Cal. App. 2d 32, 36, 80 Cal. Rptr. 518, 521 (1969) (denying reinstatement of striking workers).

9. *See* International Bhd. of Elec. Workers, Local 1245 v. City of Gridley, 34 Cal. 3d 191, 199 n.7, 666 P.2d 960, 964 n.7, 193 Cal. Rptr. 518, 422 n.7 (1983); San Diego Teachers Ass'n v. Superior Court, 24 Cal. 3d 1, 7, 593 P.2d 838, 842, 154 Cal. Rptr. 893, 897 (1979); *In re* Berry, 68 Cal. 2d 137, 151, 436 P.2d 273, 283, 65 Cal. Rptr. 273, 283 (1968).

10. 195 Cal. Rptr. 567 (Cal. App. 1983) (depublished, hearing granted by California Supreme Court on Jan. 1, 1984 (2nd Civil No. 66088)).

striking workers' jobs.[11] The court of appeal upheld the award.[12] Although the precise issue before the supreme court is whether the union and its employees are liable for tort damages resulting from a strike,[13] tort liability is premised on the illegality of the strike.[14] Thus, petitioners have asked the court to determine whether these county employees have the right to strike.[15]

As the bargaining rights of local government employees are governed by the Meyers-Milias-Brown Act (MMBA),[16] this Note begins with an analysis of that Act.[17] By comparing the MMBA with other labor statutes the Note finds that a right to strike is consistent with the purposes and legislative intent of the Act. The Note then traces judicial interpretations of the MMBA and examines the treatment of public employee strikes in the courts of appeal and the supreme court. Finally, the Note analyzes the justifications for the common law strike prohibition and their inapplicability to modern public employment conditions in California. The Note concludes that the California Supreme Court should reformulate the common law rule to give local government employees the right to strike, except when a court finds that the strike would threaten the public health and safety.

The Statutory Provisions

The California cases generally reflect the common law view that the bargaining rights of public employees are contingent upon statutory authority.[18] Courts following this rule have emphasized the legislature's power and responsibility to specify the terms and conditions of public employment.[19] Perhaps the most important bargaining right is

11. *Id.* at 570.

12. *Id.* at 570, 576.

13. *Id.* at 568.

14. *See id.* at 569.

15. Petition for Hearing at 4-5, County Sanitation Dep't v. Los Angeles County Employees Ass'n, 195 Cal. Rptr. 567 (Cal. App. 1983) (2nd Civil No. 66088).

16. CAL. GOV'T CODE §§ 3500-3510 (West 1980 & Supp. 1984).

17. Although only the MMBA provisions are specifically addressed, they are substantially similar to provisions governing other California public employees. *See id.* §§ 3512-3524 (governing state employer-employee relations); *id.* §§ 3540-3549.3 (governing employer-employee relations in public schools).

18. *See, e.g.,* City of Los Angeles v. Los Angeles Bldg. & Constr. Trades Council, 94 Cal. App. 2d 36, 46, 210 P.2d 305, 311 (1949) (determining that an employee organization had no right to strike or picket to enforce demands over which the city was not obligated to bargain collectively: "[t]o hold to the contrary would be to sanction government by contract instead of government by law"); Nutter v. City of Santa Monica, 74 Cal. App. 2d 292, 300-04, 168 P.2d 741, 746-48 (1946) (concluding that the city had no duty under California Labor Code § 923 to recognize and negotiate a contract with a designated representative of the employees). *See* cases cited *supra* note 7.

19. City of Los Angeles v. Los Angeles Bldg. & Constr. Trades Council, 94 Cal. App.

the right to strike. As most public sector strikes involve county and municipal employees,[20] and because the bargaining rights of these local employees are governed by the MMBA,[21] an analysis of the right of these employees to strike under the common law rule must begin with an evaluation of the relevant provisions in this Act.

In 1961, California passed the George Brown Act[22] and became one of the first states to grant public employees at the state and local levels the statutory right to bargain collectively with their employers.[23] Seven years later, the legislature amended the Brown Act with the MMBA.[24] The MMBA grants local government employees bargaining rights similar to those enjoyed by private sector employees.[25]

The California Legislature enacted the MMBA to improve personnel relations "by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice."[26] For example, section 3502 of the Act protects the right of such employees "to form, join, and participate in the activities of employee organizations . . . for the purpose of representation on all matters of employer-employee relations."[27] However, the MMBA fails to expressly state whether local employees have a right to strike.

Because it is unclear whether the MMBA was designed to protect public employee strikes,[28] a determination of whether strikes are pro-

2d 36, 49, 210 P.2d 305, 313 (1949); Nutter v. City of Santa Monica, 74 Cal. App. 2d 292, 302, 168 P.2d 741, 745 (1946).

20. *See supra* note 4.

21. CAL. GOV'T CODE §§ 3500-3510 (West 1980 & Supp. 1984).

22. *Id.* §§ 3500-3509 (West 1966).

23. *See* Grodin, *Public Employee Bargaining in California: The Meyers- Milias-Brown Act in the Courts*, 23 HASTINGS L.J. 719, 719-20 (1972).

24. *See* CAL. GOV'T CODE §§ 3500-3510 (West 1980 & Supp. 1984). In both Acts, "public employee" is defined as any person employed by a public agency. *Compare id.* § 3501(c) (West 1966) *with id.* § 3501(d) (West 1980). Under the Brown Act, however, "public agency" included the "State of California" and "governmental subdivisions." *Id.* § 3501(b) (West 1966). The MMBA amendments deleted reference to the State of California and refer only to governmental subdivisions. *Id.* § 3501(c) (West 1980). Thus, the MMBA applies only to local employees. State employees are governed by the State Employer-Employee Relations Act. *Id.* §§ 3512-3524 (West 1980 & Supp. 1984).

25. Grodin, *supra* note 23, at 730-32.

26. CAL. GOV'T CODE § 3500 (West 1980). The intent to provide a "uniform basis" for recognizing the rights of public employees is undercut by language stating that the Act does not supersede existing state law or the rules adopted by local public agencies to administer employer-employee relations. *See id.* This latter language, juxtaposed against specific employee protections contained in the Act, creates an ambiguity. It is unclear how much control local agencies retain over employment relations. *See* Grodin, *supra* note 23, at 723-24.

27. CAL. GOV'T CODE § 3502 (West 1980). Local jurisdictions are not required to implement the MMBA by specific legislation, but many have done so. Ross & de Gialluly, *Implementation of the Meyer-Milias-Brown Act by California's Counties and Larger Cities*, 8 CAL. PUB. EMPLOYEE REL. 6, 6 (1971).

28. *See* Saenz, *Court Interpretations of the Meyers-Milias-Brown Act*, 56 CAL. PUB. EM-

tected by the Act depends upon judicial interpretation of the statute. In their interpretation of the MMBA the courts may 1) look to federal precedent, and 2) ascertain legislative intent by comparing the provisions of the MMBA with similar provisions of other California statutes governing public employees.

Judicial Interpretations

The Use of Federal Precedent

The MMBA revised the Brown Act to closely resemble the private sector collective bargaining model[29] embodied in the federal Labor Management Relations Act (LMRA).[30] When a California statute is substantially similar to a federal statute, California courts may look to federal precedent for guidance in interpreting the state provision.[31]

The LMRA provides that private sector employees "shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bar-

PLOYEE REL. 30, 31 (1983); Staudohar, *Strikes and the Rights of Public Employees in California*, 7 CAL. PUB. EMPLOYEE REL. 1, 2 (1970). Although specific local legislation is controlled by the provisions of the MMBA, *see* CAL. GOV'T CODE § 3508 (West 1980), the MMBA is unclear on the right to strike and the local rules regarding strike prohibitions are not uniform. While 10 cities and 11 counties directly prohibit strikes, others do not address the issue or address it only indirectly. *See* Ross & de Gialluly, *supra* note 27, at 8-9.

29. *See* Grodin, *supra* note 23, at 720-21, 730; *see also* Social Worker's Union, Local 535 v. Alameda County Welfare Dep't, 11 Cal. 3d 382, 391, 521 P.2d 453, 459, 113 Cal. Rptr. 461, 467 (1974) (the California Legislature relied on the LMRA in formulating § 3504 of the MMBA).

30. 29 U.S.C. §§ 141-187 (1982). The LMRA, which amended the National Labor Relations Act in 1947, governs private sector employment relations. Several provisions of the MMBA resemble the LMRA more closely than did the Brown Act. Both the MMBA and the LMRA impose upon management and employees the duty to meet and confer in "good faith." *Compare* 29 U.S.C. § 158(d) (1982) *with* CAL. GOV'T CODE § 3505 (West 1980 & Supp. 1984). In contrast, the Brown Act merely provided that employee organizations could represent their members in their employment relations with public agencies. CAL. GOV'T CODE § 3503 (West Supp. 1966). In addition, under the MMBA and the LMRA the goal of the bargaining process is to have employers and employees reach an agreement. *Compare* CAL. GOV'T CODE § 3505 (West 1980) *with* 29 U.S.C. § 158(d) (1982). In contrast, the Brown Act simply focused on communication between employers and employees. CAL. GOV'T CODE §§ 3503-3505 (West 1966). Although one of the purposes of the MMBA is to promote communication between employers and employees, § 3505 imposes the obligation "to endeavor to reach agreement." *See* Grodin, *supra* note 23, at 731.

