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Hearing Date: July 29, 2004

ITEM 9
TEST CLAIM
FINAL STAFF ANALYSIS

Labor Code Section 3212.1

Statutes 1982, Chapter 1568
Statutes 1984, Chapter 114
Statutes 1988, Chapter 1038
Statutes 1989, Chapter 1171
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Cancer Presumption (K-14)

(02-TC-15)

Santa Monica Community College District, Claimant

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EXECUTIVE SUMMARY

Background

This case addresses an evidentiary presumption in workers compensation cases given to certain firefighters and peace officers that develop cancer during employment.

Generally, before an employer is liable for payment of workers compensation benefits, the employee must show that the injury arose out of and in the course of employment, and that the injury was proximately caused by the employment. The burden of proof is normally on the employee to show proximate cause by a preponderance of the evidence.

The Legislature eased the burden of proving industrial causation for certain public employees that provide vital and hazardous services by establishing a series of evidentiary presumptions. In 1982, the Legislature enacted Labor Code section 3212.1, which provided a limited presumption, easing the burden of proving industrial causation for specified firefighters that developed cancer during the period of employment. In 1989, certain peace officers were also given the cancer presumption. In these cases, there was a presumption that the cancer arose out of and in the course of employment, and the employer was liable for full hospital, surgical, and medical treatment, disability indemnity, and death benefits, if the firefighter or peace officer could show that he or she was exposed, while in the service of the department or unit, to a known carcinogen and that the carcinogen was reasonably linked to the cancer.

On May 27, 2004, the Commission adopted a statement of decision denying a similar test claim on Labor Code section 3212.1, as amended by Statutes 1999, chapter 595, Statutes 2000, chapter 887 (*Cancer Presumption for Law Enforcement and Firefighters*, CSM 01-TC-19.) The Commission found that the express language of Labor Code section 3212.1 does not impose any

workers compensation claim and prove that the injury is non-industrial remains entirely with the local agency, as it has since Labor Code section 3212.1 was enacted in 1982.[1]

In the present case, the claimant, a community college district, contends that the test claim statute imposes a reimbursable state-mandated program by, in part, requiring school districts and community college districts to pay additional costs of claims caused by the shifting of the burden of proof of the cause of the cancer from the police officer employee to the district.

Conclusion

As described in the analysis, staff concludes that school districts and community college districts are not eligible claimants for this test claim because the test claim statute, Labor Code section 3212.1, does not provide a rebuttable cancer presumption to employees of a school district or community college district.

Assuming for the sake of argument only that Labor Code section 3212.1 applied to peace officers or firefighters employed by school districts and community college districts, staff further concludes that Labor Code section 3212.1 is not subject to article XIII B, section 6 of the California Constitution because it does not impose a mandate on school districts and community college districts.

Staff Recommendation

Staff recommends that the Commission adopt the staff analysis and deny this test claim.

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[1] Exhibit F.

STAFF ANALYSIS

Claimants

Santa Monica Community College District

Chronology

02/27/03	Claimants file test claim with Commission
03/12/03	Test claim deemed complete
04/16/03	Department of Finance requests extension of time to file comments on test claim
04/17/03	Request for extension of time is granted
05/15/03	Department of Finance requests extension of time to file comments on test claim
05/16/03	Request for extension of time is granted
06/12/03	Department of Finance files comments on test claim
06/30/03	Claimant files rebuttal
06/02/04	Draft staff analysis is issued
06/17/04	Claimant files comments on draft staff analysis

Background

This case addresses an evidentiary presumption given to certain firefighters and peace officers in workers compensation cases. Normally, before an employer is liable for payment of workers compensation benefits, the employee must show that the injury arose out of and in the course of employment, and that the injury was proximately caused by the employment. The burden of proof is normally on the employee to show proximate cause by a preponderance of the evidence.[2]

The Legislature eased the burden of proving industrial causation for certain public employees that provide vital and hazardous services by establishing a series of presumptions.[3] In 1982, the Legislature enacted Labor Code section 3212.1, which provided a limited presumption, easing the burden of proving industrial causation for specified firefighters that developed cancer during employment. In 1989, certain peace officers were also given the cancer presumption. In these cases, there was a presumption that the cancer arose out of and in the course of employment, and the employer was liable for full hospital, surgical, and medical treatment, disability indemnity, and death benefits, if the firefighter or peace officer could show that:

- He or she was exposed, while in the service of the department or unit, to a known carcinogen as defined by the International Agency for Research on Cancer, or as defined by the director; and that

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[2] Labor Code sections 3202.5 and 3600. Labor Code section 3202.5 defines preponderance of the evidence as such evidence, "when weighed with that opposed to it, has more convincing force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence."

[3] See, Labor Code sections 3212, 3212.1 – 3212.7, and 3213.

- The carcinogen is reasonably linked to the disabling cancer.

Labor Code section 3212.1 further provided that the presumption of industrial causation was disputable and could be controverted by the employer by other evidence that the cancer was caused by non-industrial factors.[4]

Following the enactment of Labor Code section 3212.1, the courts struggled with the employee's burden of proving that the carcinogen was reasonably linked to the cancer. In *Zipton v. Workers' Compensation Appeals Board*[5], the survivors of a firefighter, who died at age 39 of metastatic undifferentiated epithelial cancer, were held ineligible for workers compensation benefits because the nature of the diagnosis made it impossible to reasonably link the carcinogens and the cancer. Metastatic cancer is a secondary cancer growth that migrates from the primary site of the disease to another part of the body. The primary site of the disease was unknown.[6] The court stated the following about the reasonable link requirement:

> While the legislative history reveals an intent on the part of the Legislature to ease the burden of proof of industrial causation by removing the barrier of proximate cause, in application a reasonable link requirement is no less than the logical equivalent of proximate cause. Moreover, we discern that the requirement was precipitated by a fear of financial doom [by self-insured state and local agencies], but that this fear may be unfounded.
>
> In summary, it may be that there is no purpose to be served by the reasonable link requirement. If indeed metastatic cancer, primary site unknown, is a common medical diagnosis in cancer cases, and therefore results in a pattern of defeating cancer claims of firefighters and police officers by requiring a burden of proof which is medically impossible to sustain, the Legislature may wish to reexamine the reasonable link requirement.[7]

In a case after *Zipton*, the First District Court of Appeal noted that Labor Code section 3212.1 does not provide the same level of presumption enumerated in other presumption statutes. Rather, Labor Code section 3212.1 contained a "limited and disputable presumption."[8] The court also disagreed with the interpretation in *Zipton* that the reasonable link standard was the same as the proximate cause standard. The court held the following:

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[4] The courts have described the rebuttable presumption as follows: "Where facts are proven giving rise to a presumption ..., the burden of proof shifts to the party, against whom it operates [i.e., the employer], to prove the nonexistence of the presumed fact, to wit, an industrial relationship." (*Zipton v. Workers' Compensation Appeals Board* (1990) 218 Cal.App.3d 980, 988, fn. 4.)

[5] *Zipton, supra,* 218 Cal.App.3d 980.

[6] *Id.* at page 991.

[7] *Id.* at page 990.

[8] *Riverview Fire Protection District v. Workers' Compensation Appeals Board* (1994) 23 Cal.App.4th 1120, 1124.

> We hold that more is required under section 3212.1 than the mere coincidence of exposure and cancer. But a showing of proximate cause is not required. Rather, if the evidence supports a reasonable inference that the occupational exposure contributed to the worker's cancer, then a "reasonable link" has been shown, and the disputable presumption of industrial causation may be invoked.[9]

In 1999, the Legislature amended Labor Code section 3212.1 (Stats. 1999, ch. 595) to address the court's criticism of the reasonable link standard in *Zipton*.[10] The test claim statute, as amended in 1999, eliminates the employee's burden of proving that a carcinogen is reasonably linked to the cancer before the presumption that the cancer arose out of and in the course of employment is triggered. Thus, the employee need only show that he or she was exposed, while in the service of the department or unit, to a known carcinogen as defined by the International Agency for Research on Cancer, or as defined by the director, for the presumption of industrial injury to arise.

The employer still has a right to dispute the employee's claim. But, when disputing the claim, the burden of proving that the carcinogen is not reasonably linked to the cancer has been shifted to the employer. Labor Code section 3212.1, subdivision (d), as amended in 1999, now states the following:

> The cancer developing or manifesting itself in these cases shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by evidence that the primary site of the cancer has been established and that the carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer. Unless so controverted, the appeals board is bound to find in accordance with the presumption.

The 1999 test claim statute also specifies that leukemia is included as a type of cancer for which the presumption of industrial injury can apply.

Finally, the 1999 test claim statute retroactively applies the amendments to section 3212.2 to workers compensation claims filed or pending on January 1, 1997. Labor Code section 3212.1, subdivision (e), states that "[t]he amendments to this section enacted during the 1999-2000 Regular Session shall apply to claims for benefits filed or pending on or after January 1, 1997, including, but not limited to, claims for benefits filed on or after that date that have previously been denied, or that are being appealed following denial."

In 2000, the Legislature amended the test claim statute (Stats. 2000, ch. 887) to extend the cancer presumption to peace officers in an arson-investigating unit, as defined in Penal Code section 830.37, subdivisions (a) and (b).

Prior Test Claim Decisions on Labor Code Section 3212.1

In 1982, the Board of Control approved a test claim on Labor Code section 3212.1, as originally added by Statutes 1982, chapter 1568 (*Firefighter's Cancer Presumption*). The parameters and guidelines authorize insured local agencies and fire districts to receive reimbursement for

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[9] *Id.* at page 1128.

[10] Assembly Floor Analysis on Assembly Bill 539, dated September 8, 1999.

increases in workers compensation premium costs attributable to Labor Code section 3212.1. The parameters and guidelines also authorize self-insured local agencies to receive reimbursement for staff costs, including legal counsel costs, in defending the section 3212.1 claims, and benefit costs including medical costs, travel expenses, permanent disability benefits, life pension benefits, death benefits, and temporary disability benefits paid to the employee or the employee's survivors.[11]

In 1992, the Commission adopted a statement of decision approving a test claim on Labor Code section 3212.1, as amended by Statutes 1989, chapter 1171 (*Cancer Presumption – Peace Officers*, CSM 4416.) The parameters and guidelines authorize reimbursement to local law enforcement agencies that employ peace officers defined in Penal Code sections 830.1 and 830.2 for the same costs approved in the Board of Control decision in the *Firefighter's Cancer Presumption* test claim.[12]

On May 27, 2004, the Commission adopted a statement of decision denying a test claim on Labor Code section 3212.1, as amended by Statutes 1999, chapter 595, Statutes 2000, chapter 887 (*Cancer Presumption for Law Enforcement and Firefighters,* CSM 01-TC-19.) The Commission found that the express language of Labor Code section 3212.1 does not impose any state-mandated requirements on local agencies. Rather, the decision to dispute this type of workers compensation claim and prove that the injury is non-industrial remains entirely with the local agency, as it has since Labor Code section 3212.1 was enacted in 1982.[13]

Claimant's Position

The claimant contends that the test claim legislation constitutes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. The claimant asserts that school districts and community college districts are eligible to receive reimbursement for the following activities:

- Develop policies and procedures to handle claims by district police officers.
- Pay additional costs of claims caused by the shifting of the burden of proof of the cause of the cancer from the police officer employee to the district.
- Pay additional costs for insurance premiums.
- Training police officer employees to take precautionary measures to prevent cancer on the job.
- Review claims dating back to January 1, 1997, to determine whether the cancer arose out of or in the course of employment.
- Pay previously denied claims dating back to January 1, 1997, for those claims that the district cannot meet the new burden of proof as required by Labor Code section 3212.1.

