

1986

# Backgrounder: The Civil Cases. Four Representative Decisions of the California Supreme Court

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*Supreme Court Project*

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## Recommended Citation

Johnson, Phillip E., "Backgrounder: The Civil Cases. Four Representative Decisions of the California Supreme Court" (1986).  
*California Agencies*. Paper 226.  
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# Backgrounder



*The Civil Cases*, by Phillip E. Johnson, is the sixth in a series of Supreme Court Project Backgrounders on California's 1986 judicial elections. In it, Johnson (who also wrote Backgrounder number one, *The Court on Trial*) explores four cases that he describes as "fairly representative of the thinking that the justices bring to a range of important questions. The first case deals with a simple life insurance contract problem, the second with the constitutionality of a medical malpractice reform statute, the third with whether or not public employees have a right to strike, and the fourth illustrates the expansive interpretation the Court gives to anti-discrimination statutes."

With so much attention focused on the Court's record in criminal cases, particularly involving the death penalty, the civil cases tend to be neglected. This is unfortunate, both because so much of the Court's work falls into the category of civil law and because these rulings can have a greater effect on ordinary Californians' day-to-day lives than all the criminal decisions combined.

But regardless of the kind of cases examined, the fundamental question, says Johnson, remains whether or not the justices have served the law.

His analyses, consequently, focus specifically on the reasoning the justices employ in applying the law rather than on the results each decision achieves. He asks whether the opinions reasonably reflect the intent of lawmakers, whether they treat the opposing parties in each case fairly, whether they are based on actual legal principles, rather than on extraneous (for instance, ideological) considerations.

The answers to these questions are an essential part of any wise evaluation of the justices on November's ballot. *The Civil Cases* is designed to help supply these answers.

Phillip Johnson served as a law clerk for California Chief Justice Roger Traynor (1965-1966) and for United States Chief Justice Earl Warren (1966-1967). He has been a member of the Boalt Hall School of Law faculty since 1968.

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\$2.00

# Backgrounder

## The Civil Cases

Four Representative Decisions of the  
California Supreme Court

by  
Phillip E. Johnson

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The Supreme Court Project

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### Who's Telling the Truth?

*Once again, through a strained and unrealistic statutory construction, the majority has thwarted the obvious intent of the framers of, and voters for, Proposition 8 [The Victims' Bill of Rights].*

- California Supreme Court Justices Malcolm Lucas and Stanley Mosk in a recent dissent.

*If I couldn't follow the law, I wouldn't sit here.*

- Chief Justice Rose Bird, quoted the day after the Proposition 8 decision was handed down.

Who is right? Have Supreme Court decisions strayed from following the clear intent of the law? Or are the controversies involving California's Supreme Court merely disagreements as to what the law really means? To answer these questions, The Supreme Court Project is publishing the research, ideas and opinions of California's top experts on the major issues involved in the 1986 judicial elections.

The Supreme Court Project's purpose is to provide opinion makers, educators, the business community and ordinary Californians with timely and concise, yet thorough, information on these critical issues. Our Backgrounders are designed to insure that responsible voices are heard throughout California in the debate on our highest court. They emphasize up-to-date research and analysis on the most important questions of the day.

Beginning with Phillip E. Johnson's *The Court on Trial*, published last December, The Supreme Court Project's Backgrounder series includes: *The Biltmore Debate*, with Professors Phillip E. Johnson, Stephen R. Barnett, Gerald F. Uelman and Steven H. Shiffrin, *Why Has Justice Lucas Ceased Concurring on Carlos-Garcia?*, *California's Supreme Court Justices: Umpires or Policy Makers?*, by Gideon Kanner, *A Foray in Judicial Policy Making: The Wellenkamp Decision*, by Richard McDonald, and *The Civil Cases*. The entire series has been widely read and debated in California's law schools, among judges and practicing attorneys, at public fora and in the news media.

All Backgrounders are available directly from The Supreme Court Project (please see back cover for our address). To help cover our printing and mailing costs, we request a \$2 donation each for *The Court on Trial* and for *The Civil Cases*, \$4 for *The Biltmore Debate*, and \$1 for each of the other Backgrounders.

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# The Civil Cases

Four Representative Decisions of the  
California Supreme Court

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Phillip E. Johnson

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## The Civil Cases by Phillip E. Johnson

PHILLIP E. JOHNSON is a professor at the University of California's Boalt Hall School of Law at Berkeley where he has served as a member of the faculty since 1968. He is the author of the course book *Criminal Law* used widely in law schools throughout the state and nation. He served as a law clerk for California Chief Justice Roger Traynor (1965-1966) and for United States Chief Justice Earl Warren (1966-1967). Professor Johnson is widely known and respected as a writer and lecturer of exceptional expertise and ability. His work has appeared in the California Law Review and in the Law Reviews of Yale, Stanford and Emory Universities and the University of Chicago. He has previously contributed to The Supreme Court Project in *The Court on Trial* and *The Biltmore Debate*.

THIS IS the second paper I have prepared for voters in the November 1986 general election. This election is extraordinary in that six of the seven justices of the state Supreme Court will be on the ballot. The group includes three justices appointed by former Governor Jerry Brown (Chief Justice Rose Bird and Justices Cruz Reynoso and Joseph Grodin), and the two justices appointed by Governor George Deukmejian (Justices Malcolm Lucas and Edward Panelli). Justice Stanley Mosk, who at the age of 73 had been considering retirement after 22 years on the Court, in August announced that he will seek re-election to a new 12-year term.