31. *See* Social Workers' Union, Local 535 v. Alameda County Welfare Dept, 11 Cal. 3d 382, 391, 521 P.2d 453, 459, 113 Cal. Rptr. 461, 467 (1974); Englund v. Chavez, 8 Cal. 3d 572, 589-90, 504 P.2d 457, 469, 105 Cal. Rptr. 521, 533 (1972); Petri Cleaners, Inc. v. Automotive Employees, Local No. 88, 53 Cal. 2d 455, 459, 349 P.2d 76, 79, 2 Cal. Rptr. 470, 473 (1960); Solano County Employees Ass'n v. Solano County, 136 Cal. App. 3d 156, 160, 186 Cal. Rptr. 147, 150 (1982).

gaining or other mutual aid or protection."[32] In contrast, the MMBA omits any reference to "other concerted activities" and simply states that "[e]xcept as otherwise provided by the Legislature, public employees shall have the right to form, join, and participate in the activities of employee organizations . . . for the purpose of representation on all matters of employer-employee relations."[33]

The courts have generally construed the LMRA phrase "concerted activities" to include strikes,[34] and it could be argued that the ommission of this phrase from the MMBA reflects a legislative intent to deny protection to public employee strike activity. But the omission appears less a deliberate attempt to deny the right to strike than a legislative reluctance to expressly recognize a right to strike in the statute.[35] Moreover, courts have not relied on the absence of that phrase in the MMBA when denying protection to public employee strike activities.[36] Indeed, the language of the MMBA quoted above is broad enough to encompass strike activity. Thus, the legislature's omission of the phrase "concerted activities" from the MMBA is not grounds for a court to find that strike activity is not protected by the Act.[37]

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32. 29 U.S.C. § 157 (1982).

33. CAL. GOV'T CODE § 3502 (West 1980).

34. *See* Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 474-75 (1955); Amalgamated Ass'n M.C.E. v. Wisconsin Employment Relations Bd., 340 U.S. 383, 389 (1951); International Union of United Automobile Workers v. O'Brien, 339 U.S. 454, 456-57 (1950); Collins Baking Co. v. N.L.R.B., 193 F.2d 483, 486 (5th Cir. 1951); N.L.R.B. v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503, 505 (2d Cir. 1942); Los Angeles Metropolitan Transit Auth. v. Brotherhood of R.R. Trainmen, 54 Cal. 2d 684, 688, 8 Cal. Rptr. 1, 3-4, 355 P.2d 905, 907 (1960). *But see infra* note 37.

35. There is no indication that the legislature intended to deny public employees the right to strike. The distinctions between the MMBA and the LMRA are probably the result of political compromise. While most unions advocated a statute similar to that governing federal private sector employment relations, other political factions were opposed to such a system. The legislature attempted to incorporate these conflicting views into the MMBA. Grodin, *supra* note 23, at 761. Additionally, the effectiveness of a public employee strike depends upon its resulting inconvenience to voters. *See* Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107, 1124 (1969). Therefore, the legislature may have feared that an explicit recognition of the right to strike would anger those constituents directly served by public employees.

36. *See, e.g.,* Stationary Eng'rs, Local 39, Int'l Union of Operating Eng'rs, AFL-CIO v. San Juan Suburban Water Dist., 90 Cal. App. 3d 796, 800-01, 153 Cal. Rptr. 666, 668-69 (1979); City & County of San Francisco v. Evankovich, 69 Cal. App. 3d 41, 47-49, 137 Cal. Rptr. 883, 886-88 (1977); City of San Diego v. American Fed'n of State, County & Mun. Employees, Local 127, 8 Cal. App. 3d 308, 316-17, 87 Cal. Rptr. 258, 264 (1970); Almond v. County of Sacramento, 276 Cal. App. 2d 32, 35-38, 80 Cal. Rptr. 518, 520-22 (1969).

37. If the MMBA is to be compared to the LMRA, it should be noted that private sector employees have the right to strike despite the absence of an explicit statutory "grant." Although the LMRA has been held to protect private sector employees' right to strike, N.L.R.B. v. Fleetwood Trailer Co., 389 U.S. 375, 378 (1967), the Act does not contain an explicit legislative "grant" of such a right. As enacted in 1935, § 7 of the National Labor Relations Act (NLRA) merely gave employees the right to engage in "concerted activities."

Comparison to Other California Statutes

A comparison of the MMBA to other statutes governing California public employees further supports the view that the legislature did not intend to preclude strikes by local government employees. In the California Labor Code, for example, the legislature provided that although firefighters are entitled to specific bargaining rights, they do not have the right to strike.[38] This prohibition, which was enacted nine years before the MMBA, is still in effect[39] and indicates that the legislature is willing and able to expressly prohibit public employee strikes when it so desires. It chose not to do so, however, when it enacted the MMBA. Thus, the absence from the MMBA of any such limitation on other local government employees suggests that the legislature did not intend to enact a general strike prohibition.[40]

The absence of any dispute resolution mechanisms in the MMBA[41] is also an indication that the legislature considered the right to strike to be an integral part of the collective bargaining process es-

29 U.S.C. § 157 (1947). Subsequent judicial interpretation of this phrase as permitting strikes cannot be considered an explicit legislative "grant" of the right to strike. For a list of these cases, see *supra* note 34. Similarly, although § 13 of the Act provided that "[n]othing in this [act] shall be construed so as to interefere with . . . the right to strike," 28 U.S.C. § 163 (1947), the United States Supreme Court held that this provision "does not purport to create, establish or define the right to strike." Automobile Workers of Am., Local 232 v. Wisconsin Employment Relations Bd., 336 U.S. 245, 258 (1949).

38. CAL. LAB. CODE § 1962 (West 1971).

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to present grievances and recommendations regarding wages, salaries, hours, and working conditions to the governing body, and to discuss the same with such governing body, through such an organization, but shall not have the right to strike . . . .

Id.

39. *Id.*

40. Other statutory schemes evidence a clear legislative intent to prohibit strikes. For example, the Connecticut Municipal Employee Relations Act states "nothing in this act shall constitute a grant of the right to strike." CONN. GEN. STAT. ANN. § 7-475 (West 1972 & Supp. 1984).

41. Although the preamble to the MMBA indicates that the legislature designed the Act to improve communication between public employees and their employers "by providing a reasonable method of resolving disputes," CAL. GOV'T CODE § 3500 (West 1980), the Act creates no mechanism for resolving disputes, *see id.* §§ 3500-3510. *See also* Grodin, *supra* note 23, at 719. In contrast, statutes governing other public employees in California authorize the Public Employee Relations Board (PERB) to resolve disputes and to enforce the statutory provisions. *See* CAL. GOV'T CODE § 3541.3 (West 1980) (setting out the powers and duties of PERB under the Educational Employment Relations Act (EERA)); *id.* § 3513(g) (making the powers and duties of P ERB under EERA applicable to the State Employee Relations Act). Local government employees covered under the MMBA are the only California public employees not under the jurisdiction of PERB. Saenz, *supra* note 28, at 31.

The MMBA merely provides that the parties *may* agree to appoint a mediator if they fail to reach an agreement. CAL. GOV'T CODE § 3505.2 (West 1980). The MMBA does

tablished in the Act. When disputes between employers and employees are not resolved, the possibility of a strike motivates both parties to reach an agreement.[42] Thus, most statutes that prohibit strikes provide alternative means of encouraging the resolution of disputes, such as mediation or fact-finding.[43] The California statute governing educational employees, for example, lacks an explicit strike prohibition,[44] but contains comprehensive procedures to be followed if the parties reach an impasse.[45] The legislature may have omitted such a procedural framework in the MMBA because it contemplated that the threat of a strike would stimulate agreement among the parties.

The strong similarity between section 3509 of the MMBA[46] and section 3549 of the Employer-Employee Relations Act[47] should also be noted. Both sections effectively prohibit the application of California Labor Code section 923 to public employees. Section 923, which protects the right of private employees to engage in "other concerted activities for the purpose of collective bargaining,"[48] could be construed to protect the right to strike.[49] However, even though the language of the MMBA and the Employer-Employee Relations Act is virtually identical, the courts have given the two statutes conflicting interpretations. Whereas the California Court of Appeal has construed section 3509 to prohibit strikes by local public employees,[50] the California Supreme

allow the use of impasse resolution procedures either contained in local rules or agreed upon by the parties. *Id.* § 3505.

42. *Interim Hearing Before the Public Employment and Retirement Comm.: In the Matter of Present Status of Law Relative to Strikes in the Public Sector*, 1981 Cal. Leg. Assembly 20 ("in 99 and 9/10 of the cases in the private sector they succeed and reach an agreement") (remarks of Prof. Alleyene, U.C.L.A. Law School) [hereinafter cited as *Interim Hearings*]. In an environment where strikes are legal, strikes may be fewer and shorter than in a system where employees must defy the law to instigate joint determination of working conditions. Kheel, *Strikes and Public Employment*, 67 MICH. L. REV. 931, 941 (1969).

43. *See* Grodin, *supra* note 23, at 759.

44. *See* CAL. GOV'T CODE §§ 3540-3549.3 (West 1980 & Supp. 1984).

45. See *id.* §§ 3548-3548.8, which empowers the Public Employee Relations Board to appoint a mediator after either party declares that an impasse exists. If the mediator fails to effect a settlement of the dispute, the parties may request either PERB or the court to appoint an arbitrator with authority to make a binding decision. The California Supreme Court has stated that "[t]he impasse procedures almost certainly were included in the EERA for the purpose of heading off strikes." San Diego Teachers Ass'n v. Superior Court, 24 Cal. 3d 1, 8, 593 P.2d 838, 843, 154 Cal. Rptr. 893, 898 (1979). Strikes before exhaustion of impasse procedures may violate EERA's meet and confer requirements. *See* CAL. GOV'T CODE §§ 3543.6-3543.7 (West 1980).

46. CAL. GOV'T CODE § 3509 (West 1980).

47. *Id.* § 3549.

48. CAL. LAB. CODE § 923 (West 1971). Identical provisions preclude application of § 923 to state and educational employees. CAL. GOV'T CODE §§ 3523.5, 3549 (West 1980).

