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You must know, then, that there are two methods of fighting, the one by law, the other by force: The first method is that of men, the second of beasts; but as the first method is often insufficient, one must have recourse to the second.
—Machiavelli

INTRODUCTION

Strikes by public employees in all aspects of public employment have increased significantly within the past ten years. Even in those states that have specifically banned strikes by public employees, strikes have continued to plague public employers.[1] Even if public employees do not have the legal right to strike, many feel that if they have the *power* to strike they will exercise such power, relying on their collective strength to force a settlement that will include a no-reprisal provision insulating them from any disciplinary action. It is interesting to note that those educational employees previously covered under the Winton Act,[2] and now governed by the new California public education collective bargaining law, the Rodda Act,[3] who have engaged in strike activity[4] have not been terminated from their employment, even though certain strike leaders have been cited for contempt of court for refusal to obey court ordered injunction.[5] This fact lends credence to the school

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1. PUBLIC SERVICE RESEARCH COUNCIL, PUBLIC SECTOR BARGAINING AND STRIKES (1976) [hereinafter cited as PUBLIC SECTOR BARGAINING AND STRIKES]. In this study it was noted that between 1958 and 1974 public employee strikes increased from 15 to 382.

2. CAL. EDUC. CODE §§ 13080-13089 (West 1975) (repealed 1975).

3. CAL. GOV'T CODE §§ 3540-3549 (West Supp. 1978).

4. From July 1, 1976 to March 1, 1978 there have been 26 public school strikes in California.

5. *See* San Diego Unified School Dist. v. San Diego Teachers Ass'n, S.D. 399394 (Cal. Super. Ct., Aug. 16, 1977), wherein Hugh Boyle, President of the San Diego Teachers Association was fined $4000.00 and sentenced to ten days in jail for his participation in a four-day teachers strike in San Diego. The San Diego Teachers Association was also fined $4,500.00. The Court of Appeal for the Fourth District denied a writ of certiorari to review the contempt judgments, but the California Supreme Court granted a hearing in this matter. San Diego Teacher's Ass'n v. Superior

of thought that legislating against public employee strikes will not necessarily end strikes.[6]

LEGALITY OF PUBLIC STRIKES IN CALIFORNIA

Common Law

It is a well-established common law principle that no public or private employee has a legal right to strike.[7] It was not until the enactment of the National Labor Relations Act[8] that private employees were given the right to engage in concerted activities, including lawful strikes.

In *United Federation of Postal Clerks v. Blount,*[9] the United States District Court upheld the constitutionality of federal law prohibiting federal or District of Columbia employees from participating in strikes.[10] The court rejected arguments that such a statute violated federal governmental employees' due process rights, equal protection rights or freedom of association rights, noting that:

> Given the fact that there is no constitutional right to strike, it is not irrational or arbitrary for the Government to condition employment on a promise not to withhold labor collectively, and to prohibit strikes by those in public employment, whether because of the prerogatives of the sovereign, some sense of higher obligation associated with public service, to assure the continuing function of the Government without interruption, to protect public health and safety or for other reasons. Although plaintiff argues that the provisions in question are unconstitutionally

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Court, 4 Civ. No. 16794 (Cal. Sup. Ct., June 29, 1978). *See also* Almond v. County of Sacramento, 276 Cal. App. 2d 32, 80 Cal. Rptr. 518 (1969), where the California court of appeal upheld the firing of 127 county employees who engaged in an unlawful strike and thus were considered to be absent without leave. In Hortonville Joint School Dist. v. Hortonville Educ. Ass'n, 426 U.S. 482 (1976), the United States Supreme Court upheld the authority of a school board to investigate and terminate striking teachers.

6. *See* Bernstein, *Alternatives to the Strike in Public Labor Relations,* 85 HARV. L. REV. 459, 462-63 (1971), where the author argues that it may be counterproductive to legislate harsh penalties for public employee strikes. However, it is safe to say that if strikes are legalized, strike activity will increase. *See* PUBLIC SECTOR BARGAINING AND STRIKES, *supra* note 1.

7. United Fed'n of Postal Clerks v. Blount, 325 F. Supp. 879 (D.D.C. 1971), *aff'd without opinion,* 404 U.S. 82 (1971). In Dorchy v. Kansas, 272 U.S. 306, 311 (1926), Mr. Justice Brandeis stated: "Neither the common law nor the Fourteenth Amendment confers the absolute right to strike."

8. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-168 (1970 & Supp. 1975)).

9. 325 F. Supp. 879 (D.D.C. 1971), *aff'd without opinion* 404 U.S. 82 (1971).

10. 5 U.S.C. § 7311(3) (1976).

> broad in covering all Governmental employees regardless of the type or performance of the work they perform, we hold that it makes no difference whether the jobs performed by certain public employees are regarded as 'essential' or 'non-essential' or whether similar jobs are performed by workers in private industry who do have the right to strike protected by statute.[11]

In California the common law concept that, absent specific legislation, public employees do not have the right to strike has been followed in numerous decisions, including the California Supreme Court decision of *Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen,*[12] which found that the Los Angeles Metropolitan Transit Authority Act of 1957 gave transit employees covered under the Act the specific right to strike and absent this specific grant such a right would not have existed.

California Statutory Law

Under the Rodda Act, and formerly under the Winton Act, the California State Legislature has specifically provided that Labor Code section 923[13] is not applicable to public school employees.[14] In *Pasadena Unified School District v. Pasadena*

11. 325 F. Supp. at 883.

12. 54 Cal. 2d 684, 687, 355 P.2d 905, 906, 8 Cal. Rptr. 1, 2 (1960). However, in *In re* Berry, 68 Cal. 2d 137, 151, 436 P.2d 273, 283, 65 Cal. Rptr. 273, 283 (1968), the California Supreme Court stated that it did not have to decide if public employee strikes could be enjoined since the injunction in question was unconstitutional. *See also* Pasadena Unified School Dist. v. Pasadena Fed'n of Teachers, 72 Cal. App. 3d 100, 105-10, 140 Cal. Rptr. 41, 44-47 (1977); City and County of San Francisco v. Evankovich, 69 Cal. App. 3d 41, 47-48 n.5, 137 Cal. Rptr. 883, 886-87 n.5 (1977); Crowley v. City and County of San Francisco, 64 Cal. App. 3d 450, 454-55, 134 Cal. Rptr. 533, 535 (1976); Los Angeles Unified School Dist. v. United Teachers of Los Angeles, 24 Cal. App. 3d 142, 145, 100 Cal. Rptr. 806, 808 (1972); Trustees of Cal. State Colleges v. San Francisco State College Fed'n of Teachers, 13 Cal. App. 3d 863, 867, 92 Cal. Rptr. 134, 136 (1970); City of San Diego v. Am. Fed'n of State, County and Mun. Employees Local 127, 8 Cal. App. 3d 308, 310-13, 87 Cal. Rptr. 258, 260-61 (1970); Almond v. County of Sacramento, 276 Cal. App. 2d 32, 34-35, 80 Cal. Rptr. 518 (1969); and Newmarker v. Regents of Univ. of Calif., 160 Cal. App. 2d 640, 646, 325 P.2d 558, 562 (1958), where the California court of appeal ruled that a strike by a public employee terminates the employment relationship with the public agency.

13. CAL. LAB. CODE § 923 (West 1971), which provides in part:

> Therefore it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

14. CAL. GOV'T CODE § 3549 (West Supp. 1978).

Federation of Teachers,[15] following *Los Angeles Metropolitan Transit Authority,* the court of appeal, in a case involving a school district suit against two unions for damages because of an unlawful strike, ruled that Labor Code section 923 guarantees individual workers the rights to engage in concerted activity, including the right to strike. However, since the then-existing Education Code section 13088 expressly stated that Labor Code section 923 did not apply to its provisions, the court found that it was clearly the legislative intent to withhold this right to strike from public school employees.[16]

With the enactment of the Rodda Act, the State Legislature has seen fit to carry over the prohibition of Labor Code section 923 as being applicable to public school employees.[17] It must be assumed that the Legislature was aware of the cases of *Almond v. County of Sacramento*[18] and *Los Angeles Unified School District v. United Teachers—Los Angeles,*[19] among others, and would not have added Government Code section 3549 if it had intended to give public school employees the right to strike.[20]

Contentions raised by public employee organizations in justifying their right to strike a public employer have included arguments such as equal protection, freedom of speech, and involuntary servitude. To date, the California Courts of Appeal have not been receptive to these arguments.