The judicial election of 1986 is in no sense a recall or other extraordinary interference with the independence of the judiciary. On the contrary, it is the constitutionally-mandated procedure by which the people of California are able to hold the justices accountable for the use they have made of their enormous discretionary power. My previous pamphlet, *The Court on Trial*, explained the election procedure and sought to justify it as a reasonable means to allow the public to exercise some control over what otherwise could be arbitrary judicial law-making power. However little the justices themselves and some leaders of the legal profession may like it, the fact is that the California Constitution does not give our judges total independence from public opinion. Recognizing that judges, like other public officials, may be tempted to abuse their vast discretionary power, the people of California have insisted on retaining the ultimate power to call the courts to order.

My earlier pamphlet also attempted to give a brief overview of

the substance of what the California Supreme Court has been doing in the Bird years (since 1977). Most of the discussion in that pamphlet, however, centered upon two areas of particular controversy: the death penalty cases and the legislative reapportionment cases. I concluded that there is a substantial basis for the charge that the chief justice and some of her colleagues have used their discretionary authority to block the enforcement of the death penalty, despite the absence of any credible legal grounds for doing so. A majority of the Court has also supported the efforts of Democratic leaders in the state Legislature to "gerrymander" the state's legislative districts. As a result, virtually all our legislators have safe seats and one party is assured control of the Legislature regardless of shifts in public opinion.

Many persons who found the information and analysis in that earlier pamphlet helpful have urged me to provide information about other aspects of the Court's performance. In particular, I have been asked to explain what the Court has been doing in the "common law" subjects that are less publicized than the death penalty and criminal law issues. Does the Court show good sense and restraint in cases dealing with the interpretation of contracts, with the tort system and proposals to reform it, with labor issues and the interpretation of civil rights statutes? The vast attention paid to the death penalty cases has deflected not only public but even professional attention from these important areas.

The purpose of this pamphlet is to provide interested citizens with information to help them make up their own minds about the performance of the Court in the civil cases. I have selected the cases described in this paper not because they are the most foolish decisions I could find, but because they are fairly representative of the thinking that the justices bring to a range of important questions. The first case deals with a simple life insurance contract problem, the second with the constitutionality of a medical malpractice reform statute, the third with whether or not public employees have a right to strike, and the fourth illustrates the expansive interpretation the Court gives to anti-discrimination statutes. In each case, my method is first to describe the nature of the case and then the reasoning contained in each of the opinions written for it. Following that, I provide an analysis of the reasoning the justices of the California Supreme Court employ in deciding the important questions that come before them.

## Excluding "Suicide" from a Life Insurance Contract

**Searle v. Allstate Life Insurance Company (1985)**  
**38 Cal.3d 425, 212 Cal.Rptr. 466, 696 P.2d 1308**

### The Issue

Life insurance policies carry a standard clause excluding coverage for "suicide, whether sane or insane," occurring within two years of the issuance of the policy. Martin Searle, depressed because of failing health and sexual impotency, told his wife "I can't take it anymore," and then raised a gun to his head and pulled the trigger. Because his life insurance policy had been purchased only 10 months earlier, the company refused to pay but returned the premiums. The widow brought a lawsuit, arguing (successfully, in the lower court) (1) that "suicide" means intentional self-destruction by a person of sound mind; (2) that "suicide, whether sane or insane" is therefore a contradiction in terms; (3) that the contradiction should be resolved against the company that wrote the policy; and (4) that she should therefore be able to collect on the policy despite the exclusionary clause if her husband was insane.

Having persuaded the lower court that only sane people can commit suicide, she then relied at the jury trial on two experts who testified that Martin was insane, one of whom explained that "suicide is not the act of a sane person." The trial court instructed the jury that the plaintiff should recover if she could prove Martin lacked the mental capacity either (1) "to intend to take his life, including awareness of the nature and consequences of his act of self-destruction," or (2) "to govern his own conduct." The jury returned a verdict for the insurance company. The widow appealed to the California Supreme Court, primarily on the ground the trial court had committed error by telling the jury she had the burden of proving Martin was insane.

### The Opinions

The majority opinion by Justice Reynoso<sup>1</sup> held that the suicide clause was neither self-contradictory nor ambiguous, and that it

1. Reynoso's majority opinion was joined by Justices Otto Kaus, Allen Broussard, Joseph Grodin and a temporary justice. When there is a vacancy

excluded suicide by a sane or an insane person. Nonetheless, the opinion reasoned, suicide is intentional self-destruction, and insanity may be relevant to show that the insured person lacked suicidal intent. If Martin was unable to understand the physical nature and consequences of the act, then he did not intentionally kill himself. The majority opinion went on to hold that the insurance company had the burden of proving that Martin was sufficiently sane to form an intent to kill himself, and that there had to be a new trial under this newly explained standard and burden of proof. In short, the widow was to get another chance at a jury verdict, even though the jury had ruled against her at the first trial despite a far broader definition of the kind of insanity that would permit recovery.

Chief Justice Bird, in a separate opinion, faulted the majority for not going further. She argued that the phrase, "suicide, whether sane or insane," would be ambiguous to a purchaser who consulted a dictionary and found that some definitions say that "suicide" means self destruction by a person of sound mind. Since the clause was ambiguous, it should be construed strictly against the insurance company, and insanity in the broadest sense should permit recovery. Martin's beneficiary could thus recover if the company could not prove that he understood the "moral character and general nature" of suicide.