49. *See supra* note 34 & accompanying text.

50. *See* Almond v. County of Sacramento, 276 Cal. App. 2d 32, 37-38, 80 Cal. Rptr. 518, 522 (1969).

Court has determined that section 3549 does not prohibit strikes by educational employees.[51] This recent supreme court interpretation of language identical to section 3509 implies that the court would not read into section 3509 of the MMBA a prohibition of strikes by local government employees.

In summary, the MMBA neither expressly grants nor denies public employees the right to strike, although its language and a comparison with other California statutes suggest that the legislature may have contemplated such a right to strike. It thus falls to the supreme court to resolve the ambiguity and determine whether local government employee strikes should be legally protected.

California Case Law

Even though the provisions of the MMBA do not expressly prohibit strikes by local government employees, California appellate courts have refused to condone local public sector strikes by reasoning that nothing in the MMBA *grants* the right to strike.[52] In *Almond v.*

51. "[S]ection 3549 does not prohibit strikes but simply excludes the applicability of Labor Code section 923's protection of concerted activities." San Diego Teachers Ass'n v. Superior Court, 24 Cal. 3d 1, 13, 593 P.2d 838, 846, 154 Cal. Rptr. 893, 901 (1979). *See also* El Rancho Unified School Dist. v. National Educ. Ass'n, 33 Cal. 3d 946, 958 n.18, 192 Cal. Rptr. 123, 130 n.18, 663 P.2d 893, 900 n.18 (1983) ("There is no provision in EERA prohibiting strikes by public school employees."). The legislature's refusal to apply Labor Code § 923 to the MMBA could be construed as a strike prohibition, since "concerted activities" generally refers to strikes. *See supra* note 34 & accompanying text. However, the court's interpretation of § 3549 indicates that it is assuming that the legislature has not expressly prohibited public employee strikes and supports the view that the court does not consider the MMBA to preclude protection of strike activity.

52. *See, e.g.,* Stationary Eng'rs, Local 39 v. San Juan Suburban Water Dist., 90 Cal. App. 3d 796, 801, 153 Cal. Rptr. 666, 669 (1979); City & County of San Francisco v. Evankovich, 69 Cal. App. 3d 41, 47-48, 137 Cal. Rptr. 883, 886-87 (1977); City of San Diego v. American Fed'n of State, County & Mun. Employees, Local 127, 8 Cal. App. 3d 308, 316-17, 87 Cal. Rptr. 258, 264 (1970); Almond v. County of Sacramento, 276 Cal. App. 2d 32, 35, 80 Cal. Rptr. 518, 520 (1969); *see also* International Bhd. of Elec. Workers, Local 1245 v. City of Gridley, 175 Cal. Rptr. 274, 276-77 (1981) (depublished), *rev'd on other grounds*, 34 Cal. 3d 191, 193 Cal. Rptr. 518, 666 P.2d 960 (1983).

The California Supreme Court addressed the legality of a public workers' strike for the first time in Los Angeles Metropolitan Transit Auth. v. Brotherhood of R.R. Trainmen, 54 Cal. 2d 684, 355 P.2d 905, 8 Cal. Rptr. 1 (1960). In *Metropolitan Transit*, the court declared that "[i]n the absence of legislative authorization public employees in general do not have the right to strike." *Id.* at 687, 355 P.2d at 906, 8 Cal. Rptr. at 2. As the court concluded that the Los Angeles Metropolitan Transit Act granted transit employees the right to strike, *id.* at 687-90, 355 P.2d at 906-08, 8 Cal. Rptr. at 3-4, its insistence on the need for statutory authorization could be viewed as dictum. *See Almond*, 276 Cal. App. 2d at 35, 80 Cal. Rptr. at 520. Nonetheless, appellate courts have relied heavily on this apparent endorsement of the common law rule when denying public employees the right to strike. *See supra* note 7 & accompanying text.

County of Sacramento,[53] for example, the court of appeal refused to order the reinstatement of 127 social workers who were fired as a result of their participation in a strike against the county. Following the common law maxim that "absent an authorizing statute, a public employee has no right . . . to strike,"[54] the *Almond* court affirmed the trial court's finding that the appellants' absence without leave for the purpose of a strike constituted good cause for termination.[55] The court's holding was based on its determination that the MMBA[56] contains no statutory grant of a right to strike.[57]

Since the *Almond* decision, appellate courts have unanimously concluded that local public employees have no right to strike.[58] The principal basis for these holdings has been the absence of express protection for public sector strikes in the MMBA.[59] However, this analysis of the MMBA has yet to be scrutinized by the California Supreme Court. For even though the court has been confronted with numerous cases involving public sector strikes, it has consistently chosen to resolve these controversies on other grounds.[60] Dicta from these opinions, however, suggest that the court may eventually grant protection to public employee strikes.[61]

In the case of *In re Berry*,[62] for example, four defendants charged with criminal contempt for disobeying a court order restraining a strike by county employees sought a writ of habeas corpus. The court issued the writ because it found the restraining order unconstitutionally overbroad and vague.[63] Although the court assumed for purposes of analy-

53. 276 Cal. App. 2d 32, 80 Cal. Rptr. 518 (1969).

54. *Id.* at 34, 80 Cal. Rptr. at 520.

55. *Id.* at 34-39, 80 Cal. Rptr. at 520-23.

56. Although the MMBA was not yet in effect at the time of the strike, the court analyzed both the MMBA and the Brown Act before it reached its decision. *Id.* at 32-34, 80 Cal. Rptr. at 518-19.

57. *Id.* at 39, 80 Cal. Rptr. at 523.

58. Stationary Eng'rs, Local 39 v. San Juan Suburban Water Dist., 90 Cal. App. 3d 796, 801, 153 Cal. Rptr. 666, 668 (1979) (denying reinstatement of striking workers evern through the employer had violated MMBA meet-and-confer requirement); City & County of San Francisco v. Evankovich, 69 Cal. App. 3d 41, 49, 137 Cal.Rptr. 883, 887 (1977) (affirming the issuance of an injunction); City of San Diego v. American Fed'n of State, County & Mun. Employees, Local 127, 8 Cal. App. 3d 308, 310-13, 87 Cal. Rptr. 258, 259-61 (1970) (denial of temporary injunction restraining public employee strike).

59. *See supra* note 7.

60. It is also interesting to note that the California Supreme Court has denied hearings in several cases involving public employee strikes. City & County of San Francisco v. Evankovich, 69 Cal. App. 3d 41, 56, 137 Cal. Rptr. 883, 893 (1977); City of San Diego v. American Fed'n of State, County & Mun. Employees, Local 127, 8 Cal. App. 3d 308, 318, 87 Cal. Rptr. 258 (1970); Almond v. County of Sacramento, 276 Cal. App. 32, 39, 80 Cal. Rptr. 518, 523 (1969).

61. *See infra* notes 72, 78-79 & accompanying text.

62. 68 Cal. 2d 137, 436 P.2d 273, 65 Cal. Rptr. 273 (1968).

63. *Id.* at 157, 436 P.2d at 286, 65 Cal. Rptr. at 286.

sis that injunctions against public sector strikes may be proper in some instances, it expressly refused to determine whether strikes by public employees could be lawfully enjoined.[64]

In *City & County of San Francisco v. Cooper*,[65] the court again declined to address the right-to-strike issue. In *Cooper*, school teachers and city and county employees went on strike to protest the salary and fringe benefits proposal under consideration for the next fiscal year.[66] During the strikes, negotiations between employees and employers culminated in the adoption of separate legislative measures by the city and county board of supervisors and the school district board.[67] These measures embodied a resolution of the salary dispute.[68]

Following this compromise, taxpayers filed suit arguing that the measures were invalid because they were adopted under the coercion of an illegal public employee strike.[69] Assuming for discussion that the strike was illegal, the court held that a legislative act could not be nullified merely because it might have been the result of improper considerations by the legislative body or illegal conduct by the employees.[70] The court refused to deny public employers the power to either sanction or negotiate settlements with striking employees.[71]

Resolution of primary issue in *Cooper* had only an indirect impact on the right to strike issue, since no injunction against or firing of striking workers was involved. The opinion is important, however, because it demonstrates that the court considers the right to strike issue to be open and because it provides important insight into the court's attitude toward legislative restrictions on public sector strikes. Referring to laws in other states that impose mandatory statutory sanctions on striking employees, the court emphasized that "experience has all too frequently demonstrated . . . that . . . harsh, automatic sanctions do not prevent strikes but instead are counterproductive, exacerbating employer-employee friction and prolonging work stoppages."[72]

After *Cooper*, the California Supreme Court decided *San Diego Teachers Association v. Superior Court*,[73] which arose under the Educational Employment Relations Act (EERA).[74] In *San Diego Teachers*

64. *Id.* at 151, 436 P.2d at 283, 65 Cal. Rptr. at 283.
65. 13 Cal. 3d 898, 534 P.2d 403, 120 Cal. Rptr. 707 (1975).
66. *Id.* at 904, 534 P.2d at 406, 120 Cal. Rptr. at 710.
67. *Id.*
68. *Id.*
69. *Id.* at 905, 534 P.2d at 406, 120 Cal. Rptr. at 711.
70. *Id.* at 912, 534 P.2d at 412, 120 Cal. Rptr. at 716.
71. *Id.*
72. *Id.* at 917, 534 P.2d at 415, 120 Cal. Rptr. at 719.
73. 24 Cal. 3d 1, 593 P.2d 838, 154 Cal. Rptr. 893 (1979).
74. CAL. GOV'T CODE §§ 3540-3549.3 (West 1980 & Supp. 1984). EERA governs public sector educational employees and recognizes rights similar to those conferred on municipal employees by the MMBA. *Id.* § 3540.