Constitutional Arguments

Equal protection of the law. In *City of San Diego v. A.F.S.C.M.E., Local 127,*[21] the California Court of Appeal was

15. 72 Cal. App. 3d at 106 n.1, 140 Cal. Rptr. at 45 n.1.

16. *See* Almond v. County of Sacramento, 276 Cal. App. 2d 32, 36, 80 Cal. Rptr. 518, 522 (1969), where the court of appeal ruled that the Meyers-Milias-Brown Act, CAL. GOV'T CODE §§ 3500-3511 (West Supp. 1978), governing city and county employee labor relations, expressly withheld from such employees the rights of CAL. LAB. CODE § 923 (West 1971). *See also* City and County of San Francisco v. Evankovich, 69 Cal. App. 3d 41, 52-53, 137 Cal. Rptr. 883, 890 (1977).

17. CAL. GOV'T CODE § 3549 (West 1978) provides in pertinent part: "The enactment of this chapter shall not be construed as making the provisions of Section 923 of the Labor Code applicable to public school employees and shall not be construed as prohibiting a public school employer from making the final decision with regard to all matters specified in Section 3543.2."

18. 276 Cal. App. 2d 32, 80 Cal. Rptr. 518 (1969).

19. 24 Cal. App. 3d 142, 100 Cal. Rptr. 806 (1972).

20. *See* City and County of San Francisco v. Evankovich, 69 Cal. App. 3d at 52-53, 137 Cal. Rptr. at 880-91 (1977).

21. 8 Cal. App. 3d 308, 87 Cal. Rptr. 258 (1970). In Norwalk Teachers' Ass'n v. Board of Educ., 138 Conn. 269, 271, 83 A.2d 482, 484 (1951), declaring no right to strike

confronted with the union's argument that denying a gardner on a public golf course the right to strike while affording a gardner on a private course that right does not serve a legitimate, compelling state interest. The court responded to this contention by stating that:

> The reasons for the law denying public employees the right to strike while affording such right to private employees are not premised on differences in types of jobs held by these two classes of employees but upon differences in the employment relationship to which they are parties. The legitimate and compelling state interest accomplished and promoted by the law denying public employees the right to strike is not solely the need for a particular governmental service but the preservation of a system of government in the ambit of public employment and the proscription of practices not compatible with the public employer-employee relationship. . . .[22]

The court added that the discrimination at which the equal protection guarantee is aimed does not attach to the common law prohibition against public employee strikes unauthorized by statute merely because some statutes do grant public transit district employees the right to strike.[23]

Freedom of Speech

Whenever employee organizations engage in concerted labor activities which involve the inducement of an unlawful strike by public employees, the California courts have rules that such speech "is subject to restraint if either the purpose or the means used to exert such economic pressure is unlaw-

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by public employees, the court quoted Franklin D. Roosevelt:

> Particularly, I want to emphasize my conviction that militant tactics have no place in the functions of any organization of Government employees. . . . [A] strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of Government until their demands are satisfied. Such action, looking toward the paralysis of Government by those who have sworn to support it, is unthinkable and intolerable.

22. 8 Cal. App. 3d at 315-16, 87 Cal. Rptr. at 263-64. All the courts that have ruled that public employee strikes are illegal have usually examined the distinction between private sector employment and public sector employment and pointed out that public employees gain certain rights and give up certain rights as a result of public employment. *Id.* at 311-12, 87 Cal. Rptr. at 260-61. *See also* Shaw & Clark, *The Practical Differences Between Public Private Sector Collective Bargaining*, 19 U.C.L.A. L. Rev. 867 (1972).

23. 8 Cal. App. 3d at 316, 87 Cal. Rptr. at 264.

ful."[24] Mere advocacy of the right to strike is protected by the first amendment but actual inducement of work stoppage is illegal absent statutory authorization.[25]

The California Supreme Court in *In re Blaney*[26] has ruled that free speech guarantees in labor disputes are not subject to the clear and present danger test since such speech is subject to modification or qualification in the interest of the society in which it exists. In labor relations the purpose of the economic pressure and the means used to exert it must be lawful in order for such speech to be protected. In *City of Los Angeles v. Los Angeles Building and Construction Trades Council*[27] the court of appeal upheld the constitutionality of a prior restraint upon peaceful picketing in support of an unlawful public employee strike. As the United States Supreme Court ruled in *Thornhill v. Alabama:*

> It is true that the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interest of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to the industrial combatants.[28]

Involuntary servitude. The argument that the use of injunctive relief to enjoin a strike by public employees would be violative of the thirteenth amendment of the United States Constitution is given short shrift by the courts. In *Trustees of California State Colleges v. San Francisco State Federation of Teachers*[29] the court of appeal ruled that since a public employee has the right to resign his/her position at any time, said individuals cannot be compelled by a court injunction to labor against their will.