Justice Stanley Mosk dissented. He argued that the clause was both economically justified and clear, and that it was meant to exclude both irrationally and rationally motivated suicide. He pointed out that the majority's position was supported by a small minority of the decided cases, mostly from Kentucky. Most states exclude psychiatric evidence of mental condition, whether or not it purports to relate to "intent." The purpose of the suicide clause is to provide a clear, easily administered standard for excluding coverage for persons who may have been contemplating suicide when they bought the policy. Opening up the trial to vague and speculative psychiatric testimony subverts that purpose.

#### Analysis

Reynoso's majority opinion and Mosk's dissent are both

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on the Court, the "Chairperson of the Judicial Council" - Chief Justice Bird - assigns a lower court judge or retired justice to temporary duty on the Supreme Court.

correct that there is nothing self-contradictory or ambiguous about a clause excluding "suicide, whether sane or insane." No one would consider it contradictory or confusing to say that insane people sometimes commit suicide. The fact that some definitions of suicide require a sound mind does not make the phrase contradictory. On the contrary, it explains why the additional words had to be included to make clear that insanity is irrelevant. Life insurance would be more expensive for the rest of us if persons contemplating suicide could obtain coverage, and obviously it is reasonable for the insurers to want to have a clause that states an easily administered rule that does not depend on discretionary jury findings about the dead person's mental state. Mosk's opinion is absolutely correct on these points.

There is a certain abstract logic to the majority's holding that insanity may in some cases be relevant to show lack of intent, but this logic had no bearing on the facts before the Court. If the insured had suffered from the delusion that he was Superman, he might have jumped off a tall building expecting to fly safely to the ground. In such a case we could say that the death was not intentional, but there was no evidence in the *Searle* case suggesting that Martin thought he could put a bullet in his brain without fatal consequences. To give the plaintiff another chance at a jury verdict on these facts is simply to give another jury the opportunity to decide that the widow needs the money more than the insurance company does.

In effect, Reynoso's majority opinion imports a "diminished capacity" defense borrowed from criminal law into the interpretation of an insurance contract. The court-created doctrine of diminished capacity was utterly unsatisfactory in the criminal law area, because it invited the jury to speculate on the basis of unreliable psychiatric testimony. Liberal and conservative voters alike were disgusted with this doctrine when it was brought to their attention after the success of the "Twinkie Defense" in the notorious "Dan White" case. It is distressing to see that the majority of the California Supreme Court learned so little from the experience with the criminal diminished capacity defense that it reached for the opportunity to make the same mistake all over again in contract law.

Bird's opinion went much farther than the majority in endorsing a wide-open psychiatric escape from the suicide exclusion. She offered no real explanation of why it is desirable to require the defendant to prove that the deceased understood "the moral character and general nature" of suicide (whatever

that might mean), other than to assert that doubtful issues of interpretation in insurance form contracts should always be resolved against the company. One of the remarkable aspects of Bird's opinion is her attitude towards legal authority. The majority opinion observed that the standard suicide exclusion clause had been consistently upheld by more than a century of legal precedent, going back to a decision of the United States Supreme Court in 1876. Responding to this point, Bird argued that "the very longevity of this authority exposes its weakness," because "[t]he initial - and leading - cases rested on the firm foundation of 19th century contract law."

The *Searle* case is important because of the attitude that the Supreme Court majority, but especially Chief Justice Bird, demonstrated towards contract disputes in which an individual is suing a corporation. Does the Court view this type of case as a traditional contract dispute where it gives a sensible meaning to language, and at the same time tries to structure contract law in an economically sound manner? Or does the Court view these cases as occasions for seeing if there is some way to take money away from the company and give it to the widow? I think the majority opinion tried to split the difference between these two incompatible approaches.

All litigants are entitled to fair treatment, even including insurance companies and other corporations. The temptation to play Robin Hood (or to encourage juries to do so) is understandable, but judges must resist it. In any case, it is naive to think that only impersonal business entities will bear the cost of unreasonable legal rules. If Martin Searle's widow recovers, the insurance company will pay the judgment, but the future cost of suicides will be borne by members of the public who pay premiums.

### Tort Reform: Periodic Payment of Future Damages

*American Bank and Trust Company v. Community Hospital of Los Gatos-Saratoga* (1984)  
36 Cal.3d 359, 204 Cal.Rptr. 671, 683 P.2d 670

#### The Issue

When an injured person recovers a judgment in a tort action, the amount may include damages for losses expected to occur in

the future (such as medical expenses, or pain and suffering) as well as losses already suffered in the past. The jury has to predict how long the injured person will live, what medical expenses he will incur, and what dollar value should be placed on the pain he will suffer in the future. Finally, the jury has to calculate the present value of all these future liabilities in order to arrive at a single "lump sum" award covering all past and future damages, so that this amount can be paid at one time to the plaintiff (and divided with his attorney).

Frequently, the jury calculation of life expectancy is overly optimistic, and the severely injured plaintiff dies before actually incurring all the expenses or losses included in the lump-sum verdict. When that happens the plaintiff's heirs receive a "windfall," and the defendant has to pay for damages that the plaintiff never suffered. (The plaintiff can also live longer than the estimate, but that is unlikely when a compassionate jury does the estimating.) The lump sum can also be squandered by an improvident plaintiff. Tort reformers have frequently recommended schemes for paying future damages in installments as they occur, but lawyers have resisted this sort of change because it is detrimental on the whole to the interests of plaintiffs, because it further complicates the administration of tort law, and because it ignores the economic fact that a third or more of the judgment belongs to the plaintiff's lawyer.