Association, both the teachers association and the school district had filed unfair labor practice charges with the Public Employee Relations Board (PERB). While these charges were pending, the district sought a court injunction against an employee strike. On the same day that the strike began, the court issued a restraining order. Two days later it issued a preliminary injunction. The association and several employees were subsequently found to be in contempt of court for striking in violation of the orders.[75] The supreme court annulled the contempt orders on the ground that "PERB had exclusive initial jurisdiction to determine whether the strike was an unfair practice and what, if any, remedies PERB should pursue."[76]

Although the right-to-strike issue was again expressly reserved,[77] *San Diego Teachers Association* may foreshadow a recognition by the supreme court of the right of public employees to strike. First, the court recognized that immediate injunctive relief against strikes and subsequent punishment for contempt often do not prevent strikes and are counterproductive.[78] Second, the court stated that PERB has the power to *withhold* remedies such as injunctions or restraining orders against strikes if PERB determines that an injunction would impair the success of statutorily mandated negotiations.[79] The holding that a public employee strike cannot be enjoined in some instances implies that such strikes may sometimes be legal.[80]

The most recent California Supreme Court decision involving a public employee strike is *International Brotherhood of Electrical Workers, Local Union 1245 v. City of Gridley*.[81] In *City of Gridley*, the court once again refused to decide whether local public employees have a right to strike and instead confined its holding to a determination of whether the city's revocation of union recognition is an appropriate

75. *San Diego Teachers' Ass'n*, 24 Cal. 3d at 3-4, 593 P.2d at 840, 154 Cal. Rptr. at 895.

76. *Id.* at 7, 593 P.2d at 846-47, 154 Cal. Rptr. at 897. *See also* El Rancho Unified School Dist. v. National Educ. Ass'n, 33 Cal. 3d 946, 961, 663 P.2d 893, 902, 192 Cal. Rptr. 123, 132 (1983) (holding that PERB has exclusive jurisdiction over a complaint for damages resulting from a teachers' strike led by a noncertified employee organization).

77. The court stated: "[I]t is unnecessary here to resolve the question of the legality of public employee strikes." *San Diego Teachers' Ass'n*, 24 Cal. 3d. at 7, 593 P.2d at 842, 154 Cal. Rptr. at 897.

78. *Id.* at 11, 593 P.2d at 845, 154 Cal. Rptr. at 900.

79. *Id.* at 13, 593 P.2d at 846, 154 Cal. Rptr. at 901. *Accord* PERB v. Modesto City Schools Dist., 136 Cal. App. 3d 881, 186 Cal. Rptr. 634 (1982) ("the EERA gives PERB discretion to withhold as well as pursue the various remedies at its disposal"). The *San Diego Teachers Ass'n* court left unanswered, however, whether such a nonissuance order is judicially reviewable. *San Diego Teachers Ass'n*, 24 Cal. 3d at 13-14, 593 P.2d at 846, 154 Cal. Rptr. at 901.

80. *See Interim Hearings*, *supra* note 42, at 25 (remarks of Prof. Alleyene, U.C.L.A. Law School).

81. 34 Cal. 3d 191, 666 P.2d 960, 193 Cal. Rptr. 518 (1983).

strike sanction under the MMBA.[82]

The controversy in *City of Gridley* arose when negotiations between the city and its employees reached an impasse and eighteen members of the public works, fire, and police departments went on strike.[83] In response, the city notified the union that it considered the strike illegal and then revoked its recognition of the union as a collective bargaining representative and dismissed all of the striking employees.[84] These sanctions were consistent with a resolution adopted by the city in 1974.[85] The striking employees petitioned for a writ of mandate to compel the city to meet and confer with the union and also sought an injunction directing their reinstatement.[86] Although both the trial court[87] and the court of appeal[88] ruled in favor of the city, the supreme court reversed.[89]

The court disagreed with the city's contention that its rule permitting revocation of union recognition was within the rulemaking authority granted to local governments by section 3507[90] of the MMBA.[91]

82. *Id.* at 199 n.7, 666 P.2d at n.7, 193 Cal. Rptr. 522 n.7.

83. *Id.* at 196, 666 P.2d at 961-62, 193 Cal. Rptr. at 519-20.

84. *Id.* at 196, 666 P.2d at 962, 193 Cal. Rptr. at 520.

85. Prior to its recognition of the union as exclusive bargaining representative of its employees, the City of Gridley adopted several resolutions governing its labor relations. *Id.* at 195, 666 P.2d at 961, 193 Cal. Rptr. at 519. One of these resolutions provided that 1) participation by any municipal employee in a strike would subject the employee to disciplinary action, up to and including discharge, and 2) the city could revoke recognition of an employee organization that encouraged or condoned such a strike. *Id.*

86. *Id.* at 194, 666 P.2d at 961, 193 Cal. Rptr. at 519.

87. *Id.* at 196, 666 P.2d at 962, 193 Cal. Rptr. at 520.

88. 175 Cal. Rptr. 274, 279 (1981) (depublished). The court of appeal held that the city's revocation of union recognition was justified and that the resolutions permitting strike sanctions were binding on the union even though they were not contained in the subsequent agreement between the union and the city. *Id.* at 278. In addition, the court found that since the strike was an act of bad faith, it absolved the city from the duty to meet and confer. *Id.*

89. *City of Gridley*, 34 Cal. 3d. at 206, 666 P.2d at 969, 193 Cal. Rptr. at 527. The court also decided that non-civil service employees were entitled to a hearing before dismissal. *Id.* at 207-09, 666 P.2d at 970-71, 193 Cal. at 522.

90. CAL. GOV'T CODE § 3507 (West 1980). Section 3507 allows local agencies to adopt reasonable rules for the administration of employer- employee relations. The interpretation of "reasonable rules" under § 3507 is somewhat confusing. Schneider, *An Analysis of the Meyers-Milias-Brown Act of 1968*, 1 CAL. PUB. EMPLOYEE REL. A-1, A-14 (1969). Local rules must be consistent with the intent of the Act and their adoption must be preceded by good faith consultation with employees. *Id.* Courts have uniformly invalidated local rules if they are inconsistent with the purposes of the MMBA. *See* Public Employees of Riverside County, Inc. v. County of Riverside, 75 Cal. App. 3d 882, 892, 142 Cal. Rptr. 521 (1977) (holding §§ 3507 and 3507.5 do not empower a county board of supervisors to adopt an amendment that would "nullify the basic right granted by the MMBA" and therefore invalidating a resolution excepting supervisory employees from the meet-and-confer requirement); Huntington Beach Police Officers Ass'n v. City of Huntington Beach, 58 Cal. App. 3d 492, 129 Cal. Rptr. 893 (1976) (ordinance excepting work schedules from the MMBA is in

Relying on section 3502[92] and the preamble to the Act,[93] the court reasoned that when the legislature adopted the MMBA, it intended to both protect the right of public employees to be represented by organizations of their own choosing and to retain for itself the exclusive power to enact any restrictions on that right.[94] The court then concluded that the rulemaking authority conferred by section 3507 allows a local government to adopt procedural rules governing recognition of representatives, but not substantive rules curtailing employee representation and activities.[95]

The court also found the city's revocation of union recognition to be inconsistent with the policies underlying the MMBA. First, section 3507 makes employee choice the guiding principle governing union recognition.[96] The city's action displaced that choice.[97] Second, by revoking recognition at the commencement of the strike, the city effectively closed off communication between employers and employees.[98] The court found that this action was contrary to an express purpose of the MMBA—the promotion of "full communication between public employees and their employers."[99]

Even though the *Gridley* court held a particular strike sanction invalid, it noted in dicta that sanctions such as injunctions and the dismissal of striking employees do not interfere with workers' legitimate rights under the MMBA[100] and may be properly imposed in response to illegal strikes or strikes in violation of contract.[101] Yet in earlier

direct conflict with the MMBA and must yield to the Act's requirements); *see also* Grodin, *supra* note 23, at 725.

91. *City of Gridley*, 34 Cal. 3d at 199, 666 P.2d at 964, 193 Cal. Rptr. at 522.

92. CAL. GOV'T CODE § 3502 (West 1980) ("[e]xcept as otherwise provided by the Legislature, public employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations").

93. *Id.* § 3500 ("recognizing the right of public employees to join organizations in their employment relationships with public agencies").

94. *City of Gridley*, 34 Cal. 3d at 199-200, 666 P.2d at 964, 193 Cal. Rptr. at 522. "[T]he power to enact restrictions on the right of employees to be represented by organizations of their own choosing is reserved to the State Legislature." *Id.* at 198, 666 P.2d at 963, 193 Cal. Rptr. at 521.

95. *Id.* at 200, 666 P.2d at 965, 193 Cal. Rptr. at 523 ("it seems clear that the Legislature did not intend to grant local agencies the power to adopt substantive rules that would interfere with employee choice").

96. CAL. GOV'T CODE § 3507 (West 1980 & Supp. 1984) ("Exclusive recognition of employee organizations formally recognized as majority representatives pursuant to a vote of the employees may be revoked by a majority vote of the employees only after a period of not less than 12 months following the date of such recognition.").

97. *City of Gridley*, 34 Cal. 3d at 200-01, 666 P.2d at 965, 193 Cal. Rptr. at 523.

98. *Id.*

99. *Id.*

100. *Id.* at 204, 666 P.2d at 968, 193 Cal. Rptr. at 526.

101. *Id.*

cases, the court recognized that strike sanctions, such as injunctions, may be counterproductive to the goals of improving employment relations and decreasing the number and duration of work stoppages.[102] Such cases suggest that the court may want to protect public employee strike activity in order to *further* the purposes of the MMBA.[103] In sum, while the court indicated in *Gridley* that some strike sanctions are permissible responses to illegal strikes, it is still unclear in what instances the court would deem a public employee strike illegal.