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[11] Exhibit D.

[12] Exhibit D.

[13] Exhibit F.

Position of the Department of Finance

The Department of Finance filed comments on June 10, 2003, concluding that the test claim legislation may create a reimbursable state-mandated program.[14]

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[15] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[16] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[17] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[18] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[19]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state

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[14] Exhibit B.

[15] Article XIII B, section 6 provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: (a) Legislative mandates requested by the local agency affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[16] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 735.

[17] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

[18] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174. In *Department of Finance v. Commission on State Mandates, supra*, 30 Cal.4th at page 742, the court agreed that "activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds - even if the local entity is obligated to incur costs as a result of its discretionary decision to participate in a particular program or practice." The court left open the question of whether non-legal compulsion could result in a reimbursable state mandate, such as in a case where failure to participate in a program results in severe penalties or "draconian" consequences. (*Id.*, at p. 754.)

[19] *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836.

policy, but does not apply generally to all residents and entities in the state.[20] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[21] Finally, the newly required activity or increased level of service must impose costs mandated by the state.[22]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[23] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[24]

Issue 1: Are school districts and community college districts eligible claimants for this test claim?

For the reasons provided below, staff finds that school districts and community college districts are not eligible claimants for this test claim because the test claim statute, Labor Code section 3212.1, does not provide a rebuttable cancer presumption to employees of a school district or community college district.

Labor Code section 3212.1, subdivision (a), lists the employees that are given the cancer presumption. Labor Code section 3212.1, subdivision (a), states the following:

> This section applies to active firefighting members, whether volunteers, partly paid, or fully paid, of all of the following fire departments: (1) a fire department of a city, county, city and county, district, or other public municipal corporation or political subdivision, (2) a fire department of the University of California and the California State University, (3) the Department of Forestry and Fire Protection, and (4) county forestry or firefighting department or unit. This section also applies to peace officers, as defined in Section 830.1, subdivision (a) of Section 830.2, and subdivisions (a) and (b) of Section 830.37, of the Penal Code, who are primarily engaged in active law enforcement activities.

The claimant has not claimed any costs relating to firefighting employees. Declarations from Santa Monica Community College District and Clovis Unified School District, which were filed

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[20] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[21] *Lucia Mar, supra*, 44 Cal.3d 830, 835.

[22] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

[23] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

[24] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817; *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280.

by the claimant with the test claim, allege costs for district police officers only.[25] In addition, the state has not expressly authorized school districts and community college districts to employ firefighters, and has not mandated that they do so. Thus, there is no evidence in the record that school districts or community college districts employ firefighters that are subject to the test claim statute.

Moreover, based on the plain language of Labor Code section 3212.1, the peace officers employed by school districts and community college districts do not receive the rebuttable cancer presumption enjoyed by peace officers employed by state and local agencies. Labor Code section 3212.1, subdivision (a), expressly provides that the cancer presumption applies to the peace officers defined in Penal Code sections 830.1, 830.2, subdivision (a), and 830.37, subdivisions (a) and (b). These code sections provide the definition for peace officers employed by counties, cities, port district police, the district attorney, the Department of Justice, the California Highway Patrol, the University of California, the California State University, the Department of Fish and Game, the Department of Parks and Recreation, and the Department of Forestry and Fire Protection, the Department of Alcoholic Beverage Control, and the Board of Directors of the California Exposition and State Fair.

Peace officers employed by school districts and community college districts are defined in Penal Code section 830.32.[26] The test claim statute does not expressly apply to peace officers defined in Penal Code section 830.32.

In response to the draft staff analysis, the claimant contends that that Penal Code section 830.32 is not relevant to the analysis. The claimant argues that Penal Code section 830.1,

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[25] Exhibit A.

[26] Penal Code section 830.32 states the following:

> The following persons are peace officers whose authority extends to any place in the state for the purpose of performing their primary duty or when making an arrest pursuant to Section 836 as to any public offense with respect to which there is immediate danger to person or property, or of the escape of the perpetrator of that offense, or pursuant to Section 8597 or 8598 of the Government Code. Those peace officers may carry firearms only if authorized and under terms and conditions specified by their employing agency.
>
> (a) Members of a California Community College police department appointed pursuant to Section 72330 of the Education Code, if the primary duty of the police officer is the enforcement of the law as prescribed in Section 72330 of the Education Code.
>
> (b) Persons employed as members of a police department of a school district pursuant to Section 38000 of the Education Code, if the primary duty of the police officer is the enforcement of the law as prescribed in Section 38000 of the Education Code.
>
> (c) Any peace officer employed by a K-12 public school district or California Community College district who has completed training as prescribed by subdivision (f) of Section 832.3 shall be designated a school police officer.

subdivision (a), a statute that is expressly listed in the cancer presumption test claim statute, defines a peace officer to include school district police officers since it includes in the definition of a peace officer a "police officer of a *district*, including police officers of the San Diego Unified Port District Harbor Police, authorized by statute to maintain a police department." (Emphasis added.) The claimant further argues that Penal Code section 830.32 simply expands the officer's jurisdiction to make an arrest, with regard to any public offense posing an immediate danger to person or property, to any place in the state.[27]

The claimant is misreading these statutes. The word "district" in Penal Code section 830.1 is not expressly defined. However, based on the rules of statutory construction, Penal Code section 830.1 does not define a peace officer to include school district peace officers, as alleged by the claimant.

Under the rules of statutory construction, the courts are required to construe a statute in light of the entire statutory scheme. When two statutes touch upon a common subject, the two statutes must be harmonized in such a way that no part of either statute becomes surplusage. The courts must presume that the Legislature intended every word, phrase, and provision to have meaning and to perform a useful function.[28]

In the present case, both Penal Code sections 830.1 and 830.32 define *different* classes of peace officers and establish their authority. Penal Code section 830.1 was originally added by the Legislature in 1968. Had the Legislature intended to include school district peace officers in Penal Code section 830.1, then its later enactment of Penal Code section 830.32 in 1989, which specifically defines peace officers to include those officers employed by school districts and community college districts, would be "surplusage."[29] The court must presume that the Legislature intended Penal Code section 830.32 to have some effect, and that the Legislature did not indulge in an idle act.[30]

This interpretation is consistent with a 2003 Attorney General Opinion, which, in part, defined the authority for community college district police officers.[31] The opinion identifies Penal Code section 830.32 as the statute defining community college police officers as "peace officers" under the Penal Code.[32]

Furthermore, to the extent that there is any conflict between Penal Code section 830.1 and 830.32, the rules of statutory construction require that the more specific statute, Penal Code section 830.32, which defines school district police officers as peace officers, govern the more general statute, Penal Code section 830.1, which defines "district" officers as peace officers.[33]

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[27] Exhibit E, Bates pages 167-175.

[28] *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476. (Exhibit G.)

[29] See footnote 25, ante.

[30] *Sondino v. Union Commerce Bank* (1977) 71 Cal.App.3d 391, 395. (Exhibit G.)

[31] 86 Ops. Cal. Atty. Gen. 112, 113. (Exhibit G.)

[32] *Ibid.*

[33] *Miller v. Superior Court* (1999) 21 Cal.4th 883, 895, where the Supreme Court held that a specific provision relating to a particular subject will govern in respect to that subject, as against

Finally, the absence of Penal Code section 830.32 in the test claim statute is relevant. The test claim legislation was amended in 1989 to provide specified peace officers with a cancer presumption in workers compensation cases. Penal Code section 830.32 was added by the Legislature to define school district peace officers to the definition of "peace officers" in 1989. It must be presumed that the Legislature was aware of related laws and intended to maintain a consistent body of statutes.[34] Thus, had the Legislature intended to give school district peace officers the presumption provided by the test claim statute, the Legislature would have specifically listed Penal Code section 830.32 in Labor Code section 3212.1.

Therefore, staff finds that school districts and community college districts are not eligible claimants for this test claim because the test claim statute, Labor Code section 3212.1, does not provide a rebuttable cancer presumption to employees of a school district or community college district.

Issue 2: Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?

Assuming for the sake of argument only that Labor Code section 3212.1 applied to peace officers or firefighters employed by school districts and community college districts, the test claim statute is still not subject to article XIII B, section 6 because state law does not mandate school districts and community college districts to employ peace officers and firefighters.

The California Constitution, article IX, Education, establishes and permits the formation of school districts, including community college districts, and county boards of education, all for the purpose of encouraging "the promotion of intellectual, scientific, moral and agricultural improvement."[35] Although the Legislature is permitted to authorize school districts "to act in any manner which is not in conflict with the laws and purposes for which school districts are established,"[36] the Constitution does not require school districts to operate fire and police departments as part of their essential educational function. Article I, section 28, subdivision (c), of the California Constitution does require K-12 school districts to maintain safe schools. However, there is no constitutional requirement to maintain safe schools through school district fire and police departments independent of the public safety services provided by the cities and counties a school district serves.[37]

In *Leger v. Stockton Unified School District*, the court interpreted the safe schools provision of the California Constitution as declaring only a general right *without* specifying any rules for its

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a general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates. (Exhibit G.)

[34] *Fuentes v. Workers Compensation Appeals Board* (1976) 16 Cal.3d 1, 7. (Exhibit G.)

[35] California Constitution, article IX, section 1.

[36] California Constitution, article IX, section 14.

[37] Article I, section 28, subdivision (c) of the California Constitution provides "All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are *safe*, secure and peaceful." (Emphasis added.)

enforcement.[38] The claimant argues that the Commission should ignore the portion of the court's ruling that the safe schools provision does not specify any rules because the *Leger* case is a tort case where the plaintiff was seeking monetary damages for the alleged negligent actions of the school district. The claimant further argues that the Commission should follow the *Leger* court's statements that "all branches of government are required to comply with constitutional directives," such as providing a safe school through police services.[39]

But, the claimant is mischaracterizing the court's holding. When interpreting the safe schools provision of the Constitution, the court was applying rules of constitutional interpretation. The court stated the following:

> The following rule has been consistently applied in California to determine whether a constitutional provision is self-executing in the sense of providing a specific method for its enforcement: " 'A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and *it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.*'" [Citations omitted.] (Emphasis added.)[40]

The court further held that the safe schools provision of the Constitution is not self-executing because it does not lay down rules that are given the force of law.