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24. Pasadena Unified School Dist. v. Pasadena Fed'n of Teachers, 72 Cal. App. 3d 104, 108, 140 Cal. Rptr. 41, 45 (1977). *See also In re* Berry, 68 Cal. 2d 137, 436 P.2d 273, 65 Cal. Rptr. 273 (1968).

25. Pasadena Unified School Dist. v. Pasadena Fed'n of Teachers, 72 Cal. App. 3d 104, 110, 140 Cal. Rptr. 41, 46 (1977).

26. 30 Cal. 2d 643, 648, 184 P.2d 892, 896 (1947).

27. 94 Cal. App. 2d 36, 40-43, 210 P.2d 305, 308-10 (1949). *See also* Pasadena Unified School Dist. v. Pasadena Fed'n of Teachers, 72 Cal. App. 3d at 109, 140 Cal. Rptr. at 46-47 (1971); City and County of San Francisco v. Evankovich, 69 Cal. App. 3d at 49, 137 Cal. Rptr. at 887 (1977).

28. 310 U.S. 88, 103 (1940).

29. 13 Cal. App. 3d 863, 866, 92 Cal. Rptr. 134, 136-37 (1970).

Injunctive Relief

Once it was established that strikes by public employees in California are unlawful, most of the recent litigation has centered around the constitutionality of the injunctive relief fashioned by the courts. In the leading case of *In re Berry*,[30] the California Supreme Court overturned a contempt citation involving county employees who were engaged in a strike against the county on the grounds that the injunctive relief fashioned by a superior court was overly broad and unlawfully restrained informational picketing and speech not carried on for an unlawful purpose. The court ruled that the following portions of the restraining order[31] were overly broad and constitutionally improper:

> 1. Prohibition of all picketing and demonstrations in front of county buildings: As to this portion the court ruled that this prohibition would prohibit "mere informational picketing and demonstrations designed to communicate the content of grievances and mobilize public support. It is clear that such informational picketing and demonstration, far from promoting or advocating a strike, might be utilized in the hope of eliminating by intellecutal persua-

30. 68 Cal. 2d 137, 436 P.2d 273, 65 Cal. Rptr. 273 (1968).

31. The superior court ordered:

> That Defendants, and each of them, their officers, agents, servants, employees, representatives and members, and all persons in active concert or participation with them, or in concert among themselves, be restrained and enjoined from doing directly or indirectly, by any means, methods or device whatsoever, any and all of the following things:
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> (a) From ordering or continuing or attempting to induce any employee of the Plaintiff to cease work for or not to work for the Plaintiff;
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> (b) From intimidating, threatening, molesting or coercing the Plaintiff or Plaintiff's agents, employees, suppliers, contractors, guests or invitees;
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> (c) From striking or engaging in a work stoppage or other similar concerted activity against Plaintiff, or inducing or calling a strike, work stoppage or other concerted activity against Plaintiff; and
>
> (d) From picketing, and from placing, stationing or maintaining, or causing any picket or pickets to be stationed or maintained, and from causing, participating in or inducing others to participate in any demonstration or demonstrations on any grounds, or that portion of any public or private street which adjoins any grounds, or any sidewalk which is contiguous to any portion of any portion of any private or public street which adjoins any grounds which are owned, possessed or controlled by the Plaintiff and on which are situated any building, buildings or structures of any kind whatsoever which are occupied by Plaintiff and in which employees of Plaintiff are assigned to work.

Id. at 141-142, 436 P.2d at 276-277, 65 Cal. Rptr. at 276-277.