Change came to California because of a crisis in the medical malpractice insurance system. Faced with rapidly escalating premiums and policy cancellations, the medical profession joined with the insurance industry to sponsor legislation designed to keep malpractice judgments (and insurance costs) under control. The Medical Injury Compensation Reform Act of 1975 (MICRA) made several changes in medical malpractice cases. One of these provided that, when a plaintiff in a medical malpractice case sustained "future damages" of \$50,000 or more, compensation for the future damages will be paid periodically over the course of time the losses are incurred, rather than in a lump sum payment at the time of judgment. This and every other provision of the MICRA reform was attacked as unconstitutional by members of the California Trial Lawyers Association (CTLA) which represents plaintiffs and which was unsuccessful in lobbying against MICRA in the Legislature.

The plaintiff in the test case that reached the California Supreme Court was admitted to the defendant hospital for brain surgery. On the eve of her scheduled operation, she fell in a

shower stall and suffered severe burns due to overheated water. After these burns were treated, the surgery proceeded and she was found to have a tumor which almost always results in death within one year. She brought a lawsuit, claiming that the hospital's negligence had led to her fall in the shower and to her burns. Her medical experts testified that future surgery would be necessary, and that she would suffer some disability in the future due to the burns. The jury returned a general verdict of slightly less than \$200,000. The defendant hospital then argued that part of this verdict should be attributed to future damages, and paid periodically as long as the plaintiff lived. (The payments would quickly have stopped on that basis, because the plaintiff died a few months after the trial.) The trial judge ruled that the provision of the MICRA reform was unconstitutional, and refused to alter the lump sum payment. The hospital appealed to the California Supreme Court.

#### The Opinions

The majority opinion by Justice Otto Kaus<sup>2</sup> (who has since retired from the Court) upheld the reform against a battery of constitutional attacks:

(1) "Plaintiff" (that is, the heirs of the injured woman, supported by the CTLA) argued that the change from a lump sum judgment to periodic payments violated the "substantive due process" rights of malpractice victims and their spouses by diminishing the value of their judgments without giving them anything equivalent in return. The majority replied that plaintiffs have no vested property right in a particular measure of damages, and that the Legislature could reasonably conclude that a provision for periodic payment of future damages would adequately compensate injured persons for damages while avoiding the "windfall" and "squandered principal" problems.

(2) Plaintiff argued that MICRA violated "equal protection of the laws" by providing reduced liability for medical malpractice defendants while leaving the law unchanged for other defendants who cause injury negligently. The majority replied that it was not unreasonable for the Legislature to consider medical malpractice as a special case because of the pressing insurance problems. Plaintiffs argued that the insurance crisis was contrived rather than real, and that malpractice insurance

2. Broussard, Grodin and a temporary justice joined the majority opinion.

premiums are in any case a small fraction of total health costs, so it was unreasonable for the Legislature to suppose that lowered premiums would result in lowered health care costs. The majority opinion replied that such claims went to the wisdom of the legislation rather than its constitutionality and were therefore for the Legislature rather than the courts to consider.

(3) Plaintiff argued that the reform violates the state constitutional right to trial by jury because it permits the judge to calculate the percentage of the lump sum award attributable to future damages, and to set the schedule for payment of those damages. The majority opinion found some merit in this argument, and to avoid a troublesome constitutional issue decided that the statute should be interpreted to require the jury to designate the portion of its verdict that is intended to compensate the plaintiff for future damages. Leaving to the court the discretion to determine the precise schedule on which these future damages would be dispersed, the majority concluded, was no more an interference with the right to jury trial than many other long-accepted instances of judicial authority.

(4) Finally, the plaintiff contended that the statutory reform was "void for vagueness," because it left so many questions of detail to be determined by subsequent decisions of the courts. (This argument was particularly curious, because the California Supreme Court has on many occasions ventured to reform tort law without any statutory guidance whatever.) The majority responded that the courts are capable of "filling in the details."

There were bitter, emotional dissents from both Mosk and Bird.<sup>3</sup> Mosk began by announcing that "[t]his imprudent legislation provides benefits to the wrongdoer at the expense of his victim." (Of course, the "wrongdoer" here is not a wicked person but a hospital whose losses are paid by insurance and eventually passed on to the public through health insurance premiums.) Mosk went on to argue that, since the calculation of future damages is inherently uncertain, the plaintiff ought to be able to retain "the whole amount of the judgment awarded by the trier of fact and the benefits from its investment," to guard against the possibility that the amount awarded may be inadequate. Mosk attributed the MICRA reform to a legislative misunderstanding of medical economics. Because malpractice insurance premiums are a small fraction of total medical costs,

3. A temporary justice joined both dissents, and so the legislation was upheld by a narrow 4-3 margin, with a temporary justice on each side.

the Legislature was wrong to suppose that a reduction of malpractice insurance premiums would result in a substantial reduction of total health care costs. Mosk pointed out that in some cases the California Supreme Court has refused to defer to a legislative judgment in determining the constitutionality of statutes restricting tort recovery, and in conclusion returned to his argument that the legislation is unconstitutional because it "benefits the wrongdoer at the expense of his victim."