> [H]owever, section 28(c) declares a general right without specifying *any* rules for its enforcement. It imposes no express duty on anyone to make schools safe. It is wholly devoid of guidelines, mechanisms, or procedures from which a damages remedy could be inferred. Rather, "it merely indicates principles, without laying down rules by means of which those principles may be given the force of law." [Citation omitted.][41]

Furthermore, the court reviewed the ballot materials for the safe schools provision and found that the provision was intended to be implemented through reforms in criminal laws.[42] For example, the court noted in footnote 3 of the decision that the Legislature implemented the safe schools provision by establishing procedures in the Penal Code by which non-students can gain access to school grounds and providing punishments for violations. The Legislature also enacted the "Interagency School Safety Demonstration Act of 1985" to encourage school districts, county offices of education, and law enforcement to develop and implement interagency strategies, programs, and activities to improve school attendance and reduce the rates of school crime and

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[38] *Leger v. Stockton Unified School Dist.* (1988) 202 Cal.App.3d 1448, 1455. (Exhibit E, Bates p. 212.)

[39] Exhibit E, Bates pages 175-178.

[40] *Leger, supra,* 202 Cal.App.3d at page 1455

[41] *Ibid.*

[42] *Id.* at page 1456.

vandalism.[43] But, as shown below, the Legislature has not implemented the safe schools provision by requiring school districts to employ peace officers and firefighters.

Accordingly, the California Constitution does not require or mandate school districts, through the safe schools provision, to employ peace officers and firefighters.

Finally, although the Legislature authorizes school districts and community college districts to employ peace officers, the Legislature does not require school districts and community college districts to employ peace officers. Pursuant to Education Code section 38000:[44]

> [t]he governing board of any school district may establish a security department ... or a police department ...[and] may employ personnel to ensure the safety of school district personnel and pupils and the security of the real and personal property of the school district. In addition, a school district may assign a school police reserve officer who is deputized pursuant to Section 35021.5 to a schoolsite to supplement the duties of school police personnel pursuant to this section. It is the intention of the Legislature in enacting this section that a school district police or security department is supplementary to city and county law enforcement agencies and is not vested with general police powers.

Education Code section 72330, derived from the same 1959 Education Code section, provides the law for community colleges. "The governing board of a community college district may establish a community college police department ... [and] may employ personnel as necessary to enforce the law on or near the campus. ... This subdivision shall not be construed to require the employment by a community college district of any additional personnel."

In 2003, the California Supreme Court decided *Department of Finance v. Commission on State Mandates* and found that "if a school district elects to participate in or continue participation in any *underlying voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate."[45] The court further stated, on page 731 of the decision, that:

> [*W]e reject claimants' assertion that they have been legally compelled to incur* notice and agenda *costs,* and hence are entitled to reimbursement from the state, based merely upon the circumstance that notice and agenda provisions are mandatory elements of education-related program in which claimants have participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled.* [Emphasis added.]

The decision of the California Supreme Court interpreting the state-mandate issue is relevant to this test claim. The Commission is not free to disregard clear statements of the California Supreme Court. Thus, pursuant to state law, school districts and community college districts are not required by the state to employ peace officers and firefighters. That decision is a local

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[43] *Id.* at page 1456, footnote 3.

[44] Formerly numbered Education Code section 39670; derived from 1959 Education Code section 15831.

[45] *Department of Finance v. Commission on State Mandates, supra*, 30 Cal.4th at page 743.

decision.[46] Thus, the activity of disputing a worker's compensation claim filed by a firefighter or peace officer employee flows from the discretionary decision to employ such officers and does not impose a reimbursable state mandate.

In response to the draft staff analysis, the claimant contends that staff has misconstrued the *Department of Finance* case. The claimant alleges that the controlling authority on the subject of legal compulsion of a state statute is *City of Sacramento v. State of California*.[47, 48] The claimant, however, is mischaracterizing the Supreme Court's holding *Department of Finance*.

In *Department of Finance*, the school districts argued that the definition of a state mandate should not be limited to circumstances of strict legal compulsion, but, instead, should be controlled by the court's broader definition of a federal mandate in the *City of Sacramento* case.[49] In *City of Sacramento*, the court analyzed the definition of a federal mandate and determined that because the financial consequences to the state and its residents for failing to participate in the federal plan were so onerous and punitive, and the consequences amounted to "certain and severe federal penalties" including "double taxation" and other "draconian" measures, the state was mandated by federal law to participate in the plan, even the federal legislation did not legally compel the participation.[50]

The Supreme Court in *Department of Finance*, however, found it "unnecessary to resolve whether [its] reasoning in *City of Sacramento* [citation omitted] applies with regard to the proper interpretation of the term 'state mandate' in section 6 of article XIII B."[51] Although the school districts argued that they had no true choice but to participate in the school site council programs, the court state that, assuming for purposes of analysis only, the *City of Sacramento* case applies to the definition of a state mandate, the school districts did not face "certain and severe penalties" such as "double taxation" and other "draconian" consequences."[52]

Here, even assuming that the *City of Sacramento* case applies, there is no evidence in the law or in the record that school districts would face "certain and severe" penalties" such as "double taxation" or other "draconian" consequences if they don't employ peace officers and firefighters.

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[46] The claimant admits that the decision to have a police department and employ peace officers is a local decision. Exhibit E, bates pages 196-197, the claimant states the following:

> The people and the legislature has [sic] not directly specified how the constitutional duty to provide safe schools is to be accomplished. They left this decision to local agencies who [sic] have first hand knowledge of what is necessary for their respective communities. It is a local decision.

[47] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51.

[48] Exhibit E, Bates pages 201-205.

[49] *Department of Finance, supra*, 30 Cal.4th at pp. 749-751.

[50] *City of Sacramento, supra,* 50 Cal.3d at pages 73-76.

[51] *Id.* at page 751.

[52] *Id.* at pages 751-752.

Finally, the claimant argues that the staff analysis is arbitrary and unreasonably since it is not consistent with the Commission's prior decisions approving school district peace officer cases, such as the *Peace Officer Procedural Bill of Rights* (CSM 4499).[53] The claimant acknowledges the California Supreme Court's decision in *Weiss v. State Board of Education*, which held that the failure of a quasi-judicial agency to consider prior decisions is not a violation of due process as long as the action is not arbitrary or unreasonable.[54] But, claims that "staff has offered no compelling reason ... why mandated activities of district peace officers were reimbursable in previous rulings and now activities of district peace officers are not reimbursable, other than what appears to be a whim or current fancy."[55]

As explained above, the compelling reason is the California Supreme Court's decision in *Department of Finance*, which affirmed the 1984 decision of *City of Merced*, and requires the Commission to determine whether the claimant's participation in the underlying program is voluntary or compelled. All of the previous Commission decisions cited by the claimant were decided before the Supreme Court issued the *Department of Finance* decision.[56]

Therefore, the test claim legislation is not subject to article XIII B, section 6 of the California Constitution because it does not impose a mandate on school districts and community college districts.

CONCLUSION

Based on the foregoing, staff concludes that school districts and community college districts are not eligible claimants for this test claim because the test claim statute, Labor Code section 3212.1, does not provide a rebuttable cancer presumption to employees of a school district or community college district.

Assuming for the sake of argument only that Labor Code section 3212.1 applied to peace officers or firefighters employed by school districts and community college districts, staff further concludes that Labor Code section 3212.1 is not subject to article XIII B, section 6 of the California Constitution because it does not impose a mandate on school districts and community college districts.

Staff Recommendation

Staff recommends that the Commission adopt the staff analysis and deny this test claim.

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[53] Exhibit E, Bates pages 199-201.

[54] *Weiss v. State Board of Equalization* (1953) 40 Cal.2d 772, 777.

[55] Exhibit E, Bates page 201.

[56] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777 was a case brought by the city seeking reimbursement for eminent domain statutes under the former Senate Bill 90, Revenue and Taxation Code, provisions. The claim was not brought pursuant to article XIII B, section 6 of the California Constitution.

PAGES 16-100 LEFT BLANK INTENTIONALLY

State of California
COMMISSION ON STATE MANDATES
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562
CSM 2 (1/91)

EXHIBIT A

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TEST CLAIM FORM

Claim No. 02-TC-19

Local Agency or School District Submitting Claim

SANTA MONICA COMMUNITY COLLEGE

Contact Person	Telephone Number
Keith B. Petersen, President SixTen and Associates	Voice: 858-514-8605 Fax: 858-514-8645

Claimant Address

Santa Monica Community College District
1900 Pico Avenue
Santa Monica, California 90405-1628

Representative Organization to be Notified

Dr. Carol Berg, Consultant, Education Mandated Cost Network
c/o School Services of California
1121 L Street, Suite 1060
Sacramento, CA 95814

Voice: 916-446-7517
Fax: 916-446-2011

This claim alleges the existence of a reimbursable state mandated program within the meaning of section 17514 of the Government Code and section 6, article XIII B of the California Constitution. This test claim is filed pursuant to section 17551(a) of the Government Code.

Identify specific section(s) of the chaptered bill or executive order alleged to contain a mandate, including the particular statutory code citation(s) within the chaptered bill, if applicable.

Chapter 887, Statutes of 2000
Chapter 595, Statutes of 1999
Chapter 1171, Statutes of 1989
Chapter 1038, Statutes of 1988
Chapter 114, Statutes of 1984
Chapter 1568, Statutes of 1982

Cancer Presumption (K-14)

Labor Code Section 3212.1

IMPORTANT: PLEASE SEE INSTRUCTIONS AND FILING REQUIREMENTS FOR COMPLETING TEST CLAIM ON THE REVERSE SIDE.

Name and Title of Authorized Representative	Telephone No.
Cheryl Miller Associate Vice President, Business Services	(310) 434-4221

Signature of Authorized Representative	Date
X Cheryl Miller	November 20, 2002

Claim Prepared By:
Keith B. Petersen
SixTen and Associates
5252 Balboa Avenue, Suite 807 Balboa Avenue, Suite 807
San Diego, CA 92117
Voice: (858) 514-8605

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

Test Claim of:	No. CSM 02-TC-15
Santa Monica Community College District	Chapter 887, Statutes of 2000 Chapter 595, Statutes of 1999 Chapter 1171, Statutes of 1989 Chapter 1038, Statutes of 1988 Chapter 114, Statutes of 1984 Chapter 1568, Statutes of 1982
Test Claimant	Labor Code Sections 3212.1
	Cancer Presumption (K-14)
	TEST CLAIM FILING

PART 1. AUTHORITY FOR THE CLAIM

The Commission on State Mandates has the authority pursuant to Government Code section 17551(a) to "...hear and decide upon a claim by a local agency or school district that the local agency or school district is entitled to be reimbursed by the state for costs mandated by the state as required by Section 6 of Article XIII B of the California Constitution." Santa Monica Community College District is a "school district"

as defined in Government Code section 17519.[1]

PART II. LEGISLATIVE HISTORY OF THE CLAIM

This test claim alleges mandated costs reimbursable by the state for school districts and community college districts to pay increased worker's compensation claims or premiums for members of district police departments as a result of the new presumption that cancer or leukemia contracted during employment arose out of or in the course of employment.

SECTION 1. LEGISLATIVE HISTORY PRIOR TO JANUARY 1, 1975

The "Workers' Compensation and Insurance" law is found in Division 4 of the Labor Code. Labor Code Section 3200[2] sets forth the declaration of the Legislature that the term "workman's compensation" shall thereafter be known as "workers' compensation".

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[1] Government Code Section 17519, as added by Chapter 1459/84:

"School District" means any school district, community college district, or county superintendent of schools."