> sion the need for more drastic action."[32] Thus the restraining order would have precluded such picketing even *absent* a strike, and without a showing that a specific governmental interest would be harmed by such picketing, no injunctive relief would be proper.
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> 2. Prohibition against inducing county employees to cease work or threatening county employees or other persons not to do work for the county: As to this portion the court ruled that this would preclude any action done for purely innocent purposes and not connected in any way with the strike.[33]
>
> 3. Prohibition against striking, picketing "or other concerted activity": As to this portion the court ruled that this could involve non-strike activity such as distribution of information, circulating petitions, or publishing articles.[34]

In warning against an unlawful restraint of first amendment rights the court stated: "it is clear that constitutionally permissible restrictions upon the exercise of First Amendment rights must be drawn with a narrow specificity calculated to prevent repression of expressive activities as to which restriction is constitutionally forbidden."[35]

In *City and County of San Francisco v. Evankovich,* the court of appeal upheld an injunction that enjoined only picketing in support of an actual strike or the hindering or interfering with work at the public facility.[36] The California courts have rejected the approach that some states have taken to the effect that injunctive relief will be granted only if there is a showing of violence, irreparable injury, or breach of the peace. For example, in *School District v. Holland Education Association,*[37] the Michigan Supreme Court reversed a trial court's issuance

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32. *Id.* at 152, 436 P.2d at 283, 65 Cal. Rptr. at 283.

33. *Id.* at 154-55, 436 P.2d at 285, 65 Cal. Rptr. at 285.

34. *Id.*

35. *Id.* (citations omitted).

36. 69 Cal. App. 3d 41, 46-47, 137 Cal. Rptr. 883, 886 (1977). The injunction prohibited the unions from:

> 1. Striking or calling or inducing or giving notice of a strike against the plaintiff, City and County of San Francisco;
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> 2. Picketing said plaintiff's facilities, buildings, and properties in support, promotion, or advocacy of a strike against said plaintiff.

The court of appeal in *Evankovich* indicated that the language in the San Francisco State teacher's strike was similar and that such language had been upheld in Trustees of Calif. State Colleges v. San Francisco State College Fed'n of Teachers, 13 Cal. App. 3d 863, 866-67, 92 Cal. Rptr. 134, 136 (1970).

37. 380 Mich. 314, 157 N.W.2d 206 (1968).

of a temporary injunction against striking school teachers on the ground that there was no showing in the record that the school district would suffer irreparable injury in any manner if the injunctive relief were not granted. The school district could show only that its schools would not be open or staffed by teachers on the scheduled opening date. In California, a simple showing that a strike is unlawful is sufficient to obtain injunctive relief, even though peaceful means are used to carry out the strike, since such conduct is improper if the object is unlawful.[38]

Liability of Unions for Unlawful Strike Activities

In the landmark decision of *Pasadena Unified School District v. Pasadena Federation of Teachers,*[39] a California court of appeal ruled that a teacher union that openly advocated and solicited members of a school district to go on strike is liable for damages on the theory of tortious inducement of breach of contract and on a theory of direct liability for harm resulting from an unlawful act. The court found that the relationship between a teacher and the school district is based upon a statutory contract which includes state statutes, the rules and regulations of a school board, and board resolutions.[40] The union attempted to argue that a labor union was privileged to induce a breach of contract or to interfere with the contractual relationship because it has the right to represent employees under the law. The court rejected this argument, ruling that such a privilege applies only when a union is engaging in lawful activity.[41]

Since strikes by public employees in California are unlawful, both *Imperial Ice Co. v. Rossier,*[42] in which the California Supreme Court articulated a rule of privilege for lawful union activity, and the Restatement of Torts section 775 are not applicable. Thus, when the union advocated the breach of con-

38. *See* City of Los Angeles v. Los Angeles Bldg. & Constr. Trades Council, 94 Cal. App. 2d 36, 210 P.2d 305 (1949). In Los Angeles Unified School Dist. v. United Teachers of Los Angeles, 24 Cal. App. 3d 142, 100 Cal. Rptr. 806 (1972), a temporary restraining order prohibiting a strike by public school teachers was granted on the simple showing that the strike would result in a loss of state and federal funds to the district.

39. 72 Cal. App. 3d 100, 140 Cal. Rptr. 41 (1977).

40. *Id.* at 112, 140 Cal. Rptr. at 48; *see also* Fry v. Board of Educ., 17 Cal. 2d 753, 760, 112 P.2d 229, 234 (1941).

41. *Id.* at 110-111, 140 Cal. Rptr. at 47-48.

42. 18 Cal. 2d 33, 112 P.2d 631 (1941).

tract by engaging in a one-day unlawful strike, the union subjected itself to liability for damages.