Toward a Modification of the Common Law Rule

The California Supreme Court currently has another opportunity in *County Sanitation District v. Los Angeles County Employees Association*[104] to decide whether public employees have the right to strike. As indicated above, the court is not constrained by the language of the MMBA, since the Act neither expressly grants nor denies the right to strike.[105] Although the lower courts have held that there is no right to strike under the MMBA, these holdings are premised on the common law rule that absent a statutory grant, public employees do not have the right to strike.[106] If policy justifications supporting the common law rule no longer apply, however, the supreme court can make a principled departure from that rule.[107] In numerous other contexts, the court has explicitly reformulated or abrogated the common law when modern conditions and public policy supported such a change.[108] Similar considerations militate against blind adherence to the common law rule governing the right of local government employees to strike.[109]

Strikes play an important role in both the public and private sec-

102. *See supra* notes 72, 78 & accompanying text.

103. The improvement of public employment relations is an express purpose of the MMBA. CAL. GOV'T CODE § 3500 (West 1980 & Supp. 1984).

104. 195 Cal. Rptr. 567 (Cal. App. 1983) (depublished, hearing granted by California Supreme Court on Jan. 1, 1984 (2nd Civil No. 66088)).

105. *See supra* note 28.

106. *See supra* note 7.

107. *See* Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 382, 394, 525 P.2d 669, 676, 115 Cal. Rptr. 765, 772 (1974) ("The nature of the common law requires that each time a rule of law is applied, it be carefully scrutinized to make sure that the conditions and needs of the times have not so changed as to make further application of it the instrument of injustice.").

108. *See id.* (permitting a spouse to recover for loss of consortium following injury to the other spouse); Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 216, 359 P.2d 457, 460, 11 Cal. Rptr. 89, 92 (1961) (abrogating the common law rule of governmental immunity); *see also* Li v. Yellow Cab Co., 13 Cal. 3d 804, 823, 532 P.2d 1226, 1239, 119 Cal. Rptr. 858, 871 (1975) (modifying common law rule of contributory negligence to one of comparative negligence); Green v. Superior Court, 10 Cal. 3d 616, 624, 517 P.2d 1168, 1173, 111 Cal. Rptr. 704, 709 (1974) (holding that modern urbanization undermines justification for reliance on common law landlord-tenant rules and, therefore, landlords have a duty to maintain leased dwellings in habitable conditions).

109. *See infra* notes 116-39 & accompanying text.

tor.[110] "The right of employees to withhold their labor to improve . . . working conditions is a key feature of the private sector industrial relations system."[111] Public sector strikes have a parallel purpose.[112] In the absence of the right to strike, the bargaining position of the public employee is too weak to facilitate effective collective bargaining.[113] If public employee strikes are illegal, the issuance of an injunction against striking workers will often stop negotiations between employers and employees.[114] As a result, judicial enforcement of strike sanctions may actually prolong, rather than resolve, the conflict.[115]

In addition, the arguments in favor of a prohibition against public sector strikes are no longer valid. One primary justification for the common law rule is the conviction that one should not be able to strike against the sovereign.[116] This theory is similar to the doctrine of sovereign immunity. Both emanate from the early English law concept that the king could do no wrong. However, the highest courts in many states have abandoned the doctrine of sovereign immunity.[117] The California Supreme Court joined this trend in 1961 when it determined that the rule is "an anachronism, without rational basis, and has existed only by the force of inertia."[118] This rationale also fails to convincingly support the view that public employee strikes should be prohibited.[119] As noted by one commentator, the application of the strict sovereignty

110. *See* Burton & Krider, *The Role and Consequences of Strikes by Public Employees*, 79 YALE L.J. 418, 420-21 (1970).

111. *See* Olson, *Advances to Impasse Resolution: The Use of the Legal Right to Strike in the Public Sector*, 33 LAB. L.J. 494, 494 (1982).

112. *Id.*

113. *See* Kheel, *supra* note 42, at 941; Wellington & Winter, *supra* note 35, at 1112-13.

114. *See Interim Hearings*, *supra* note 42, at 34.

115. In a study of nine public employee strikes between 1970 and 1979 in which temporary restraining orders and injunctions were issued ordering the strikers back to work, in no case did a cessation of strike activity follow the issuance of the order. *See* Statistical chart prepared by David Clisham (1983) (on file with the *Hastings Law Journal*); *see also* Cebulski, *An Analysis of 22 Illegal Strikes and California Law*, 18 CAL. PUB. EMPLOYEE REL. 2, 8 (1973) (strikes with legal sanctions lasted twice as long as those without).

116. *See, e.g.*, City of Los Angeles v. Los Angeles Bldg. & Constr. Trades Council, 94 Cal. App. 2d 36, 47-48, 210 P.2d 305, 312 (1949); Olson, *supra* note 111, at 494-95; Staudohar, *supra* note 28, at 16.

117. *See, e.g.*, Colorado Racing Comm'n v. Brush Racing Ass'n, 136 Colo. 279, 282-83, 316 P.2d 582, 585-86 (1957); Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 132-34 (Fla. 1957); Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 12-20, 163 N.E.2d 89, 90-96 (1959), *cert. denied*, 362 U.S. 968 (1960); Becker v. Beaudoin, 106 R.I. 562, 568, 261 A.2d 896, 901 (1970); *see also* School Comm. v. Westerly Teachers Ass'n, 111 R.I. 96, 110, 299 A.2d 441, 449 (1973) (Roberts, C.J., dissenting).

118. Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 216, 359 P.2d 457, 460, 11 Cal. Rptr. 89, 92 (1961).

119. Note, *Private Damage Actions Against Public Sector Unions for Illegal Strikes*, 91 HARV. L. REV. 1309, 1314-15 (1978). *See* H. WELLINGTON & R. WINTER, THE UNIONS AND THE CITIES 36-41 (1971).

notion—that governmental power can never be opposed by employee organizations—is "clearly a vestige from another era."[120] In short, the idea is "archaic and no longer logically supportable."[121]

A second rationale for the common law rule is the claim that since the terms of public employment are fixed by the legislature, the public employer is powerless to respond to strike pressure.[122] This justification may have had merit before the legislature gave public employees extensive bargaining rights.[123] Presently, however, most of the terms and conditions of public employment in California are determined through bilateral collective bargaining, rather than unilateral lawmaking.[124] In view of the statutorily mandated bargaining process, it is illogical to suggest that the public employer is powerless to respond to employee pressure to change the terms and conditions of public employment. A public employer is just as able to grant economic concessions in response to strike pressure as it is to grant economic concessions in response to other pressures used in the bargaining process.[125]

A third justification for the common law rule is that if public employees were permitted to strike they would wield a disproportionate amount of political power that could result in a distortion of the political process.[126] Proponents of this theory argue that the inelastic de-

120. Edwards, *The Developing Labor Relations Law in the Public Sector*, 10 DUQ. L. REV. 357, 359-60 (1972).

121. School Comm. v. Westerly Teachers Ass'n, 111 R.I. 96, 111, 299 A.2d 441, 449 (1973) (Roberts, C.J., dissenting).

122. *See, e.g.*, City of San Diego v. Am. Fed'n of State County & Mun. Employees, Local 127, 8 Cal. App. 3d 308, 312, 87 Cal. Rptr. 258, 261 (1970); City of Los Angeles v. Los Angeles Bldg. & Constr. Trades Council, 94 Cal. App. 2d 36, 48, 210 P.2d 305, 311 (1949); Nutter v. City of Santa Monica, 74 Cal. App. 2d 292, 302, 168 P.2d 741, 745 (1946).

123. *See supra* note 23 & accompanying text; *see also* CAL. GOV'T CODE §§ 3500-3511 (West 1980 & Supp. 1984) (governing local government employees); *id.* §§ 3512-3524 (governing state employment); *id.* §§ 3540-3549.3 (governing educational employees).

124. *See* El Rancho Unified School Dist. v. National Educ. Ass'n, 33 Cal. 3d 946, 963, 663 P.2d 893, 904, 192 Cal. Rptr. 123, 134 (1983) (Grodin, J., concurring). For example, the MMBA specifies that "the scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment." CAL. GOV'T CODE § 3504 (West 1980). *Cf. id.* § 3516 (State Employer-Employee Relations Act limits scope of representation to wages, hours, and other terms and conditions of employment); *id.* § 3543.2 (Educational Employment Relations Act similarly limits scope of representation).

125. *See* El Rancho Unified School Dist. v. National Educ. Ass'n, 33 Cal. 3d 946, 963, 663 P.2d 893, 904, 192 Cal. Rptr. 123, 134 (1983) (Grodin, J., concurring). The converse is also true. "In collective bargaining negotiations, whether or not the employees strike, the employer is free to reject demands if he determines that they are unacceptable." Los Angeles Metropolitan Transit Auth. v. Brotherhood of R.R. Trainmen, 54 Cal. 2d 689, 693, 355 P.2d 905, 910, 8 Cal. Rptr. 1, 6 (1960).