[2] Labor Code Section 3200, added by Chapter 1454, Statutes of 1974, Section 11:

"The Legislature hereby declares its intent that the term "workmen's compensation" shall hereafter also be known as "workers' compensation." In furtherance of this policy it is the desire of the Legislature that references to the terms "workmen's compensation" in this code be changed to "workers' compensation" when such code sections are being amended for any purpose. This act is declaratory and not amendatory of existing law."

Labor Code Section 3202[3] provides that the provisions of Division 4 and Division 5 of the code shall be liberally construed by the courts to extend benefits to persons injured in the course of their employment.

Labor Code Section 3208[4] defines injury to include any injury or disease arising out of employment.

Prior to 1975, there was no statute, code section or regulation that created a presumption that cancer or leukemia developing or manifesting itself on members of district peace officer departments arose out of or in the course of employment with the district.

SECTION 2: LEGISLATIVE HISTORY AFTER JANUARY 1, 1975

Chapter 922, Statutes of 1982, Section 3, added Labor Code Section 3202.5[5]

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[3] Labor Code Section 3202, added by Chapter 90, Statutes of 1937, Section 3202:

"The provisions of Division IV and Division V of this code shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment."

[4] Labor Code Section 3208, added by Chapter 90, Statutes of 1937, Section 3208, as amended by Chapter 1064, Statutes of 1971, Section 1:

"'Injury' includes any injury or disease arising out of the employment, including injuries to artificial members, dentures, hearing aids, eyeglasses and medical braces of all types; provided, however, that eyeglasses and hearing aids will not be replaced, repaired, or otherwise compensated for, unless injury to them is incident to an injury causing disability."

[5] Labor Code Section 3202.5, as added by Chapter 922, Statutes of 1982, Section 3:

to clarify that nothing in Section 3202 (i.e. "liberal construction") shall be construed as relieving a party from meeting the evidentiary burden of proof by a "preponderance of the evidence".

Chapter 1568, Statutes of 1982, Section 1, added Labor Code Section 3212.1[6]

"Nothing contained in Section 3202 shall be construed as relieving a party from meeting the evidentiary burden of proof by a preponderance of the evidence. "Preponderance of the evidence" means such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence."

[6] Labor Code Section 3212.1, added by Chapter 1568, Statutes of 1982, Section 1:

"In the case of active firefighting members of fire departments of cities, counties, cities and counties, districts, or other public or municipal corporations or political subdivisions, and active firefighting members of the fire departments of the University of California, whether these members are volunteers, partly paid, or fully paid, and in the case of active firefighting members of the Department of Forestry and Fire Protection, or of any county forestry or firefighting department or unit, whether volunteers, partly paid, or fully paid, the term "injury" as used in this division includes cancer which develops or manifests itself during a period while the member is in the service of the department or unit, provided that the member demonstrates that he or she was exposed, while in the service of the department or unit, to a known carcinogen as defined by the International Agency for Research on Cancer, or as defined by the director, and that the carcinogen is reasonably linked to the disabling cancer.

The compensation which is awarded for cancer shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits, as provided by the provisions of this division.

The cancer so developing or manifesting itself in these cases shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by other evidence, but unless so controverted, the appeals board is bound to find in accordance with it. This presumption shall be extended to a member following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.

This section shall remain in effect only until January 1, 1989, and as of this date

to expand the term "injury" to include cancer which develops or manifests itself during a period while a firefighter employee is in the service of the department or unit, provided that the member demonstrates that he or she was exposed, while in the service of the department or unit, to a known carcinogen and that the carcinogen was reasonably linked to the disabling cancer. Section 3212.1 also created a disputable presumption that cancer developing or manifesting itself in these cases arose out of and in the course of employment. This statute applies to active firefighter members of fire departments of cities, counties, cities and counties, districts, or other public or municipal corporations and other political subdivisions. The presumption was extended to a member following termination of service for a period of three calendar months for each full year of requisite service, but not to exceed 60 months.

Chapter 114, Statutes of 1984, Section 1, amended Labor Code Section 3212.1[7]

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is repealed, unless a later enacted statute, which is chaptered before January 1, 1989, deletes or extends this date."

[7] Labor Code Section 3212.1, added by Chapter 1568, Statutes of 1982, Section 1, as amended by Chapter 114, Statutes of 1984, Section 1:

"In the case of active firefighting members of fire departments of cities, counties, cities and counties, districts, or other public or municipal corporations or political subdivisions, and active firefighting members of the fire departments of the University of California, whether these members are volunteers, partly paid, or fully paid, and in the case of active firefighting members of the Department of Forestry and Fire Protection, or of any county forestry or firefighting department or unit, whether volunteers, partly paid, or fully paid, the term "injury" as used in this division includes cancer which develops or manifests itself during a period while the member is in the service of the department or unit, provided that the member demonstrates that he or she was exposed, while in the service of the department or unit, to a known carcinogen as defined by the International Agency for Research on Cancer, or as defined by the director, and that the carcinogen

to delete a January 1, 1989, sunset date.

Chapter 193, Statutes of 1984, Section 96, and Chapter 248, Statutes of 1986, Section 158, amended Labor Code Section 3202 to make technical changes.

Chapter 1038, Statutes of 1988, Section 1, amended Labor Code Section 3212.1 to make technical changes and to add members of the California State University fire departments to the firefighter members included in the statute.

Chapter 1171, Statutes of 1989, Chapter 2, amended Labor Code Section 3212.1[8] to add peace officers, as defined in Section 830.1[9], and subdivision (a) of

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is reasonably linked to the disabling cancer.

The compensation which is awarded for cancer shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits, as provided by the provisions of this division.

The cancer so developing or manifesting itself in these cases shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by other evidence, but unless so controverted, the appeals board is bound to find in accordance with it. This presumption shall be extended to a member following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.

~~This section shall remain in effect only until January 1, 1989, and as of this date is repealed, unless a later enacted statute, which is chaptered before January 1, 1989, deletes or extends this date.~~"

[8] Labor Code Section 3212.1, added by Chapter 1568, Statutes of 1983, Section 1, as amended by Chapter 1171, Statutes of 1989, Section 2:

"In the case of active firefighting members of fire departments of cities, counties, cities and counties, districts, or other public or municipal corporations or other political subdivisions, and active firefighting members of the fire departments of the University of California and the California State University, whether these members are volunteers, partly paid, or fully paid, and in the case of active firefighting members of the Department of Forestry and Fire Protection, or of any county forestry or firefighting department or unit, whether volunteers, partly paid, or fully paid, and peace officers as

Section 830.2 of the penal code to those for whom the presumption of cancer applies has having arisen out of or in the course of employment. Therefore, for the first time, the presumption was applied to peace officers, including school district and community college district peace officers.

Chapter 4, Statutes of 1993, Section 1.5, amended Labor Code Section 3202.5 to make technical changes.

Chapter 595, Statutes of 1999, Section 1, amended Labor Code Section 3212.1[10] to letter the individual subdivisions and to make other technical changes.

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defined in Section 830.1 and subdivision (a) of Section 830.2 of the penal code who are primarily engaged in active law enforcement activities, the term "injury" as used in this division includes cancer which develops or manifests itself during a period while the member is in the service of the department or unit, ~~provided that~~ if the member demonstrates that he or she was exposed, while in the service of the department or unit, to a known carcinogen as defined by the International Agency for Research on Cancer, or as defined by the director, and that the carcinogen is reasonably linked to the disabling cancer.

The compensation which is awarded for cancer shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits, as provided by this division.

The cancer so developing or manifesting itself in these cases shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by other evidence, but unless so controverted, the appeals board is bound to find in accordance with it. This presumption shall be extended to a member following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity."

[9] Subdivision (a) of Penal Code Section 830.1 defines "peace officer" to include police officers of a district authorized by statute to maintain a police department.

[10] ~~In the case of~~ (a) This section applies to active firefighting members ~~of fire departments of cities, counties, cities and counties, districts, or other public or other municipal corporations or political subdivisions, and active firefighting members of the~~

Subdivision (b) further expanded the term "injury" to include, for the first time, in addition to cancer, leukemia as a covered "injury" under the statute. The amendment also removed the requirement that the carcinogen to which the member was exposed

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~~fire departments of the University of California and the California State University~~, whether ~~these members are~~ volunteers, partly paid, or fully paid, ~~and in the case of active firefighting members of the Department of Forestry and Fire Protection, or of any county forestry or firefighting department or unit, whether volunteers, partly paid, or fully paid, and peace officers~~ of all of the following fire departments: (1) a fire department of a city, county, city and county, district, or other public or municipal corporation or political subdivision. (2) a fire department of the University of California and the California State University. (3) the Department of Forestry and Fire Protection, and (4) a county forestry or firefighting department or unit. This section also applies to peace officers, as defined in Section 830.1, and subdivision (a) of Section 830.2, ~~of the penal code~~ who are primarily engaged in active law enforcement activities~~,~~.

(b) The term "injury," as used in this division, includes cancer, including leukemia, that ~~which~~ develops or manifests itself during a period ~~while the~~ in which any member described in subdivision (a) is in the service of the department or unit, if the member demonstrates that he or she was exposed, while in the service of the department or unit, to a known carcinogen as defined by the International Agency for Research on Cancer, or as defined by the director ~~and that the carcinogen is reasonably linked to the disabling cancer~~.

(c) The compensation ~~which~~ that is awarded for cancer shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits, as provided by this division.

(d) The cancer so developing or manifesting itself in these cases shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by ~~other~~ evidence~~, but unless so controverted,~~ that the primary site of the cancer has been established and that the carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer. Unless so controverted, the appeals board is bound to find in accordance with ~~it~~ the presumption. This presumption shall be extended to a member following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.

(e) The amendments to this section enacted during the 1999-2000 Regular Session shall be applied to claims for benefits filed or pending on or after January 1, 1997, including, but not limited to, claims for benefits filed on or after that date that have previously been denied, or that are being appealed following denial.

be reasonably linked to the disabling cancer. Under Section (d), the employer is now required to prove that the carcinogen to which the member had been exposed was not reasonably linked to the disabling cancer.

Chapter 595, Statutes of 1999, also amended Labor Code Section 3212.1 to add subdivision (e) which applies these amendments retroactively to January 1, 1997, including claims for benefits filed on or after that date that have previously been denied, or that are being appealed following denial.

Chapter 887, Statutes of 2000, Section 1, amended Labor Code Section 3212.1 to make technical changes.

PART III. STATEMENT OF THE CLAIM

SECTION 1. COSTS MANDATED BY THE STATE

The Labor Code Section referenced in this test claim results in school districts incurring costs mandated by the state, as defined in Government Code section 17514[11], by creating new state-mandated duties related to the uniquely governmental function of providing public services to students and these statutes apply to school districts and do

[11] Government Code section 17514, as added by Chapter 1459/84:

"Costs mandated by the state" means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIIIB of the California Constitution.

not apply generally to all residents and entities in the state.[12]

The new duties mandated by the state upon school districts and community colleges require state reimbursement of the direct and indirect costs of labor, materials and supplies, data processing services and software, contracted services and consultants, equipment and capital assets, staff and student training and travel to implement the following activities:

A) To develop policies and procedures, and periodically update those policies and procedures, for the handling of claims by district police officers who make claims of worker's compensation alleging the development of his or her cancer or leukemia was caused by their employment with the district pursuant to Labor Code Section 3212.1;

B) To pay the additional costs of claims, including full hospital, surgical and medical treatment, disability indemnity and death benefits, caused by the shifting of the burden of proof of the cause of cancer or leukemia from the police officer employees to the district pursuant to Labor Code Section

[12] Public schools are a Article XIII B, Section 6 "program," pursuant to Long Beach Unified School District v. State of California, (1990) 225 Cal.App.3d 155; 275 Cal.Rptr. 449:

"In the instant case, although numerous private schools exist, education in our society is considered to be a peculiarly government function. (Cf. Carmel Valley Fire Protection Dist. V. State of California (1987) 190 Cal.App.3d at p.537) Further, public education is administered by local agencies to provide service to the public. Thus public education constitutes a 'program' within the meaning of Section 6."