Chief Justice Bird also dissented in uncompromising language. She argued that the provision for periodic payments violates the constitutional right to jury trial, and also violates the right to equal protection of the laws because it burdens a small and defenseless minority (malpractice victims with future damages of more than \$50,000) for the benefit of insurance carriers who may or may not pass the savings on to their customers in the form of lower premiums. Although Bird purported to agree with the majority that the legislation should be upheld if it bears a "rational relationship to a legitimate state purpose," she somewhat confusingly criticized the majority opinion for reducing this rational relationship test to a "rubber stamp," by holding that the test is satisfied if the legislation had a rational basis. In her exact words:

*To invalidate discriminatory legislation under the majority's version of the rational relationship test, this Court would have to conclude that the Legislature acted 'irrationally' in passing it.*

Bird's complaint sounds like doubletalk, but she pointed out that a majority of the Court in the past has sometimes employed the rational basis test to strike down laws adversely affecting tort plaintiffs and other "defenseless groups" even where the legislation could not fairly be said to lack a rational basis.

#### Analysis

The majority opinion is obviously correct. The shocking thing is that this entirely reasonable legislation was upheld as constitutional by only a 4-3 vote of the Court. Bird and Mosk also dissented when the Court upheld the other provisions of the MICRA reform,<sup>4</sup> and their opinions taken as a whole imply that

4. For a complete picture of the litigation over the MICRA reforms, see the opinions in *Fein v. Permanente Medical Group*, 38 Cal.3d 137 (1985).

they would not allow the Legislature to make any changes in tort law that reduce the advantages currently possessed by plaintiffs. The logic of these opinions is not compelling, to put it mildly.

California has an international reputation as a strongly "pro-plaintiff" jurisdiction, with rules of liability and judicial and jury attitudes that tend to encourage very large recoveries for injured persons. Reasonable persons can differ over whether California tort law is in need of reform, and if so in what direction. What ought to be beyond question is that the Legislature has the authority to institute reforms, whether or not those reforms have the approval of the plaintiffs' trial bar.

There is absolutely nothing in the state or federal constitutions that prohibits the Legislature from changing the rules of liability, or guarantees plaintiffs that any changes will only be in the direction of providing ever more generous rights of recovery. The CTLA had tenable arguments to make against the MICRA reform, and its members made those arguments unsuccessfully in the Legislature. There the matter ought to have ended. For Mosk and Bird to attempt to read those arguments into vague and general constitutional language was, in my judgment, an abuse of judicial authority.

#### Public Employees' Right to Strike

*County Sanitation District No. 2 v. Los Angeles County Employees' Association* (1985)  
38 Cal.3d 564, 214 Cal.Rptr. 424, 699 P.2d 835

#### The Issue

American law generally regards public employee strikes as illegal. A strike by federal employees may be treated as a crime, and everyone remembers how President Reagan ordered the firing of striking air controllers. As of 1985 strikes by state and local employees had been explicitly allowed by court decision or statute in only 10 states, and a long line of Court of Appeal decisions in California had endorsed the common law doctrine that such strikes are illegal. The Legislature has repeatedly avoided taking an explicit position on this politically-charged issue, however, and before 1985 California Supreme Court opinions had indicated the Court regarded the law as unsettled.

The Los Angeles case involved a labor union representing sanitation workers, who went on strike for 11 days after

collective bargaining over a new labor contract reached an impasse. The Sanitation District succeeded in maintaining its operations with supervisory personnel and non-striking workers, and eventually the strikers returned to work. The District then sued the union for damages, winning a substantial judgment for costs it had incurred due to the strike. The California Supreme Court reversed the judgment.

### The Opinions

There was no majority opinion. The plurality opinion by Justice Allen Broussard (joined by Mosk and Grodin) explained that the legality of public employee strikes remained an unsettled issue as far as the California Supreme Court was concerned, despite the clear rule of law arising from the Court of Appeals decisions. Except in the special case of firemen, the Legislature had also carefully avoided pronouncing on the legality of strikes when enacting statutes providing for collective bargaining by public employees. The plurality opinion then reviewed the traditional arguments that have been made against allowing public employee strikes, particularly the claims that a right to strike would give public employees excessive leverage in the bargaining process and would cause the disruption of essential public services. The plurality noted that not all public employees perform essential services, and that government agencies frequently are able to hold firm during these strikes and reject demands they consider unreasonable. After considering the policy arguments on both sides of the question, the plurality concluded that there is no clear-cut distinction between private and public employment that would support an endorsement of the right to strike in the former and a prohibition in the latter. Accordingly, the plurality announced the abolition in California of the common law doctrine prohibiting public sector strikes, except where it is clearly demonstrated that the strike creates an imminent threat to the health or safety of the public.

Broussard's opinion went on to make some rather mysterious pronouncements about the constitutional dimensions of the right to strike. It remarked that "[a]lthough we are not inclined to hold that the right to strike rises to the magnitude of a fundamental right, it does appear that associational rights are implicated to a substantial degree." The purpose of this Delphic pronouncement seems to have been to warn the Legislature that the Court will carefully scrutinize any statutory bar to public employee strikes

to make sure it is only as broad as necessary to protect public health and safety. In other words, the plurality might well hold a broad statutory ban on public employee strikes unconstitutional.

Kaus wrote a brief but significant concurring opinion, joined by Reynoso. Kaus pointed out that it was only necessary to hold in this case that a peaceful strike by public employees does not give rise to a tort action for damages against the union, in the absence of any legislative provision for such a remedy. It was unnecessary to decide whether such strikes are legal or illegal in an abstract sense, or whether a public employer could obtain some other remedy (such as an injunction) against a similar strike. Finally, Kaus argued that it was unwise for the plurality to speculate on potential constitutional problems with hypothetical future legislation. "In my view," Kaus wrote, "we should - if anything - be encouraging the Legislature to attempt to deal with the difficult public policy questions in this area, not frightening it away with premature warnings of possible constitutional mine fields."