126. *See* H. WELLINGTON & R. WINTER, *supra* note 119, at 167, 190, 195-96; Wellington & Winter, *supra* note 35, at 1123-25; Comment, *The Collective Bargaining Process at the*

mand for governmental services and the lack of market restraints in the public sector would make public employee strikes an unfair means of exerting political pressure to satisfy union demands.[127]

These arguments are overstated. Several factors would limit the incentives of public employees to strike. First, wages lost due to strikes are as important to public employees as they are to private sector employees.[128] Second, taxpayer pressure will prevent public employers from continually acquiescing to economic demands by public employees.[129] Third, public employers often have the option of rejecting public employee demands if subcontracting to the private sector is a realistic alternative.[130] For example, some municipalities have resolved bargaining impasses with sanitation workers by subcontracting the entire sanitation service or by threatening to take such action.[131] Finally, the effect of the strike on the political process depends upon the nature of the services provided by the striking employees.[132] A strike by public employees whose services are not essential to the public health and safety probably would not result in intense public pressure to give in to union demands at the expense of other interest groups pursuing the same tax dollars.[133] And of course, in a strike involving non-economic issues a settlement would not deplete the government's budget and other interest groups seeking public funds would not be directly injured

Municipal Level Lingers in Its Chrysalis Stage, 14 SANTA CLARA L. REV. 397, 410 (1974). An example of such distortion is provided by a firefighter's strike in Newark, New Jersey. After the twelve-hour strike, state urban aid funds originally authorized to "help the poor" were diverted to salary increases for firemen and police. Wellington & Winter, *supra* note 35, at 1125 n.59.

127. Demand for product "A" is inelastic if an increase in unit price does not result in a significant decrease in the number of units sold. If a consumer cannot easily substitute another product for product "A," he or she will probably continue to purchase product "A" despite the higher price. Thus, demand for product "A" is inelastic. The demand for public employee services is often inelastic because governmental services do not have close substitutes. On the other hand, the demand for many products produced in the private sector is more elastic. For example, if the price of a Ford increases, a consumer can buy a Chevrolet. These market restraints force private sector unions to limit their demands, for if increased wages result in higher prices and decreased sales, layoffs may occur. *See* H. WELLINGTON & R. WINTER, *supra* note 119, at 18-19; Comment, *supra* note 125, at 410.

128. *See* Burton & Krider, *supra* note 110, at 425.

129. *See id.* A related economic constraint exists for services such as water, sewage, and garbage removal for which users are charged specific fees. Even though users do not participate in the bargaining process, employers and employees would recognize the negative impact of user fee increases on the public. *Id.*

130. *Id.*

131. *Id.* at 425-26.

132. *Id.* at 426-27.

133. *Id. But cf.* Wellington & Winter, *supra* note 35, at 1124-25 (arguing that even in strikes by teachers, garbage collectors, and sanitation and social workers, the citizen is likely to be seriously inconvenienced and will exert enormous pressure on the employer to settle).

by the settlement.[134] In sum, the fear that public employee strikes would distort the normal political process is exagerated.

The most compelling argument in favor of the common law rule is that the services provided by public employees should not be disrupted.[135] For example, strikes by police officers or firefighters could leave the public without essential safety services. Strikes by workers responsible for maintaining highway and sanitation systems could also endanger the public health and safety.[136] Other municipal employees, however, do not provide essential services. For example, a strike by employees of a city recreation department or by administrative or clerical staff might not threaten public health or safety.[137] The essential services argument thus provides no support for an across-the-board strike prohibition for public employees.[138]

Strike prohibitions may also be unnecessary in relation to employees such as sanitation or utility workers. The argument that the absence of these workers *might* endanger the public health or safety is undermined by the fact that in many cities these services are performed by private sector employees who have the right to strike.[139] If identical work is often performed by both public and private employees, or if striking public employees can be easily replaced by subcontracting, then the public safety theory fails to justify prohibiting only the public sector employees from striking.[140]

Little reason remains to retain the common law rule that, absent a

134. Further, in strikes involving some non-economic issues, such as decentralization of the governance of schools, intense concern expressed by well-organized interest groups might counter union pressure. Wellington & Winter, *supra* note 35, at 1125. It is possible, however, that pressures for settlement from a public indifferent to the underlying issue may eventually prove overwhelming. *Id.*

135. *See* H. WELLINGTON & R. WINTER, *supra* note 119, at 190-201.

136. *See infra* notes 153 & accompanying text. One commentary suggests that services can be divided into three categories: 1) essential services, such as police and fire, where strikes immediately endanger the public health and safety; 2) intermediate services, such as sanitation, hospitals, transit, water, and sewage, where strikes of a few days might be tolerated; and 3) non-essential services, such as streets, parks, education, housing, welfare and general administration, where strikes of indefinite duration could be tolerated. Burton & Krider, *supra* note 110, at 427. The authors further suggest that these categories are not exact, since the essential nature of a public service depends on city size. Whereas a sanitation strike in New York City might be critical, a similar strike in a small town might cause little inconvenience. *Id. See* ALASKA STAT. § 23.40.200 (1981) (describing similar division).

137. *See* School Comm. v. Westerly Teachers Ass'n, 111 R.I. 96, 110, 299 A.2d 441, 448-49 (1973) (Roberts, J., dissenting).

138. *But cf.* Anderson, *Strikes and Impasse Resolution in Public Employment*, 67 MICH. L. REV. 943, 948-56 (1969) (difficulty of distinguishing essential from non-essential services except in clear areas such as police and fire services).

139. W. SIMKIN, MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING 354 (1971); Burton & Krider, *supra* note 110, at 426.

140. Indeed, some private sector employee strikes may seriously threaten the public health and safety. For example, a Teamsters' strike in New York City one winter involving

statutory grant, public employees have no right to strike. Of all the justifications advanced for the common law rule, only the concern that strikes by some government employees might threaten the public health and safety is still relevant. This concern, however, does not compel the California Supreme Court to retain an across-the-board prohibition of public employee strikes.

Several state legislatures have granted public employees a limited right to strike.[141] Typically, such statutes expressly prohibit strikes by employees engaged in essential services.[142] In addition, injunctive relief is usually available against strikes by other public employees if the court finds that their absence from work would endanger the health and safety of the public.[143]

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fuel oil truck drivers was legal even though the interruption in fuel oil service was believed to cause the death of several people. Burton & Krider, *supra* note 110, at 426-27.

141. *See, e.g.,* ALASKA STAT. § 23.40.200 (1981); MINN. STAT. ANN. § 179.64(1) (West Supp. 1984); OR. REV. STAT. § 243.726 (1979); PA. STAT. ANN. tit. 43, § 1101.1003 (Purdon Supp. 1983); WIS. STAT. ANN. § 111.70(4)(cm)(5), (6)(c) (West Supp. 1983). Aside from the limitations on this right discussed *infra* notes 142-43 & accompanying text, employees must also comply with certain procedures before striking. *See, e.g.,* OR. REV. STAT. § 243.726(2) (1981) (employees must have complied in good faith with certain provisions relating to the resolution of labor disputes and employee representative must give ten days notice of intent to strike). *But see* ALASKA STAT. § 23.40.200(d) (1981) (employees in certain class "may engage in a strike if a majority of the employees in a collective bargaining unit vote by secret ballot to do so").

142. *See, e.g.,* ALASKA STAT. § 23.40.200(b) (1981) (police and fire protection employees, prison and hospital employees); MINN. STAT. ANN. § 179.63(11) (West Supp. 1984) (firefighters, peace officers, guards at correctional facilities, and hospital employees); OR. REV. STAT. § 243.736 (1979) (firefighters, police officers, and guards at correctional or mental health institutions); PA. STAT. ANN. tit. 43, § 1101.1001 (Purdon Supp. 1983) (guards at correctional or mental health institutions and employees necessary to the functioning of the courts). For a further discussion of these provisions, see Hanslowe & Acierno, *The Law and Theory of Strike by Government Employees*, 67 CORNELL L. REV. 1055, 1079-83 (1982).

143. *See, e.g.,* ALASKA STAT. § 23.40.200(b) (1981) (strikes by certain employees may not be enjoined unless it can be shown that it has begun to threaten the health, safety, and welfare of the public); OR. REV. STAT. § 243.726(3)(a) (1979) (injunctive relief available when strike creates a clear and present danger or threat to the health, safety or welfare of the public); PA. STAT. ANN. tit. 43, § 1101.1003 (Purdon Supp. 1983) (injunctive relief available when strike creates a clear and present danger or threat to the health, safety or welfare of the public); WIS. STAT. ANN. § 111.70(7m)(b) (West Supp. 1983) (injunctive relief available if strike poses an imminent threat to the public health or safety); *see also* Holland School Dist. v. Holland Educ. Ass'n, 380 Mich. 314, 326, 157 N.W.2d 206, 211 (1968) (state's policy is "not to issue injunctions in labor disputes absent a showing of violence, irreparable injury, or breach of the peace"); Timberlane Regional School Dist. v. Timberlane Regional Educ. Ass'n, 114 N.H. 245, 251, 317 A.2d 555, 559 (1974) (in determining whether to issue a strike injunction, a court should consider "whether the public health, safety and welfare will be substantially harmed if the strike is allowed to continue"). The federal Labor Management Relations Act of 1947, 18 U.S.C. §§ 141-187 (1976), adopts a similar approach. It empowers the President to direct the Attorney General to enjoin a threatened or actual strike if it affects an industry involved in interstate commerce and if it would imperil the national health or safety. *Id.* §§ 176-180.

This approach allows most public employees to exercise effective control over the terms and conditions of their employment and to engage in meaningful collective bargaining.[144] At the same time, it insures that essential public services will not be interrupted to the detriment of the public's health and safety.[145]

The California Legislature has neither adopted nor rejected such a limited-right approach,[146] and it is within the power of the California Supreme Court to accomplish this change by modifying the common law rule.[147] The court could provide that public employees have a limited right to strike that is constrained only if the strike involves employees whose services are essential to the health and safety of the public.[148]

144. *See supra* notes 111-13 & accompanying text.