3212.1;

C) In lieu of additional costs of claims caused by the cancer or leukemia of its peace officers, to pay the additional costs of insurance premiums covering those claims pursuant to Labor Code Section 3212.1;

D) The cost of training its police officer employees to take precautionary measures to prevent cancer or leukemia on the job pursuant to the Labor Code Section 3212.1;

E) The cost, or additional cost, to review claims dating back to January 1, 1997, to determine whether the leukemia or cancer arose out of or in the course of employment, pursuant to Labor Code Section 3212.1; and

F) To pay previously denied claims dating back to January 1, 1997, for those claims for which the district cannot meet the new burden of proof as required pursuant to Labor Code Section 3212.1.

SECTION 2. EXCEPTIONS TO MANDATE REIMBURSEMENT

None of the Government Code Section 17556[13] statutory exceptions to a finding

[13] Government Code section 17556, as last amended by Chapter 589, Statutes of 1989:

"The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that:

(a) The claim is submitted by a local agency or school district which requested legislative authority for that local agency or school district to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency or school

of costs mandated by the state apply to this test claim. Note, that to the extent school districts may have previously performed functions similar to those mandated by the referenced code section, such efforts did not establish a preexisting duty that would relieve the state of its constitutional requirement to later reimburse school districts when these activities became mandated.[14]

SECTION 3. FUNDING PROVIDED FOR THE MANDATED PROGRAM

No funds are appropriated by the state for reimbursement of these costs

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district which requests authorization for that local agency or school district to implement a given program shall constitute a request within the meaning of this paragraph.

(b) The statute or executive order affirmed for the state that which had been declared existing law or regulation by action of the courts.

(c) The statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation.

(d) The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.

(e) The statute or executive order provides for offsetting savings to local agencies or school districts which result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.

(f) The statute or executive order imposed duties which were expressly included in a ballot measure approved by the voters in a statewide election.

(g) The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction."

[14] Government Code section 17565, added by Chapter 879, Statutes of 1986:

"If a local agency or a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency or school district for those costs incurred after the operative date of the mandate."

mandated by the state and there is no other provision of law for recovery of costs from any other source.

PART IV. ADDITIONAL CLAIM REQUIREMENTS

The following elements of this claim are provided pursuant to Section 1183, Title 2, California Code of Regulations:

Exhibit 1: Declaration of Cheryl Miller
Santa Monica Community College District

Declaration of Sharleen Crosby, Benefits Technician
Clovis Unified School District

Exhibit 2: Copies of Statutes Cited
Chapter 887, Statutes of 2000
Chapter 595, Statutes of 1999
Chapter 1171, Statutes of 1989
Chapter 1038, Statutes of 1988
Chapter 114, Statutes of 1984
Chapter 1568, Statutes of 1982

Exhibit 3: Copies of Code Sections Cited
Labor Code Section 3212.1

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PART V. CERTIFICATION

I certify by my signature below, under penalty of perjury, that the statements made in this document are true and complete of my own knowledge or information and belief.

Executed on November 20, 2002, at Santa Monica, California by:

Cheryl Miller

Cheryl Miller
Associate Vice President
Business Services

Voice: (310) 434-4231
Fax: (310) 434-3607

PART VI. APPOINTMENT OF REPRESENTATIVE

Santa Monica Community College District appoints Keith B. Petersen, SixTen and Associates, as its representative for this test claim.

Cheryl Miller

Cheryl Miller
Associate Vice President
Business Services

Nov 20, 2002
Date

Exhibit 1: Declarations

DECLARATION OF CHERYL MILLER

Santa Monica Community College District

Test Claim of Santa Monica Community College District

COSM No. _____

Chapter 887, Statutes of 2000
Chapter 595, Statutes of 1999
Chapter 1171, Statutes of 1989
Chapter 1038, Statutes of 1988
Chapter 114, Statutes of 1984
Chapter 1568, Statutes of 1982

Labor Code Section 3212.1

Cancer Presumption

I, Cheryl Miller, Associate Vice President Business Services, Santa Monica Community College District, make the following declaration and statement.

In my capacity as Associate Vice President Business Services , I am the supervisor of the district's Risk Management Department and I directly supervise those employees of the department who are responsible for the receipt and processing of claims for Worker's Compensation. I am familiar with the provisions and requirements of the Labor Code Section enumerated above.

This Labor Code section requires the Santa Monica Community College District to:

A) To develop policies and procedures, and periodically update those policies and procedures, for the handling of claims by district police officers who make claims of worker's compensation alleging the development of his or her cancer or leukemia was caused by their

employment with the district pursuant to Labor Code Section 3212.1;

B) To pay the additional costs of claims, including full hospital, surgical and medical treatment, disability indemnity and death benefits, caused by the shifting of the burden of proof of the cause of cancer or leukemia from the police officer employees to the district pursuant to Labor Code Section 3212.1;

C) In lieu of additional costs of claims caused by the cancer or leukemia of its peace officers, to pay the additional costs of insurance premiums covering those claims pursuant to Labor Code Section 3212.1;

D) The cost of training its police officer employees to take precautionary measures to prevent cancer or leukemia on the job pursuant to the Labor Code Section 3212.1;

E) The cost, or additional cost, to review claims dating back to January 1, 1997, to determine whether the leukemia or cancer arose out of or in the course of employment, pursuant to Labor Code Section 3212.1; and

F) To pay previously denied claims dating back to January 1, 1997, for those claims for which the school district cannot meet the new burden of proof as required pursuant to Labor Code Section 3212.1.

It is estimated that Santa Monica Community College District will incur, should such a Worker's Compensation claim be filed, approximately $1000, or more annually, in staffing and other costs in excess of any funding provided to districts to implement these

new duties mandated by the state for which the district has not been reimbursed by any federal, state, or local government agency, and for which it cannot otherwise obtain reimbursement.

The foregoing facts are known to me personally and, if so required, I could testify to the statements made herein. I hereby declare under penalty of perjury that the foregoing is true and correct except where stated upon information and belief and where so stated I declare that I believe them to be true.

EXECUTED this 20 day of November, 2002, at Santa Monica, California

Cheryl Miller

Cheryl Miller
Associate Vice President Business Services
Santa Monica Community College District

DECLARATION OF SHAREEN CROSBY

Clovis Unified School District

Test Claim of Santa Monica Community College District

COSM No. _____

Chapter 887, Statutes of 2000
Chapter 595, Statutes of 1999
Chapter 1171, Statutes of 1989
Chapter 1038, Statutes of 1988
Chapter 114, Statutes of 1984
Chapter 1568, Statutes of 1982

Labor Code Section 3212.1

Cancer Presumption

I, Shaleen Crosby, Benefits Technician, Clovis Unified School District, make the following declaration and statement.

In my capacity as Benefits Technician for the District, I am responsible for receiving and processing claims for Worker's Compensation. I am familiar with the provisions and requirements of the Labor Code Section enumerated above.

This Labor Code section requires the Clovis Unified School District to:

A) To develop policies and procedures, and periodically update those policies and procedures, for the handling of claims by district police officers who make claims of worker's compensation alleging the development of his or her cancer or leukemia was caused by their employment with the district pursuant to Labor Code Section 3212.1;

B) To pay the additional costs of claims, including full hospital, surgical and

medical treatment, disability indemnity and death benefits, caused by the shifting of the burden of proof of the cause of cancer or leukemia from the police officer employees to the district pursuant to Labor Code Section 3212.1;

C) In lieu of additional costs of claims caused by the cancer or leukemia of its peace officers, to pay the additional costs of insurance premiums covering those claims pursuant to Labor Code Section 3212.1;

D) The cost of training its police officer employees to take precautionary measures to prevent cancer or leukemia on the job pursuant to the Labor Code Section 3212.1;

E) The cost, or additional cost, to review claims dating back to January 1, 1997, to determine whether the leukemia or cancer arose out of or in the course of employment, pursuant to Labor Code Section 3212.1; and

F) To pay previously denied claims dating back to January 1, 1997, for those claims for which the district cannot meet the new burden of proof as required pursuant to Labor Code Section 3212.1.

It is estimated that Clovis Unified School District will incur, should such a Worker's Compenstion claim be filed, approximately $1,000, or more annually, in staffing and other costs in excess of any funding provided to districts to implement these new duties mandated by the state for which the school district has not been reimbursed by any federal, state, or local government agency, and for which it cannot otherwise obtain

reimbursement.

The foregoing facts are known to me personally and, if so required, I could testify to the statements made herein. I hereby declare under penalty of perjury that the foregoing is true and correct except where stated upon information and belief and where so stated I declare that I believe them to be true.

EXECUTED this 18th day of February, 2003, at Clovis, California.

Shareen Crosby
Benefits Technician
Clovis Unified School District

EXHIBIT 2
COPIES OF STATUTES CITED

CHAPTER 887

S.B. No. 1820

AN ACT to amend Section 3212.1 of the Labor Code, relating to workers' compensation.

[Filed with Secretary of State September 29, 2000.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1820, Burton. Workers' compensation: cancer: peace officers and safety officers.

Existing workers' compensation law provides that in the case of active firefighting members of certain state and local fire departments and in the case of certain peace officers, a compensable injury includes cancer that develops or manifests itself during the period while the firefighter or peace officer demonstrates that he or she was exposed, while in the service of the public agency, to a known carcinogen, as defined, and that the carcinogen is reasonably linked to the disabling cancer. Existing law establishes a presumption that the cancer in these cases is presumed to arise out of and in the course of employment, unless the presumption is controverted by evidence that the primary site of the cancer has been established and that the carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer.

This bill would extend the application of these provisions to additional categories of peace officers, as specified.

The people of the State of California do enact as follows:

SECTION 1. Section 3212.1 of the Labor Code is amended to read:

3212.1. (a) This section applies to active firefighting members, whether volunteers, partly paid, or fully paid, of all of the following fire departments: (1) a fire department of a city, county, city and county, district, or other public or municipal corporation or political subdivision, (2) a fire department of the University of California and the California State University, (3) the Department of Forestry and Fire Protection, and (4) a county forestry or firefighting department or unit. This section also applies to peace officers, as defined in Section 830.1, subdivision (a) of Section 830.2, and subdivisions (a) and (b) of Section 830.37, of the Penal Code, who are primarily engaged in active law enforcement activities.