Grodin wrote a separate brief concurrence responding to the concerns expressed by Kaus, in which he seemed to disassociate himself from the constitutional speculation in the Broussard opinion. Lucas dissented, taking the view that any change in the settled Court of Appeals doctrine prohibiting public employee strikes should be for the Legislature to enact.

Chief Justice Bird wrote a lengthy concurring opinion, starting with the observation that it is desirable to tell the Legislature what it will and will not be allowed to do under the Constitution, and comparing the prohibition against public employee strikes with the suppression of the Solidarity Union by the communist government in Poland. She then derived a broad constitutional right for public employees to strike from such constitutional principles as "the basic personal liberty to pursue happiness and economic security through productive labor", "the absolute prohibition against involuntary servitude," and the "fundamental freedoms of association and expression."

### Analysis

Public employee strikes are generally unpopular, and the Court's holding in this case has been widely criticized. Bird's opinion is regarded as an embarrassment even by her supporters: it is unnecessary, and incorrect to the point of absurdity. Persons who voluntarily choose the advantages of public

employment, and who are of course free to leave their jobs at any time, are not held in "involuntary servitude" if they are denied a right to strike for higher wages. That is a point on which both logic and legal authority are in agreement. The plurality opinion also flirts with the idea of creating a constitutional right to strike for public employees, and it does so in a much less straightforward manner. I strongly disapprove of these ominous hints that the Court will hold unconstitutional any legislation that it considers overbroad. Justice Kaus had it right: the Court should welcome a legislative response, and not threaten the Legislature in advance with constitutional decrees.

If the unnecessary and mischievous constitutional speculation were removed, and the decision suitably limited to the controversy actually before the Court, I would be inclined to defend the decision rather than attack it. The plurality is correct in observing that legal prohibitions of strikes tend to be ineffective, and that public employee strikes do not necessarily disrupt essential services. (The strike by sanitation workers in this case was unsuccessful, and management was able to maintain essential operations by using supervisors and nonstriking workers.) The Legislature can certainly ban public employee strikes, but it is probably wise not to do so unless they produce intolerable effects (as in the case of truly essential workers.) In any case, the Legislature has chosen to avoid the issue, and in the absence of legislation it may be prudent for the courts not to imply a damage remedy.

Against this line of argument, of course, is the fact that there has been a long-standing rule derived from Court of Appeal decisions outlawing these strikes, and there is considerable force to the argument by Lucas that proponents of change should go to the Legislature rather than to the courts. On balance, I would nonetheless defend the view that it is always open to the Court to change a common law doctrine when experience shows a change to be desirable, especially when the Legislature has in effect delegated control of the subject to the courts.

What disturbs me about the plurality opinion in the Los Angeles Sanitation District case is the potential for expansion inherent in the broad manner in which the plurality framed the issue. It is one thing to say that, in the absence of legislation, the courts will not imply a damage remedy for a strike. It would be quite another thing to say that a public employer may not fire striking employees for refusing to show up for work. A court that thinks in terms of a broad "right to strike," and announces

that it stands ready to afford constitutional or semi-constitutional protections for striking public employees, may be tempted to grant striking public employees special protection from discharge or other discipline. That should be a matter for the Legislature rather than the courts.

### May a Boys' Club Exclude Girls?

*Isbister v. Boys' Club of Santa Cruz (1985)*  
40 Cal.3d 72, 219 Cal.Rptr. 150, 707 P.2d 212

#### The Issue

California's Unruh Civil Rights Act provides that "all persons within the jurisdiction of the state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." The California Supreme Court has consistently viewed this statute as a broad grant of power to the courts to ban all "arbitrary" discrimination, rather than as a carefully drafted provision to be interpreted according to its terms. For example, one decision held that the statute forbids owners of rental property from refusing to rent apartments to families with children, although the statute says nothing about discrimination on the basis of childhood.<sup>5</sup> In other words, the Court treats the specific types of discrimination listed in the Act as illustrative rather than exclusive. On the other hand, even the forms of discrimination specifically mentioned are not absolutely prohibited. The Court has said that discrimination is unlawful only where it is "arbitrary." By its terms, the statute applies only to "business establishments."

The question in this case was whether the Unruh Act, so interpreted, requires the Boys' Club of Santa Cruz to admit girls as members and permit them to use its facilities. The Club defended its policy of restricting membership to boys on two grounds. First, it argued that a nonprofit community service

5. *Marina Point, Ltd. v. Wolfson*, 30 Cal.3d 721 (1982). The Court has also said that the Act prohibits discrimination against homosexuals, although there is no language in it to that effect. See *Koire v. Metro Car Wash*, 40 Cal.3d 24 at page 32.

organization is not a "business establishment" within the meaning of the Act. Second, it argued that the policy of admitting only boys was not "arbitrary," because the Club's primary purpose - to combat delinquency - is an important social interest best served by concentrating on boys, who are far more likely to get into trouble with the law than girls.

### The Opinions

The majority opinion by Grodin<sup>6</sup> held that the Boys' Club is a "business establishment" and that the exclusion of girls is "arbitrary." Grodin acknowledged that the Unruh Act as initially drafted banned discrimination in "all public or private groups," and that the final version of the Act limited its scope to "business establishments of every kind whatsoever." Although this legislative history could have been read as indicating a legislative intent not to cover nonprofit organizations, the majority opinion thought that the qualifying phrase "of every kind whatsoever" indicated a legislative intent that the term "business establishments" should be given an extremely broad construction to cover all places of public accommodation or amusement. In the majority's view, the Boys' Club was "public" in this sense because it admits all boys indiscriminately with no attempt to "restrict membership or access on the basis of personal, cultural, or religious affinity, as a private club might do." Curiously, this seems to have the effect of suggesting that the Club is "public," and therefore subject to the anti-discrimination statute, because it did not discriminate on any basis *other* than sex and age.