145. *See* Burton & Krider, *supra* note 110, at 437; Kheel, *supra* note 42, at 941. Commentators have suggested variations and refinements on this approach. *See* Burton & Krider, *supra* note 110, at 437 (advocating a presumption of illegality in strikes involving essential services, therefore relieving the state of the burden to demonstrate the elements necessary for an injunction); Kheel, *supra* note 42, at 940-41 (favoring legislation that authorizes the state governor to seek an injunction under conditions similar to §§ 176-180 of the LMRA).

146. The legislature could amend the MMBA to expressly prohibit or allow public sector strikes. For examples of express strike prohibitions, see *supra* notes 40, 43. The legislature could also limit the right to strike to non-essential public employees. *See supra* notes 141-43 & accompanying text.

As an alternative to an express prohibition of the right to strike, the legislature could provide additional impasse resolution procedures in the MMBA. Under the present statute the parties *may* agree to appoint a mediator. CAL. GOV'T CODE § 3505.2 (West 1980). Generally, the goal of the mediator is to persuade negotiators for union and management to voluntarily settle their dispute. W. BAER, THE LABOR ARBITRATION GUIDE 88 (1974); F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 4 (1976). Fact-finding and arbitration could be included in the MMBA as additional resolution procedures. In disputes where fact-finding is implemented, strikes are prohibited until the fact-finding body investigates and reports the facts surrounding the disputes. The report may include recommendations, although the parties are free to accept or reject them. F. ELKOURI & E. ELKOURI, *supra*, at 4-5. Arbitration differs from both mediation and fact-finding because the parties are generally bound by the decision of the arbitrator, either as a result of a voluntary agreement or by law. *Id.* at 2; W. SIMKIN, MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING 26 (1971). All three impasse resolution measures are less costly and time-consuming than seeking an injunction. F. ELKOURI & E. ELKOURI, *supra*, at 8-10. Arbitration, however, has not always proved successful at averting strikes. In Australia, where binding arbitration is mandatory in the private sector, the strike rate far exceeds that of the United States. H. NORTHRUP, COMPULSORY ARBITRATION AND GOVERNMENT INTERVENTION IN LABOR DISPUTES 39-41 (1966). Moreover, mediation and fact-finding may inhibit the collective bargaining process, and discourage the parties from reaching voluntary agreement. *Id.* at 162, 207, 263-64. Thus, the legislative implementation of alternative dispute resolution procedures might have little effect on the incidence of public employee strikes.

147. *See supra* note 107-08 & accompanying text (discussion of the supreme court's power to modify or abrogate common law rules).

148. An alternative to implementing such a limited right to strike is the adoption of a balancing test similar to that suggested by Justice Reynoso when he served on the court of appeal. *See* Stationary Eng'rs, Local 39 v. San Juan Suburban Water Dist., 90 Cal. App. 3d

Such a test would require the courts to determine in each case whether the absence of services provided by striking employees would constitute a threat to the public health and safety. Although this may impose an additional burden on the judiciary, it is not an unmanageable task.[149]

796, 806, 153 Cal. Rptr. 666, 672 (1979) (Reynoso, J., concurring). Justice Reynoso would balance the "seriousness of the employees' misconduct" against the "seriousness of the employer's unlawful acts" in order to determine if strike sanctions should be imposed. *Id.* at 806, 153 Cal. Rptr. at 672.

The National Labor Relations Board uses this balancing approach. *See, e.g.,* Kohler Co. v. N.L.R.B., 148 N.L.R.B. 1434, 1445 (1964), *aff'd*, 345 F.2d 748 (D.C. Cir. 1965). The NLRA enumerates specific unfair labor practices by both the employer and the employee. 29 U.S.C. § 158 (1982). In the event that one party engages in an unfair practice, the N.L.R.B., upon receipt of a complaint, is empowered to determine whether the unfair practice occurred and to fashion a remedy for the other party. *Id.* § 160. If both parties allegedly engaged in an unfair practice, the N.L.R.B. must, in making its determination, weigh the seriousness of one's misconduct against that of the other.

This approach would be difficult to implement in California. For even though the California statutes governing state and educational employees enumerate unfair labor practices, CAL. GOVT. CODE §§ 3519, 3519.5 (1980) (state employees); *id.* §§ 3543, 3543.6 (educational employees), the MMBA does not provide guidelines for determining the seriousness of a violation of one of its provisions. *See Id.* §§ 3500- 3510. Second, although the statutes governing state and educational employees state that PERB has jurisdiction over the investigation of an unfair labor practice charge, *id.* §§ 3514.5, 3541.3, the MMBA does not grant a single agency jurisdiction over cases arising under its provisions. *See supra* note 41 & accompanying text. If Justice Reynoso's proposal were adopted, courts would be required to make balancing decisions in the absence of specific statutory guidelines. Under such a system it would be extremely difficult for employers or employees to predict whether their actions would be judicially upheld. *See also* Staudohar, *supra* note 28, at 19 (proposing that public employees be permitted to strike in response to unfair practices by government agencies).

149. Legislation in several states already requires courts to make this determination. See *supra* note 143 for the relevant statutory provisions in Alaska, Oregon, Pennsylvania, and Wisconsin. For example, under the Pennsylvania Public Employe Relations Act, public employees may strike after they have submitted to mediation and factfinding unless such a strike would endanger the public. PA. STAT. ANN. tit. 43, § 1101.1003 (Purdon Supp. 1983). In such cases, the employer is entitled to equitable relief if the court finds that the strike creates a clear and present danger to the health, safety and welfare of the public. *Id.* The Pennsylvania courts have applied this standard to several classes of public employees. *See, e.g.,* Bethel Park School Dist. v. Bethel Park Fed'n of Teachers, Local 1607, 54 Pa. Commw. 49, 52, 420 A.2d 18, 19 (1980) (teacher's strike constituted a clear and present danger to the public's health, safety and welfare); Bristol Township Educ. Ass'n v. School Dist. of Bristol Township, 14 Pa. Commw. 463, 468-70, 322 A.2d 767, 770-71 (1974) (school district entitled to injunction against teacher's strike); Highland Sewer & Water Auth. v. Local Union 459, I.B.E.W., 67 Pa. D.&C.2d 564, 565-67 (1973) (no clear and present danger as the services provided by the sewer and water workers could be performed by others during the strike); Port Auth. of Allegheny County v. Division 85, Amalgamated Transit Union, 122 PITTSBURGH LEGAL J. 189, 189-90, 193-94 (1974) (transit strike constituted a clear and present danger to the health safety and welfare of the public since the strike deprived commuters of an essential service and the resulting traffic jams prevented emergency vehicles from transporting the ill and injured to hospitals).

In certain cases the determination would be relatively simple. The nature of the services provided by some employees leads to an inevitable finding that the public health and safety would be threatened by a strike. Thus, strikes by firefighters,[150] police officers, or guards at mental or correctional institutions should be *per se* illegal.[151] In contrast, strikes by recreation department employees, general clerical staff, and other employees whose absence could be tolerated for some time or indefinitely should be presumed legal.[152]

In between these two categories are those employees whose strikes may endanger the public health and safety in certain situations. This group might include sanitation workers, utility workers, and public school employees.[153] In cases involving strikes by these employees, the particular circumstances surrounding the work stoppage should determine whether it is illegal.[154]

County Sanitation District—Applying the Proposal

A brief analysis of *County Sanitation District v. Los Angeles County Employees Association*,[155] which is currently pending before the California Supreme Court, demonstrates how a court could implement the proposed limited right to strike. In *County Sanitation District*, workers responsible for the operation and maintenance of sewage treatment and disposal facilities went on strike on July 5, 1976, after negotiations related to wages and benefits reached an impasse.[156] On July 6, the sanitation district filed suit against the union, seeking both injunctive relief and damages.[157] The trial court issued a temporary restraining order prohibiting the strike. The employees ignored the order[158] and the

150. Strikes by firefighters are already statutorily prohibited in California. CAL. LAB. CODE §§ 1961-1963 (West 1971).

151. The jurisdictions allowing public employees to strike specifically prohibit some or all of these employees from striking. *See supra* note 142 & accompanying text.

152. *See supra* note 137 & accompanying text; *see also* ALASKA STAT. § 23.40.200(a)-(d) (1981) (allows all public employees except police and fire protection employees, jail, prison and other correctional institution employees, hospital employees, public utility employees, snow removal employees, sanitation employees and public school and other educational institution employees to strike since they are engaged in "those services in which work stoppages may be sustained for extended periods of time without serious effects on the public.").

153. *See* ALASKA STAT. § 23.40.200(a)(2), (c) (1981) (specifies these workers as performing "those services which may be interrupted for a limited period but not for an indefinite period of time").

154. *See infra* note 170-78 & accompanying text (examples of pertinent factors).

155. 195 Cal. Rptr. 567 (Cal. App. 1983) (depublished, hearing granted by California Supreme Court on Jan. 1, 1984 (2nd Civil No. 66088)).

156. *Id.* at 568.

157. Answer to Petition for Hearing at 1-2, County Sanitation Dep't v. Los Angeles County Employees Ass'n, 195 Cal. Rptr. 567 (Cal. App. 1983) (2nd Civil No. 66088).

158. *Id.* at 2. The union was later adjudged guilty of contempt for failure to obey the order. *Id.*

strike continued for eleven days.[159] During this time, non-striking employees performed the services of the strikers and were compensated at overtime rates.[160] Negotiations resumed during the strike,[161] and on July 16 the employees agreed to accept the district's offer and return to work.[162]

Following trial of the claim for damages, judgment was entered in favor of the Sanitation District in the sum of $246,904 plus interest and costs.[163] The damages were awarded to compensate the district for the overtime paid to those who filled in for the striking workers and for the extra security costs incurred by the district because of the strike.[164] The court of appeal affirmed.[165]

Application of the proposed limited right to strike to the facts of this case might not protect the employees' strike activity. A court would first characterize the type of services provided by the employees and their necessity to the public health and safety.[166] Sanitation workers are not within the categories of employees whose strikes are either absolutely prohibited or presumed legal.[167] The court, therefore, would proceed to the second step of the analysis and examine the particular circumstances of the strike.[168] It should only issue an injunction if it finds that the disruption of services imminently threatens the public health or safety.[169]

In making this determination, the court could consider several factors. Past cases and studies have shown that strikes by sanitation workers do not usually threaten the public's health or safety,[170] but the possibility of harm to the public from disruption of sanitation services

159. *County Sanitation District*, 195 Cal. Rptr. at 568.