(b) The term "injury," as used in this division, includes cancer, including leukemia, that develops or manifests itself during a period in which any member described in subdivision (a) is in the service of the department or unit, if the member demonstrates that he or she was exposed, while in the service of the department or unit, to a known carcinogen as defined by the International Agency for Research on Cancer, or as defined by the director.

(c) The compensation that is awarded for cancer shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits, as provided by this division.

(d) The cancer so developing or manifesting itself in these cases shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by evidence that the primary site of the cancer has been established and that the carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer. Unless so controverted, the appeals board is bound to find in accordance with the presumption. This presumption shall be extended to a member following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.

(e) The amendments to this section enacted during the 1999 portion of the 1999–2000 Regular Session shall be applied to claims for benefits filed or pending on or after January 1, 1997, including, but not limited to, claims for benefits filed on or after that date that have previously been denied, or that are being appealed following denial.

EMERGENCY PERSONNEL—WORKERS' COMPENSATION—FIREFIGHTERS AND PEACE OFFICERS

CHAPTER 595

A.B. No. 539

AN ACT to amend Section 3212.1 of the Labor Code, relating to workers' compensation.

[Filed with Secretary of State October 10, 1999.]

LEGISLATIVE COUNSEL'S DIGEST

AB 539, Papan. Workers' compensation: cancer; firefighters and peace officers.

Existing workers' compensation law provides that in the case of active firefighting members of certain state and local fire departments and in the case of certain peace officers, a compensable injury includes cancer that develops or manifests itself during the period while the firefighter or peace officer demonstrates that he or she was exposed, while in the service of the public agency, to a known carcinogen, as defined, and that the carcinogen is reasonably linked to the disabling cancer. Existing law establishes a presumption that the cancer in these cases is presumed to arise out of and in the course of employment, unless controverted by other evidence.

This bill would delete the requirement for the affected firefighter or peace officer to demonstrate that the carcinogen is reasonably linked to the disabling cancer. The bill instead would provide that the presumption may only be controverted by evidence that the primary site of the cancer has been established and that the carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer. This bill would also define cancer to include leukemia for these purposes. These changes would apply to claims for benefits filed or pending on or after January 1, 1997.

The people of the State of California do enact as follows:

SECTION 1. Section 3212.1 of the Labor Code is amended to read:

3212.1. (a) * * * This section applies to active firefighting members * * *, whether volunteers, partly paid, or fully paid, of all of the following fire departments * * *: (1) a fire department of a city, county, city and county, district, or other public or municipal corporation or political * * * subdivision, (2) a fire department of the University of California and the California State University, * * *, (3) the Department of Forestry and Fire Protection, * * *, and (4) a county forestry or firefighting department or unit * * *. This section also applies to peace officers, as defined in Section 830.1 and subdivision (a) of Section 830.2 of the Penal Code, who are primarily engaged in active law enforcement activities * * *.

(b) The term "injury," as used in this division, includes cancer * * *, including leukemia, that develops or manifests itself during a period * * * in which any member described in subdivision (a) is in the service of the department or unit, if the member demonstrates that he or she was exposed, while in the service of the department or unit, to a known carcinogen as defined by the International Agency for Research on Cancer, or as defined by the director * * *.

(c) The compensation that is awarded for cancer shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits, as provided by this division.

(d) The cancer so developing or manifesting itself in these cases shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by * * * evidence * * * that the primary site of the cancer has been established and that the carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer. Unless so controverted, the appeals board is bound to find in accordance with * * * the presumption. This presumption shall be extended to a member following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.

(e) The amendments to this section enacted during the 1999–2000 Regular Session shall be applied to claims for benefits filed or pending on or after January 1, 1997, including, but not limited to, claims for benefits filed on or after that date that have previously been denied, or that are being appealed following denial.

response by the office to the agency's Request for Review. Upon receipt of the decision, the office shall publish in the California Regulatory Notice Register the agency's Request for Review, the office's response thereto, and the decision of the Governor's office.

(d) The time requirements set by subdivisions (a) and (b) may be shortened by the Governor's office for good cause.

(e) In the event the Governor overrules the decision of the office, the office shall immediately transmit the regulation to the Secretary of State for filing.

(f) Upon overruling the decision of the office, the Governor shall transmit to the Rules Committees of both houses of the Legislature a statement of the reasons for overruling the decision of the office.

CHAPTER 1171

An act to amend Section 3212.1 of the Labor Code, relating to workers' compensation.

[Approved by Governor September 30, 1989. Filed with Secretary of State September 30, 1989.]

The people of the State of California do enact as follows:

SECTION 1. This act shall be known and may be cited as the Police Officer's Cancer Protection Act.

SEC. 2. Section 3212.1 of the Labor Code is amended to read:

3212.1. In the case of active firefighting members of fire departments of cities, counties, cities and counties, districts, or other public or municipal corporations or political subdivisions, and active firefighting members of the fire departments of the University of California and the California State University, whether these members are volunteers, partly paid, or fully paid, and in the case of active firefighting members of the Department of Forestry and Fire Protection, or of any county forestry or firefighting department or unit, whether volunteers, partly paid, or fully paid, and peace officers as defined in Section 830.1 and subdivision (a) of Section 830.2 of the Penal Code who are primarily engaged in active law enforcement activities, the term "injury" as used in this division includes cancer which develops or manifests itself during a period while the member is in the service of the department or unit, if the member demonstrates that he or she was exposed, while in the service of the department or unit, to a known carcinogen as defined by the International Agency for Research on Cancer, or as defined by the director, and that the carcinogen is reasonably linked to the disabling cancer.

The compensation which is awarded for cancer shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits, as provided by this division.

The cancer so developing or manifesting itself in these cases shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by other evidence, but unless so controverted, the appeals board is bound to find in accordance with it. This presumption shall be extended to a member following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.

SEC. 3. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund. Notwithstanding Section 17580 of the Government Code, unless otherwise specified in this act, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution.

CHAPTER 1172

An act to add Section 13023 to the Penal Code, relating to criminal records.

[Approved by Governor September 30, 1989. Filed with Secretary of State September 30, 1989.]

The people of the State of California do enact as follows:

SECTION 1. Section 13023 is added to the Penal Code, to read:

13023. Commencing July 1, 1990, subject to the availability of adequate funding, the Attorney General shall direct local law enforcement agencies to report to the Department of Justice, in a manner to be prescribed by the Attorney General, such information as may be required relative to any criminal acts or attempted criminal acts to cause physical injury, emotional suffering, or property damage where there is a reasonable cause to believe that the crime was motivated, in whole or in part, by the victim's race, ethnicity, religion, sexual orientation, or physical or mental disability. On or before July 1, 1992, and every July 1 thereafter, the Department of Justice shall submit a report to the Legislature analyzing the results of the information obtained from local law enforcement agencies pursuant to this section.

SEC. 2. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act

read:

5653.5. For purposes of Section 5653, "river, stream, or lake" means the body of water at the current water level at the time of the dredging.

SEC. 4. Section 5653.7 is added to the Fish and Game Code, to read:

5653.7. In the event of an unanticipated water level change, when necessary to protect fish and wildlife resources, the department may close areas that were otherwise opened for dredging and for which permits were issued pursuant to Section 5653.

SEC. 5. Section 5653.9 is added to the Fish and Game Code, to read:

5653.9. The department may adopt regulations to carry out Sections 5653, 5653.3, 5653.5, and 5653.7.

SEC. 6. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs which may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, changes the definition of a crime or infraction, changes the penalty for a crime or infraction, or eliminates a crime or infraction.

CHAPTER 1038

An act to amend Section 3212.1 of the Labor Code, relating to workers' compensation.

[Approved by Governor September 20, 1988. Filed with Secretary of State September 20, 1988.]

The people of the State of California do enact as follows:

SECTION 1. Section 3212.1 of the Labor Code is amended to read:

3212.1. In the case of active firefighting members of fire departments of cities, counties, cities and counties, districts, or other public or municipal corporations or political subdivisions, and active firefighting members of the fire departments of the University of California and the California State University, whether these members are volunteers, partly paid, or fully paid, and in the case of active firefighting members of the Department of Forestry, or of any county forestry or firefighting department or unit, whether volunteers, partly paid, or fully paid, the term "injury" as used in this division includes cancer which develops or manifests itself during a period while the member is in the service of the department or unit, provided that the member demonstrates that he or she was exposed, while in the service of the department or unit, to a known carcinogen as defined by the International Agency for Research on Cancer, or

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as defined by the director, and that the carcinogen is reasonably linked to the disabling cancer.

The compensation which is awarded for cancer shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits, as provided by this division.

The cancer so developing or manifesting itself in these cases shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by other evidence, but unless so controverted, the appeals board is bound to find in accordance with it. This presumption shall be extended to a member following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.

CHAPTER 1039

An act to amend Section 5353 of the Public Utilities Code, and to add Section 34507.6 to the Vehicle Code, relating to carriers.

[Approved by Governor September 20, 1988. Filed with Secretary of State September 20, 1988.]

The people of the State of California do enact as follows:

SECTION 1. Section 5353 of the Public Utilities Code is amended to read:

5353. This chapter does not apply to any of the following:

(a) Transportation service rendered wholly within the corporate limits of a single city or city and county and licensed or regulated by ordinance.

(b) Transportation of school pupils conducted by or under contract with the governing board of any school district entered into pursuant to the Education Code.

(c) Common carrier transportation services between fixed termini or over a regular route which are subject to authorization pursuant to Article 2 (commencing with Section 1031) of Chapter 5 of Part 1 of Division 1.

(d) Transportation services occasionally afforded for farm employees moving to and from farms on which employed when the transportation is performed by the employer in an owned or leased vehicle, or by a nonprofit agricultural cooperative association organized and acting within the scope of its powers under Chapter 1 (commencing with Section 54001) of Division 20 of the Food and Agricultural Code, and without any requirement for the payment of compensation therefor by the employees.

(e) Transportation service rendered by a publicly owned transit system.

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CHAPTER 114

An act to amend Sections 3212.1, 3361, 3600.4, 4850, and 4850.5 of, and to add and repeal Section 3212.8 of, the Labor Code, relating to workers' compensation.

[Approved by Governor May 10, 1984. Filed with Secretary of State May 10, 1984.]

The people of the State of California do enact as follows:

SECTION 1. Section 3212.1 of the Labor Code is amended to read:

3212.1. In the case of active firefighting members of fire departments of cities, counties, cities and counties, districts, or other public or municipal corporations or political subdivisions, and active firefighting members of the fire departments of the University of California, whether these members are volunteers, partly paid, or fully paid, and in the case of active firefighting members of the Department of Forestry, or of any county forestry or firefighting department or unit, whether volunteers, partly paid, or fully paid, the term "injury" as used in this division includes cancer which develops or manifests itself during a period while the member is in the service of the department or unit, provided that the member demonstrates that he or she was exposed, while in the service of the department or unit, to a known carcinogen as defined by the International Agency for Research on Cancer, or as defined by the director, and that the carcinogen is reasonably linked to the disabling cancer.

The compensation which is awarded for cancer shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits, as provided by the provisions of this division.

The cancer so developing or manifesting itself in these cases shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by other evidence, but unless so controverted, the appeals board is bound to find in accordance with it. This presumption shall be extended to a member following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.