The majority also found the discrimination to be arbitrary, despite the prevention of delinquency rationale. The majority commented that delinquency also affects girls, that girls need the recreation offered by the Club as much as boys, and that there was no evidence in the record that a sex-segregated recreational facility is more effective in combatting juvenile delinquency than one open to both sexes. Finally, the majority was unmoved by the fact that the Boys' Club had recently received a grant of \$200,000, conditioned on continuation of the male-only policy. Although the Club might have to forfeit this large amount of money, the majority hoped that "admission of girls may well produce offsetting new revenue sources."

6. The majority opinion was joined by Broussard, Reynoso, and a temporary justice.

Chief Justice Bird did not join the majority opinion, but once again chose to write her own individual concurring opinion. She quoted at length from the dissenting opinion of Justice Poche in the Court of Appeals, and her apparent purpose in writing separately was to give recognition to an opinion she thought excellent. Poche had argued that exempting nonprofit fraternal or charitable organizations from the statute would permit a racist group like the Ku Klux Klan to provide athletic facilities for white children only. He also observed that exempting non-profit organizations that charge only nominal membership fees would allow organizations supported by wealthy donors to discriminate, when less affluent organizations that have to charge fees sufficient to cover the costs of operation would not be allowed to do so. The statute, he thought, must be construed sufficiently broadly to prevent these outrageous possibilities.

Justices Mosk and Kaus dissented separately, on different grounds. Mosk took the view that, by specifying only business establishments and not other types of organizations, the Unruh Act deliberately left private clubs, charitable institutions and the like unregulated. Against the majority's and Chief Justice Bird's desire to construe the Unruh Act broadly to fight discrimination in institutions of all kinds, Justice Mosk posed the countervailing values of pluralism and freedom of association. He pointed out that the logic of the majority opinion would seem to ban college fraternities and sororities and would require private women's colleges to admit males upon demand. "Girls' organizations throughout California are no more eager for an invasion by boys than are boys' groups for dilution of their programs by compulsory inclusion of girls," he commented.

Kaus also expressed doubt the Boys' Club is a business establishment, but he preferred to rest his dissent on the argument that excluding girls was not an arbitrary policy. He commented:

*If one of the main goals of the Club is the control of juvenile delinquency and those who guide its affairs have made a reasoned decision that this goal is best advanced by a prophylactic application of the Club's limited resources to that group of youngsters from which the majority of serious delinquents seems to come - boys - that is surely not arbitrary.*

### Analysis

There may be good arguments for extending the reach of

anti-discrimination law to charities and private clubs, but there are important countervailing considerations and the California Legislature made a decision to restrict the application of the Unruh Act to only a certain kind of institution - business establishments. Both the majority opinion and the Bird opinion rob this term of all meaning. The comments of Judge Poche, quoted at length by Bird and also referred to with approval in the majority opinion, are particularly revealing on this point. The Ku Klux Klan is a despicable organization, but that does not make it a business establishment. In the unlikely event that the Klan were to start providing luxurious athletic facilities without charge on a racially exclusionary basis, legislators could consider amending the statute to govern non-business organizations. If we admit as legitimate the principle that statutes should be construed not according to their terms, but broadly enough to prevent any hypothetical evil that judges think the Legislature ought to have prohibited, then we have simply abandoned the rule of law.

The majority opinion also uses the term "arbitrary" in an unusual sense. The majority concedes that the Boys' Club has an intelligible and apparently reasonable basis for its membership policy, but then holds that policy "arbitrary" because there are also good arguments for a different policy. Arbitrary turns out to mean just controversial, or questionable.

A doctrine that says that all questionable distinctions between categories of people are unlawful in an entirely open-ended category of establishments or organizations is simply too vague to qualify as a rule of law. If a bill phrased in this way were proposed in the Legislature, practically everyone would agree that the lawmakers have a duty to be more precise in telling the courts and the public just who is forbidden to discriminate, and whom they are forbidden to discriminate against. When the Legislature does pass a loosely drafted statute, the courts ought to try to give it a reasonably definite construction, so that citizens and their lawyers can form some idea of what is prohibited and what is allowed without taking every question to court. The Court has done the opposite with the Unruh Act, preferring to construe its language as vaguely as possible so as to maximize the Court's own discretionary power.

In the long run, the goal of equal justice under law will be threatened - not protected - if we encourage the growth of arbitrary power in the judiciary.

## Conclusion

The most striking fact to emerge from this review of typical civil cases is the extraordinary way in which Chief Justice Bird conceives her role. One might expect and hope that the chief justice, as presiding officer of the Court, would take the lead in furthering the process of compromise and coalition-building that is necessary if a seven-member body is to speak with anything like a unified voice. On the contrary, Bird is always the strident advocate, and she frequently declines to join the opinions of others even when there is no apparent reason for standing aloof. I am at a loss to understand, for example, why she refused to join the Broussard plurality opinion in the Los Angeles Sanitation District case, thus preventing the publication of a majority opinion. She could easily have joined Broussard's opinion and still presented separately her unusual theory about the basis for a constitutional right to strike.