160. *Id.* at 570.

161. Petition for Hearing at 13, County Sanitation Dep't v. Los Angeles County Employees Ass'n, 195 Cal. Rptr. 567 (Cal. App. 1983) (2nd Civil No. 66088).

162. *County Sanitation District*, 195 Cal. Rptr. at 568.

163. *Id.*

164. *Id.*

165. *Id.* at 576. The court stated that it was bound by precedent holding that public employee strikes are illegal. *Id.* at 570. It noted that although the California Supreme Court has not squarely passed upon the legality of public employee strikes in recent decisions, the supreme court did state in Los Angeles Metropolitan Transit Auth. v. Brotherhood of R.R. Trainmen, 54 Cal. 2d 684, 355 P.2d 905, 8 Cal. Rptr. 1 (1960), that absent legislative authorization, public employees in general do not have the right to strike. The court of appeal then stressed that other courts of appeal "have treated this declaration as establishing a general rule—and have honored it." *County Sanitation District*, 195 Cal. Rptr. at 569.

166. *See supra* note 142 & accompanying text.

167. *See supra* notes 137, 143 & accompanying text.

168. *See supra* note 149 & accompanying text.

169. *See supra* notes 143, 149 & accompanying text.

170. *See, e.g.*, Highland Sewer & Water Auth. v. Local Union 459, I.B.E.W., 67 Pa. D.&C.2d 564, 565-67 (1973) (discussed *supra* note 149); *see also* Burton & Krider, *supra* note 110, at 427-28.

may depend upon whether non-striking and managerial employees are available to perform the services of the striking workers.[171] If replacement workers are unavailable, or if the jobs performed by the strikers require expertise, the environment and the public health and safety may be threatened by a sanitation workers' strike.[172] For example, a recent work stoppage by San Francisco sanitation workers resulted in the discharge of 426 million gallons of untreated sewage into the Pacific Ocean and the San Francisco Bay.[173] These discharges had a harmful effect on shellfish, fisheries, and recreational uses of the water and resulted in illness to several swimmers.[174] In the *County Sanitation District* case, the county claimed that the discharge in San Francisco amounted to only one tenth of the amount of sewage potentially involved in the Los Angeles strike.[175] Although replacement workers were available,[176] the potential for harmful effects was greater. Further, the sanitation district's facilities were apparently susceptible to sabotage and vandalism by striking workers.[177] This might have inter-

171. *See, e.g.,* Highland Sewer & Water Auth. v. Local Union 459, I.B.E.W. 67 Pa. D.&C.2d 564, 565-67 (1973) (holding public health and safety not endangered because replacement workers available). The sanitation district here took similar action. *See supra* note 149 & accompanying text.

172. In some situations, the length of the strike may be an important consideration. For example, in *County Sanitation District* the strike lasted for 11 days. *County Sanitation District*, 195 Cal. Rptr. at 568. During this time, some employees were required to be on duty 24 hours a day. Therefore, they had no guarantee of uninterrupted sleep or meals. *Id.* at 572. A district might be unable to operate its facilities safely under these conditions for an extended period time.

173. State v. City & County of San Francisco, 94 Cal. App. 3d 522, 525, 156 Cal. Rptr. 542, 543 (1979). The sewage workers did not actually strike, but honored picket lines set up around sewage treatment plants by other striking city workers. The city decided against operating the plants with supervisors. Nor did the city recruit others to assist in operating the plants, maintaining that it feared sabotage. The Director of Public Works decided to close the plants. The city later determined that it could run the plants with supervisory personnel. The strike ended two days after the plants opened. *Id.* at 525-26, 156 Cal. Rptr. at 543. *See also* Caso v. District Council 37, AFSCME, 43 A.D.2d 159, 162, 350 N.Y.S.2d 173, 175 (1973) (a strike by New York sanitation workers allegedly resulted in the discharge of approximately one billion gallons of untreated sewage into the East River).

174. *County Sanitation District*, 156 Cal. Rptr. at 544.

175. Answer to Petition for Hearing at 22, County Sanitation Dep't v. Los Angeles County Employees Ass'n, 195 Cal. Rptr. 567 (Cal. App. 1983) (2nd Civil No. 66088).

176. *County Sanitation District*, 156 Cal. Rptr. at 570. *See supra* note 171 & accompanying text.

177. *County Sanitation District*, 156 Cal. Rptr. at 571. Vandalism and sabotage apparently occurred in spite of the county's security precautions. *Id.* at 571 n.4. Replacement workers at the district's largest sewer facility found debris that "does not normally enter the sewage system" such as an innerspring mattress, tires, upholstered cushions, carpeting, and cabinet doors. Entrances to the plants were routinely strewn with roofing tacks and broken glass. In addition, on the three days preceeding the strike, employees had taken action to reduce the production of methane gas from the sewer sludge. Since most of the plants facilities relied on this gas for power production, emergency measures were required to conserve

fered with or stopped the operation of the plant, and led to a discharge of raw sewage into the ocean.[178] Based upon the facts of *County Sanitation District*, a court would be justified in finding that the strike imminently threatens the public health or safety.

County Sanitation District provides the California Supreme Court with the opportunity to modify the common law rule and establish a limited right to strike for local public employees. The facts of this case indicate that the strike might have imminently threatened the public health or safety. If the supreme court finds that the appellate court was justified by these particular circumstances in finding the strike illegal, it should affirm the court's holding.[179] However, in future cases, strikes may pose less of a threat to the public and an application of the limited right to strike would result in upholding some local employees' strike activity.

Although *County Sanitation District* can be decided upon the narrow issue of union liability for damages, this liability was premised on the presumed illegality of public employee strikes,[180] and the California Supreme Court should consider the broader policy issues involved in the case. Appellate courts have specifically requested guidance in determining whether local employee strikes can receive legal protection.[181] In addition, resolution of the right-to-strike issue is necessary

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the gas for the most critical operations. Finally, as the battery cables of the plant's standby generator had been cut, any significant delay in the starting of the effluent pumps could cause the plant to flood out. *Id.*

178. *See id.* at 571 n.4. The District contended that if the employees had successfully sabotaged the main sewage treatment facility and flooded it with inflowing sewage, substantial damage to the equipment would have rendered it inoperable. Consequently, over four billion gallons of raw sewage could have been discharged into the Pacific Ocean. Answer to Petition for Hearing at 22-23, County Sanitation Dep't v. Los Angeles County Employees Ass'n, 195 Cal. Rptr. 567 (Cal. App. 1983) (2nd Civil No. 66088).

Courts in future cases could determine whether sabotage was likely by looking to the history of strikes in the particular district or union. For example, the trial court in *County Sanitation District* could have looked to a 1974 strike against the district in which a significant amount of vandalism occured. *County Sanitation District*, 195 Cal. Rptr. at 571 n.4.

179. For example, Pennsylvania has adopted the limited right to strike proposed in this Note. *See supra* notes 141-43, 149. In Pennsylvania, appellate review of trial court determinations of the legality of a strike is limited. *See, e.g.,* Bethel Park School Dist. v. Bethel Park Fed'n of Teachers, Local 1607, 54 Pa. Commw. 49, 52, 420 A.2d 18, 19 (1980) (scope of appellate review limited to whether apparently reasonable grounds existed for the equitable relief ordered by the trial court); Bristol Township Educ. Ass'n v. School Dist. of Bristol Township, 14 Pa. Commw. 463, 466, 322 A.2d 767, 770-71 (1974) (scope of appellate review limited to whether apparently reasonable grounds existed for the equitable relief ordered by the trial court).

180. *See supra* note 22 & accompanying text.

181. *See e.g., County Sanitation District*, 195 Cal. Rptr. at 570; Stationary Eng'rs, Local 39 v. San Juan Suburban Water Dist., 90 Cal. App. 3d 796, 801, 153 Cal. Rptr. 666, 669 (1979); City of San Diego v. American Fed'n of State, County & Mun. Employees, 8 Cal. App. 3d 308, 313, 87 Cal. Rptr. 258, 261 (1970).

to apprise local governments and their employees of their rights and liabilities in the event of a strike. Even if the court declines to establish the proposed right to strike, it should at least provide some guidelines for lower courts and local governments and their employees.

Conclusion

California's local governments and their employees are plagued by uncertainty as a result of legislative and judicial ambiguity. The frequency of public employee strikes requires that the law clearly apprise both public employers and employees of their rights and remedies in a bargaining impasse or strike situation.

The public policy justifications that supported the general common law public employee strike prohibition are no longer applicable to present local employment conditions. The California Supreme Court, therefore, should exercise its power and modify the common law rule by establishing a limited right to strike.

Public employees' strike activity should be legally protected, unless the disruption of services performed by the employees would pose an immediate threat to the public health or safety. This determination could be made upon the basis of actual services performed or the particular circumstances of the case. If a court finds that the strike threatens the public health or safety, it may declare the strike illegal and issue an injunction.

Establishment of legal protection for local public employee strikes will result in more effective collective bargaining. As in the private sector, the threat of public sector strikes will encourage good faith negotiation and agreement between local governments and their employees. In this way, implementation of a right to strike will decrease the actual number of work stoppages and hasten their resolution.

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