SEC. 2. Section 3212.8 is added to the Labor Code, to read:

3212.8. This section and Section 3212.1 shall remain in effect only until January 1, 1989, and as of this date are repealed, unless a later enacted statute, which is chaptered before January 1, 1989, deletes or extends this date.

SEC. 3. Section 3361 of the Labor Code is amended to read:

3361. Each member registered as an active firefighting member of any regularly organized volunteer fire department, having official

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recognition, and full or partial support of the government of the county, city, town, or district in which the volunteer fire department is located, is an employee of that county, city, town, or district for the purposes of this division, and is entitled to receive compensation from the county, city, town or district in accordance with the provisions thereof.

SEC. 4. Section 3600.4 of the Labor Code is amended to read:

3600.4. (a) Whenever any firefighter, as defined in Section 50925 of the Government Code, of a city, county, city and county, district, or other public or municipal corporation or political subdivision is injured, dies, or is disabled from performing his or her duties as a firefighter by reason of his or her proceeding to or engaging in a fire suppression or rescue operation, or the protection or preservation of life or property, anywhere in this state, including the local jurisdiction in which he or she is employed, but is not at the time acting under the immediate direction of his or her employer, he or she or his or her dependents, as the case may be, shall be accorded by his or her employer all of the same benefits of this division which he or she or they would have received had that firefighter been acting under the immediate direction of his or her employer. Any injury, disability, or death incurred under the circumstances described in this section shall be deemed to have arisen out of and been sustained in the course of employment for purposes of workers' compensation and all other benefits.

(b) Nothing in this section shall be deemed to:

(1) Require the extension of any benefits to a firefighter who at the time of his or her injury, death, or disability is acting for compensation from one other than the city, county, city and county, district, or other public or municipal corporation or political subdivision of his or her primary employment or enrollment.

(2) Require the extension of any benefits to a firefighter employed by a city, county, city and county, district, or other public or municipal corporation or political subdivision which by charter, ordinance, or departmental regulation, whether now in force or hereafter enacted or promulgated, expressly prohibits the activity giving rise to the injury, disability, or death.

SEC. 5. Section 4850 of the Labor Code, as amended by Chapter 762 of the Statutes of 1983, is amended to read:

4850. Whenever any city policeman, harbor policeman of any harbor district, city, county, or district firefighter, sheriff or any officer or employee of a sheriff's office, any inspector, investigator, detective, or personnel with comparable title in any district attorney's office, or lifeguard employed year round on a regular, full-time basis by a county of the first class, who is a member of the Public Employees' Retirement System or subject to the County Employees Retirement Law of 1937 (Chapter 3 (commencing with Section 31450) of Part 3 of Division 4 of Title 3 of the Government Code) is disabled, whether temporarily or permanently, by injury or illness arising out of and in the course of his or her duties, he or she

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shall become entitled, regardless of his or her period of service with the city, county, or district, to leave of absence while so disabled without loss of salary in lieu of temporary disability payments, if any, which would be payable under this chapter, for the period of the disability, but not exceeding one year, or until such earlier date as he or she is retired on permanent disability pension, and is actually receiving disability pension payments. This section shall apply only to city policemen, harbor district policemen, sheriffs or any officer or employee of a sheriff's office, and any inspector, investigator, detective, or personnel with comparable title in any district attorney's office, who are members of the Public Employees' Retirement System or subject to the County Employees Retirement Law of 1937 (Chapter 3 (commencing with Section 31450) of Part 3 of Division 4 of Title 3 of the Government Code) and excludes such employees of a police department whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise, and whose functions do not clearly fall within the scope of active law enforcement service, and excludes such employees of a county sheriff's office whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise, and whose functions do not clearly come within the scope of active law enforcement service. It shall also apply to city, county, or district firefighters who are members of the Public Employees' Retirement System or subject to the County Employees Retirement Law of 1937 (Chapter 3 (commencing with Section 31450) of Part 3 of Division 4 of Title 3 of the Government Code) and excludes such employees of the city fire department, county fire department, and of any fire district whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise, and whose functions do not clearly fall within the scope of active firefighting and prevention service. It shall also apply to deputy sheriffs subject to the County Employees Retirement Law of 1937 (Chapter 3 (commencing with Section 31450) of Part 3 of Division 4 of Title 3 of the Government Code). It shall also apply to lifeguards employed year round on a regular, full-time basis by counties of the first class who are subject to the County Employees Retirement Law of 1937 (Chapter 3 (commencing with Section 31450) of Part 3 of Division 4 of Title 3 of the Government Code). If the employer is insured, the payments which, except for the provisions of this section, the insurer would be obligated to make as disability indemnity to the injured, the insurer may pay to the insured.

This section shall remain in effect only until January 1, 1990, and as of that date is repealed, unless a later enacted statute, which is chaptered before January 1, 1990, deletes or extends that date.

SEC. 5.5. Section 4850 of the Labor Code, as added by Chapter 762 of the Statutes of 1983, is amended to read:

4850. Whenever any city policeman, city, county, or district firefighter, sheriff or any officer or employee of a sheriff's office, any inspector, investigator, detective, or personnel with comparable title

in any district attorney's office, or lifeguard employed year round on a regular, full-time basis by a county of the first class, who is a member of the Public Employees' Retirement System or subject to the County Employees Retirement Law of 1937 (Chapter 3 (commencing with Section 31450) of Part 3 of Division 4 of Title 3 of the Government Code) is disabled, whether temporarily or permanently, by injury or illness arising out of and in the course of his or her duties, he or she shall become entitled, regardless of his or her period of service with the city or county, to leave of absence while so disabled without loss of salary in lieu of temporary disability payments, if any, which would be payable under this chapter, for the period of the disability, but not exceeding one year, or until such earlier date as he or she is retired on permanent disability pension. This section shall apply only to city policemen, sheriffs or any officer or employee of a sheriff's office, and any inspector, investigator, detective, or personnel with comparable title in any district attorney's office, who are members of the Public Employees' Retirement System or subject to the County Employees Retirement Law of 1937 (Chapter 3 (commencing with Section 31450) of Part 3 of Division 4 of Title 3 of the Government Code) and excludes such employees of a police department whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise, and whose functions do not clearly fall within the scope of active law enforcement service, and excludes such employees of a county sheriff's office whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise, and whose functions do not clearly come within the scope of active law enforcement service. It shall also apply to city, county, or district firefighters who are members of the Public Employees' Retirement System or subject to the County Employees Retirement Law of 1937 (Chapter 3 (commencing with Section 31450) of Part 3 of Division 4 of Title 3 of the Government Code) and excludes such employees of the city fire department, county fire department, and of any fire district whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise, and whose functions do not clearly fall within the scope of active firefighting and prevention service. It shall also apply to deputy sheriffs subject to the County Employees Retirement Law of 1937 (Chapter 3 (commencing with Section 31450) of Part 3 of Division 4 of Title 3 of the Government Code). It shall also apply to lifeguards employed year round on a regular, full-time basis by counties of the first class who are subject to the County Employees Retirement Law of 1937 (Chapter 3 (commencing with Section 31450) of Part 3 of Division 4 of Title 3 of the Government Code). If the employer is insured, the payments which, except for the provisions of this section, the insurer would be obligated to make as disability indemnity to the injured, the insurer may pay to the insured.

This section shall become operative on January 1, 1990.

SEC. 6. Section 4850.5 of the Labor Code is amended to read:

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4850.5. Any firefighter employed by the County of San Luis Obispo, and the sheriff or any officer or employee of the sheriff's office of the County of San Luis Obispo, shall, upon the adoption of a resolution of the board of supervisors so declaring, be entitled to the benefits of this article, if otherwise entitled to these benefits, even though the employee is not a member of the Public Employees' Retirement System or subject to the County Employees Retirement Law of 1937 (Chapter 3 (commencing with Section 31450) of Part 3 of Division 4 of Title 3 of the Government Code).

CHAPTER 115

An act to amend Section 29142.2 of, to add Section 99268.11 to, and to repeal and add Section 29142.5 of, the Public Utilities Code, relating to transportation, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor May 10, 1984. Filed with Secretary of State May 10, 1984.]

The people of the State of California do enact as follows:

SECTION 1. Section 29142.2 of the Public Utilities Code is amended to read:

29142.2. Notwithstanding Section 7271 of the Revenue and Taxation Code, after deduction for the cost of the State Board of Equalization in administering the transactions and use tax, the amounts collected under the ordinance adopted pursuant to Section 29140 and available for distribution shall be allocated as follows:

(a) Seventy-five percent to the San Francisco Bay Area Rapid Transit District.

(b) Twenty-five percent shall be allocated by the Metropolitan Transportation Commission to the San Francisco Bay Area Rapid Transit District, the City and County of San Francisco for its municipal railway system, and the Alameda-Contra Costa Transit District for transit services on the basis of regional priorities established by the commission. The allocations by the commission to these transit operators for transit services shall be in accordance with the criteria in the financial management plan which is to be developed and annually revised by the commission in coordination with the Alameda-Contra Costa Transit District, the San Francisco Bay Area Rapid Transit District, and the City and County of San Francisco.

SEC. 2. Section 29142.5 of the Public Utilities Code is repealed.

SEC. 3. Section 29142.5 is added to the Public Utilities Code, to read:

29142.5. On and after July 1, 1984, for purposes of meeting the requirement of subdivision (b) of Section 29142.4, the Metropolitan

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SEC. 2. If any provision of this act or the application thereof to any person or circumstances is held invalid, that invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

SEC. 3. No appropriation is made and no reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution or Section 2231 or 2234 of the Revenue and Taxation Code because the Legislature finds and declares that there are savings as well as costs in this act which, in the aggregate, do not result in additional net costs.

CHAPTER 1568

An act to add and repeal Section 3212.1 of the Labor Code, relating to workers' compensation.

[Approved by Governor September 30, 1982. Filed with Secretary of State September 30, 1982.]

The people of the State of California do enact as follows:

SECTION 1. Section 3212.1 is added to the Labor Code, to read:

3212.1. In the case of active firefighting members of fire departments of cities, counties, cities and counties, districts, or other public or municipal corporations or political subdivisions, and active fire fighting members of the fire departments of the University of California, whether these members are volunteers, partly paid, or fully paid, and in the case of active firefighting members of the Department of Forestry, or of any county forestry or firefighting department or unit, whether volunteers, partly paid, or fully paid, the term "injury" as used in this division includes cancer which develops or manifests itself during a period while the member is in the service of the department or unit, provided that the member demonstrates that he or she was exposed, while in the service of the department or unit, to a known carcinogen as defined by the International Agency for Research on Cancer, or as defined by the director, and that the carcinogen is reasonably linked to the disabling cancer.

The compensation which is awarded for cancer shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits, as provided by the provisions of this division.

The cancer so developing or manifesting itself in these cases shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by other evidence, but unless so controverted, the appeals board is bound to find in accordance with it. This presumption shall be extended to a member following termination of service for a period of three

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calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.

This section shall remain in effect only until January 1, 1989, and as of this date is repealed, unless a later enacted statute, which is chaptered before January 1, 1989, deletes or extends this date.