Precisely why Bird writes these individualistic statements, which ordinarily serve no practical purpose other than to draw public and professional criticism, appears to be a mystery even to her supporters. If this practice were her only fault it could be passed off as an eccentricity, but it tends to lend credence to the widely reported view that she is a naturally autocratic person who does not display much objectivity or impartiality in her judgments. Bird has some of the virtues of a dedicated advocate, including courage, but a person who thinks of herself as a prophet is not likely to be a good judge.

No similarly clear verdict emerges with respect to any of the other justices who have been the subject of controversy: Mosk, Reynoso and Grodin. (Lucas and Panelli are uncontroversial and in any case uninvolved in these cases, except for the reasonable Lucas opinion in the Los Angeles Sanitation District case. Broussard is not on the ballot.)

Mosk is a highly intelligent person whose standards of judgment have puzzled me for years. He writes some excellent opinions, and some incredibly capricious opinions. Sticking to the evidence presented by these four cases, I would describe Mosk's opinions in the life insurance suicide case and the Santa Cruz Boys' Club case as welcome statements of good sense to a Court that badly needs such statements. On the other hand, his opinion on the constitutionality of the medical malpractice reform is simply dreadful. It exemplifies the worst excesses of the discredited "substantive due process" approach to constitutional

law, which permits a judge to throw out any legislation that he deems unreasonable. Mosk himself is one of the main architects of California's current tort law; the fact that he thinks it unconstitutional for the Legislature to alter the structure he and his colleagues have created indicates that he places too high a value on his own handiwork.

Mosk's views seem to have undergone a series of adjustments in the recent past. Although he expresses strong moral opposition to capital punishment and has consistently voted to hold death penalty statutes unconstitutional, he dissents with increasing frequency from majority decisions that reverse death verdicts on tenuous grounds. After many years of championing the rights of tort plaintiffs, and of supporting "strict liability" for sellers of defective products, he dissented from a 1985 majority opinion extending strict liability to landlords and authored a plurality opinion in 1986 holding that pharmacists are not strictly liable for selling defective drugs.<sup>7</sup> Mosk has been proud of his reputation as a pioneer in creating "independent state grounds" for reversing criminal judgments, but on the day he announced his candidacy he published an opinion for a 4-3 majority on an important criminal procedure issue that followed the lead of the United States Supreme Court and overturned a California doctrine that had favored the defense.<sup>8</sup> Such flexibility helps to explain why Justice Mosk faces no organized opposition.

Reynoso was a prominent advocate for minority rights before his appointment to the bench, and he has continued his dedication to this cause. I am not favorably impressed with his opinion in the life insurance suicide case, and he joined Grodin's opinion in the Santa Cruz Boys' Club case. On the other hand, Reynoso joined the sensible opinion of Kaus in the Los Angeles Sanitation District case, avoiding the mistake of unnecessary

7. See *Becker v. IRM Corp.*, 38 Cal.3d 462 (1985); *Murphy v. E. R. Squibb & Sons, Inc.*, 40 Cal.3d 672 (1986).

8. The decision in *People v. Collins* (August 11, 1986) is reported on page 1 of the *Los Angeles Daily Journal* for August 12. The Court held that a defendant who did not testify may not obtain a reversal of his conviction on the ground that the prosecution planned to impeach his testimony with inadmissible prior felony convictions. Previous California decisions had allowed defendants to raise the issue on appeal even if they did not testify; the federal rule allows a defendant to raise the issue only if his testimony was actually impeached by the allegedly inadmissible priors.

constitutional speculation. He did not participate in the MICRA case, because he had decided the same issue while a member of the Court of Appeal (voting there to uphold the statute). Reynoso's candidacy is controversial mainly because of his role in the death penalty and other criminal cases, described in my earlier paper, *The Court on Trial*, where his position is very close to that of Chief Justice Bird.

I would also give a mixed review to Grodin. I thoroughly deplore the perverse way in which the Court has "interpreted" the Unruh Civil Rights Act, as exemplified by the Santa Cruz Boys' Club case. In fairness, however, the Court began treating the act as a wide-open charter for judicial lawmaking long before Grodin was appointed, and the Legislature has never objected. I give Grodin considerable credit for joining the Kaus opinion upholding the MICRA reform, especially since I suspect that his natural inclination was otherwise.<sup>9</sup> My impression of Grodin overall is that he is an able legal scholar of strong liberal sympathies who has been taking an increasingly moderate position as the Court's public standing has become precarious. On a somewhat differently balanced Court, with more support from sensible colleagues, I believe that he would be an effective and constructive participant in the deliberative process. I would not rely on him as a voice of moderation, however.

Those are my opinions, but I invite the reader to reach his or her own judgments on the basis of the information in this pamphlet, my previous pamphlet, and any rebutting material provided by others. For better or worse, California's Constitution gives the voters - not the "experts" - final authority over whether the present justices of the California Supreme Court should continue to exercise the vast discretionary power to make law illustrated by the cases I have described. An election, like a jury verdict, reflects our faith that ordinary citizens can somehow summon the wisdom to decide complex disputes that baffle and divide the experts. We permit persons with specialized knowledge to enlighten the jury, but not to usurp from it the ultimate power of decision. This is my testimony: The verdict is yours.

9. Grodin's vote in the MICRA case was particularly significant because the Court initially voted to hold the Act unconstitutional in a majority opinion by Mosk, joined by Bird and two temporary justices. (See 190 Cal.Rptr. at 371.) Following Grodin's appointment the Court granted a rehearing, and the dissenting opinion by Kaus became the majority opinion.

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