In addition, the appellate court ruled that, even absent a contract, the union would still be liable for inducing and participating in an unlawful act.[43] In *Garmon v. San Diego Building Trades Council*[44] the California Supreme Court, in a case involving a suit for damages and injunctive relief as a result of a strike under the National Labor Relations Act, ruled that Civil Code section 1708 imposes upon everyone the "duty to abstain from injuring the person or property of another, or infringing upon any of his rights."[45] If a strike is unlawful, then there is a breach of this legal duty. "That breach constitutes the commission of a tort, under the laws of this state, for which an action in damages will lie."[46] The court then went on to state that "it is further established in this state that by an unlawful and unauthorized labor practice an employer who is damaged thereby may recover damages in a tort action."[47]

In the *Pasadena* case, in noting that *Garmon* was reversed by the United States Supreme Court, the appellate court ruled:

> The reversal therefore has no effect upon the validity of our Supreme Court's statement as a pronouncement of California law applicable to employment not subject to National Labor Relations Board jurisdiction. Defendants have not claimed that plaintiff is involved in interstate commerce and it is patent that it is not. The union cannot avoid liability for this tort by claiming it did not itself strike. The complaint alleges directly that it induced and encouraged such unlawful labor practice. All those who aid and abet in the commission of an intentional tort are equally liable with the party directly committing it.[48]

The action by the union in *Pasadena* clearly falls within the ambit of the Restatement of Torts. A pertinent part of section 876 of the Restatement of Torts reads:

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43. 72 Cal. App. 3d at 112-13, 140 Cal. Rptr. at 48-49.

44. 49 Cal. 2d 595, 320 P.2d 473 (1958), *rev'd*, 359 U.S. 236 (1959), on the theory that the National Labor Relations Board had exclusive jurisdiction with respect to employers in interstate commerce. Other sections of *Garmon* not pertinent to this discussion were overruled in Petri Cleaners, Inc. v. Automotive Employees, Laundry Drivers and Helpers Local No. 88, 53 Cal. 2d 455, 475, 349 P.2d 76, 88, 2 Cal. Rptr. 470, 480 (1960).

45. 49 Cal. 2d at 606, 320 P.2d at 479.

46. *Id.*

47. *Id.*

48. 72 Cal. App. 3d at 113, 140 Cal. Rptr. at 49.

> For harm resulting to a third person from the tortious conduct of another, a person is liable if he
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> (a) orders or induces such conduct, knowing of the conditions under which the act is done or intending the consequences which ensue, or
>
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself,. . . .[49]

Based upon a more compelling factual situation because of the duration of the strike and more clearly definable damages, the El Rancho Unified School District in Pico Rivera, California recently filed a lawsuit against the National Education Association, the California Teachers Association, the El Rancho Education Association, the California Federation of Teachers, and the El Rancho Federation of Teachers for damages resulting from a 25 day strike in 1976.[50] The district based its lawsuit on the fact that the above-mentioned employee organizations and unions induced the employees of the district to breach their contract.

In addition, the suit alleges that the associations and unions engaged in clearly unlawful activity and attempted to force the district to negotiate with the defendants, who were not the exclusive representative, in clear violation of California Government Code section 3543.3.[51] In the lawsuit the district claimed it suffered actual damages of $1,085,000 as the result of nineteen days of instruction being denied to the students and because the amount of time and money in administrative costs necessary to keep the schools open during the strike. The district is also seeking an additional $10,000,000 in punitive damages, based upon an intentional violation of the law.

UNFAIR PRACTICES AND STRIKE ACTIVITY

As stated above, the Rodda Act specifically excludes the right to strike.[52] However, if public school employees do strike, is an employee organization guilty of an unfair practice? Government Code section 3543.6 specifies that union conduct which is prohibited.[53]

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49. RESTATEMENT OF TORTS § 876 (1939).

50. El Rancho Unified School Dist. v. National Educ. Ass'n, No. C213061 (Cal. Super. Ct., demurrer denied Mar. 15, 1978).

51. CAL. GOV'T CODE § 3543.3 (West Supp. 1978). This section provides that a school district is obligated to negotiate only with the exclusive representative.

52. CAL. GOV'T CODE § 3549 (West Supp. 1978).

53. It shall be unlawful for an employee organization to:

If a union strikes it is usually to put pressure on a district to capitulate to the union's demands. An early study of strike activity under the Rodda Act indicated that of twenty work stoppages during the first full school year, in not one instance was the full impasse procedure used.[54] This omission could give rise to an unfair practice charge on the ground that a union has failed to implement the impasse procedure in good faith.[55] Another argument could be sustained on the theory that by placing *unlawful* pressure on a district during negotiations, a union is not negotiating in good faith.[56]

At the time this article was written, the California Public Employment Relations Board (PERB) had not had the opportunity to rule on an unfair practice charge involving unlawful strike activity. However, in *El Rancho Unified School District v. El Rancho Federation of Teachers,*[57] PERB did rule that a school district had standing to *file* an unfair practice charge against two unions who allegedly threatened and coerced employees during an illegal work stoppage. The charge was based in part upon the theory that the unions had interfered with employees' rights guaranteed by the Rodda Act.

If PERB fails to find that an unlawful strike constitutes an unfair practice, unions will use the impasse procedure only when they feel it can be employed to put political pressure on

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(a) Cause or attempt to cause a public school employer to violate Section 3543.5.

(b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

(c) Refuse or fail to meet and negotiate in good faith with a public school employer of any of the employees of which it is the exclusive representative.

(d) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

CAL. GOV'T CODE § 3543.6 (West Supp. 1978).

54. Special Bulletin, PUBLIC EMPLOYMENT RELATIONS REPORTER (July 29, 1977). See also Currier, *A Case Study: 16 Public School Job Actions and the Use of Impasse Procedures,* CALIF. PUB. EMPLOYEE REL. (June, 1977).

55. CAL. GOV'T CODE § 542.6(d) (West Supp. 1978).

56. *But see* Board of Educ. v. Detroit Fed'n of Teachers Local 231, 55 Mich. App. 499, 223 N.W.2d 23 (1974), in which the Michigan Court of Appeals ruled that an unlawful strike was not a per se refusal to bargain in good faith and upheld the Michigan Public Employment Relations Commission's decision to dismiss the school district's petition. *See also* Lamphere Schools v. Fed'n of Teachers, 67 Mich. App. 331, 240 N.W.2d 792 (1976), and Warren Educ. Ass'n v. Warren Consolidated Schools, 1976 M.E.R.C. Lab. Op. 974 (Mich. 1976).

57. EERB Decision No. 45 (Dec. 30, 1977), [1977-1978] 2 PUB. EMPL. REP. CAL. (L.R.P.) ¶ 2024.

a school board. Instead of the procedure being used to assist in reaching peaceful settlements, it will be used for political reasons only. If unions will not be cited by PERB for unfair practices for striking during negotiations, including impasse, more strikes will likely occur in California, with the unions claiming that PERB has not "prohibited" them from striking. Clearly, this result would be contrary to the intent of the legislature.[58]

CONCLUSION

It is clear that in public education in California there have been no restraints placed upon unions for engaging in unlawful strikes. Until school boards determine that it will be in their long-range best interests to terminate striking employees or to successfully sue the unions for engaging in unlawful strike activity, it is most likely that the unions will continue with the activity that has been so successful for them over the past five years. Of course, some unions may feel that their cause is justified and will engage in such activity no matter what the cost. In the long run, until the employer-employee relationship stabilizes, such strike activities will probably continue in light of the tight financial restraints imposed upon school districts by court decisions such as *Serrano v. Priest*[59] and by property taxpayers' rebellions against higher public expenditures, such as the recent passage of Proposition 13 in California (property tax relief initiative). Such financial restraints clash head-on with collective bargaining demands. There is a general proposition that he who has the power will exercise that power if necessary. Unless the strike power is restrained, the education of children will continue to suffer due to unlawful activities, labor relation stability will be in turmoil, and the lofty goals of the Rodda Act will be thwarted.[60]

58. *See* CAL. GOV'T CODE § 3540 (West Supp. 1978).

59. 5 Cal. 3d 584, 487 P.2d 1193, 96 Cal. Rptr. 661 (1971), *aff'd on rehearing* 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), *cert. denied*, 432 U.S. 907 (1977). In *Serrano* the California Supreme Court ruled that the method of funding public education in California was unconstitutional.

60. CAL. GOV'T CODE § 3540 (West Supp. 1978) states in part: "It is the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California. . . ."