SEC. 2. Notwithstanding Section 6 of Article XIII B of the California Constitution and Section 2231 or 2234 of the Revenue and Taxation Code, no appropriation is made by this act for the purpose of making reimbursement pursuant to these sections. It is recognized, however, that a local agency or school district may pursue any remedies to obtain reimbursement available to it under Chapter 3 (commencing with Section 2201) of Part 4 of Division 1 of that code. However, notwithstanding any other provision of law to the contrary, all reimbursements to a local agency or school district or any state agency pursuant to this act shall be paid from the appropriation to the Department of Industrial Relations for the payment of additional compensation for subsequent injury, as provided in Article 5 (commencing with Section 4750) of Chapter 2 of Part 2 of Division 4 of the Labor Code.

CHAPTER 1569

An act to add Section 15453.5 to the Government Code, relating to the financing of health care facilities, and making an appropriation therefor.

[Approved by Governor September 30, 1982. Filed with Secretary of State September 30, 1982.]

The people of the State of California do enact as follows:

SECTION 1. Section 15453.5 is added to the Government Code, to read:

15453.5. Notwithstanding Section 15453, the total amount of bonds which may be outstanding at any one time is hereby increased by an amount not exceeding seven hundred sixty-seven million dollars ($767,000,000).

CHAPTER 1570

An act to amend Sections 14654, 31109, 31702, 31704, 31705, 31706, 31707, 31708, and 31713 of, to amend and renumber Sections 31047, 31048, 31049, 31050, and 31051 of, and to add Sections 362.5, 703.5, 1803.5, 1857.5, 31152.5, 31551.5, and 31706.5 to, the Financial Code, relating to financial institutions.

10 05

EXHIBIT 3
COPY OF CODE SECTION CITED

§ 3212.1. Active firefighters and peace officers; injury; inclusion of cancer; presumption

(a) This section applies to active firefighting members, whether volunteers, partly paid, or fully paid, of all of the following fire departments: (1) a fire department of a city, county, city and county, district, or other public or municipal corporation or political subdivision, (2) a fire department of the University of California and the California State University, (3) the Department of Forestry and Fire Protection, and (4) a county forestry or firefighting department or unit. This section also applies to peace officers, as defined in Section 830.1, subdivision (a) of Section 830.2, and subdivisions (a) and (b) of Section 830.37, of the Penal Code, who are primarily engaged in active law enforcement activities.

(b) The term "injury," as used in this division, includes cancer, including leukemia, that develops or manifests itself during a period in which any member described in subdivision (a) is in the service of the department or unit, if the member demonstrates that he or she was exposed, while in the service of the department or unit, to a known carcinogen as defined by the International Agency for Research on Cancer, or as defined by the director.

(c) The compensation that is awarded for cancer shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits, as provided by this division.

(d) The cancer so developing or manifesting itself in these cases shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by evidence that the primary site of the cancer has been established and that the carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer. Unless so controverted, the appeals board is bound to find in accordance with the presumption. This presumption shall be extended to a member following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.

(e) The amendments to this section enacted during the 1999 portion of the 1999-2000 Regular Session shall be applied to claims for benefits filed or pending on or after January 1, 1997, including, but not limited to, claims for benefits filed on or after that date that have previously been denied, or that are being appealed following denial.

(Amended by Stats.1989, c. 1171, § 2; Stats.1999, c. 595 (A.B.539), § 1; Stats.2000, c. 887 (S.B.1820), § 1.)

EXHIBIT B

DEPARTMENT OF FINANCE
GRAY DAVIS, GOVERNOR
915 L STREET ■ SACRAMENTO CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

June 10, 2003

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Ms. Higashi:

As requested in your letter of March 12, 2003, the Department of Finance has reviewed the test claim submitted by the Santa Monica Community College District (claimant) asking the Commission to determine whether specified costs incurred under Chapter No. 1568, Statutes of 1982, (AB 3011); Chapter No. 114, Statutes of 1984, (AB 1399); Chapter No. 1038, Statutes of 1988 (SB 1145); Chapter No. 1171, Statutes of 1989 (SB 89); Chapter No. 595, Statutes of 1999 (AB 539, Papan); Chapter No. 887, Statutes of 2000 (SB 1820, Burton); and Labor Code Section 3212.1 are reimbursable state mandated costs (Claim No. CSM-02-TC-15 "Cancer Presumption"). Commencing with page ten of the test claim, claimant has identified the following new duties, which it asserts are reimbursable state mandates:

- Increased workload associated with the development and periodic revision of policies and procedures for the handling of workers' compensation claims related to the contraction of cancer in peace officers.
- Increased workers' compensation claims for cancer in peace officers.
- Increased workers' compensation insurance coverage for peace officers.
- Increased training to prevent the contraction of cancer for peace officers.
- Increased costs to review claims dated back to January 1, 1997.
- Increased costs to pay claims dating back to January 1, 1997.

As the result of our review, we have concluded that the statutes may have resulted in the following new state mandated programs:

- Increased workers' compensation claims for cancer in peace officers.
- Increased costs to review claims dated back to January 1, 1997.
- Increased costs to pay claims dating back to January 1, 1997.

These new programs may have resulted in establishing a presumption that the contraction of cancer for peace officers occurring during the employee's service period arose out of and in the course of employment. This is consistent with the findings in our initial response to CSM-01-TC-19, a similar test claim filed by the County of Tehama. This conclusion also appears consistent with Chapter No. 595, Statutes of 1999 (AB 539, Papan), which requires that this cancer presumption be applied to claims having been denied or pending since January 1, 1997.

However, the following duties have been determined to have not resulted in a new state mandated program or reimbursable mandate:

- Increased workload associated with the development and periodic revision of policies and procedures for the handling of workers' compensation claims related to the contraction of cancer in peace officers.
- Increased requirements for physical examinations prior to employment for peace officers.
- Increased training to prevent the contraction of cancer for peace officers.
- Increased workers' compensation insurance coverage for peace officers.

Although these programs are involved in the screening and protection of employees related to the contraction of cancer in peace officers, the statutes cited in this claim do not require these duties and, therefore, these programs cannot be considered state reimbursable mandates as specified within this claim.

As required by the Commission's regulations, we are including a "Proof of Service" indicating that the parties included on the mailing list which accompanied your March 12, 2003 letter have been provided with copies of this letter via either United States Mail or, in the case of other state agencies, Interagency Mail Service.

If you have any questions regarding this letter, please contact Jennifer Osborn, Principal Program Budget Analyst at (916) 445-8913 or Keith Gmeinder, state mandates claims coordinator for the Department of Finance, at (916) 445-8913.

Sincerely,

Calvin Smith

S. Calvin Smith
Program Budget Manager

Attachments

Attachment A

DECLARATION OF JENNIFER OSBORN
DEPARTMENT OF FINANCE
CLAIM NO. CSM-02-TC-15

1. I am currently employed by the State of California, Department of Finance (Finance), am familiar with the duties of Finance, and am authorized to make this declaration on behalf of Finance.

2. We concur that the sections relevant to this claim are accurately quoted in the test claim submitted by claimants and, therefore, we do not restate them in this declaration.

I certify under penalty of perjury that the facts set forth in the foregoing are true and correct of my own knowledge except as to the matters therein stated as information or belief and, as to those matters, I believe them to be true.

June 10, 2003
at Sacramento, CA

Jennifer Osborn
Jennifer Osborn

PROOF OF SERVICE

Test Claim Name: Cancer Presumption
Test Claim Number: CSM-02-TC-15

I, Mary Latorre, the undersigned, declare as follows:
I am employed in the County of Sacramento, State of California, I am 18 years of age or older and not a party to the within entitled cause; my business address is 915 L Street, 8th Floor, Sacramento, CA 95814.

On June 10, 2003, I served the attached recommendation of the Department of Finance in said cause, by facsimile to the Commission on State Mandates and by placing a true copy thereof: (1) to claimants and nonstate agencies enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Sacramento, California; and (2) to state agencies in the normal pickup location at 915 L Street, 8th Floor, for Interagency Mail Service, addressed as follows:

A-16
Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
Facsimile No. 445-0278

B-8
State Controller's Office
Division of Accounting & Reporting
Attention: William Ashby
3301 C Street, Room 500
Sacramento, CA 95816

B-29
Legislative Analyst's Office
Attention Marianne O'Malley
925 L Street, Suite 1000
Sacramento, CA 95814

Santa Monica Community College District
1900 Pico Blvd.
Santa Monica, CA 90405-1628

Mr. Keith B. Petersen
SixTen & Associates
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

Ms. Cheryl Miller
Santa Monica Community College District
1900 Pico Blvd.
Santa Monica, CA 90405-1628

Mr. Paul Minney
Spector, Middleton, Young and Minney, LLP
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Sacramento, CA 95825

Dr. Carol Berg
Education Mandated Cost Network
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Mandate Resource Services
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Mr. Arthur Palkowitz
San Diego Unified School District
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San Diego, CA 92103-8363

Mr. Michael Havey
State Controller's Office (B-08)
Division of Accounting and Reporting
3301 C Street, Suite 500
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Ms. Beth Hunter
Centration, Inc.
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Rancho Cucamonga, CA 91730

Mr. Gerald Shelton
California Department of Education (E-08)
Fiscal and Administrative Services Division
1430 N Street, Suite 2213
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on June 10, 2003 at Sacramento, California.

Mary Latorre

EXHIBIT C

SixTen and Associates
Mandate Reimbursement Services

KEITH B. PETERSEN, MPA, JD, President
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

Telephone: (858) 514-8605
Fax: (858) 514-8645
E-Mail: Kbpsixten@aol.com

June 27, 2003

Paula Higashi, Executive Director
Commission on State Mandates
U.S. Bank Plaza Building
980 Ninth Street, Suite 300
Sacramento, California 95814

Re: Test Claim 02-TC-15
Santa Monica Community College District
Cancer Presumption (K-14)

Dear Ms. Higashi:

I have received the comments of the Department of Finance ("DOF") dated June 10, 2003, to which I now respond on behalf of the test claimant.

Although none of the objections generated by DOF are included in the statutory exceptions set forth in Government Code Section 17556, the objections stated additionally fail for the following reasons:

1. **The Comments of the DOF are Incompetent and Should be Excluded**

Test claimant objects to the Comments of the DOF, in total, as being legally incompetent and move that they be excluded from the record. Title 2, California Code of Regulations, Section 1183.02(d) requires that any:

> "...written response, opposition, or recommendations and supporting documentation shall be signed at the end of the document, under penalty of perjury by an authorized representative of the state agency, with the declaration that it is true and complete to the best of the representative's personal knowledge or information and belief."

The DOF comments do not comply with this essential requirement.

2. The Test Claim Legislation and Regulations Create New Mandated Duties

DOF concurs that the test claim statutes may have resulted in a new state mandated program for the following activities:

1. Increased worker's compensation claims for cancer in peace officers.
2. Increased costs to review claims dated back to January 1, 1997.
3. Increased costs to pay claims dating back to January 1, 1997.

DOF disagrees that the test claim statutes have resulted in a new state mandated program for:

(1) Increased workload associated with the development and periodic revision of policies and procedures for the handling of workers' compensation claims related to the contraction of cancer in peace officers.

(2) Increased workers' compensation insurance coverage for peace officers.

(3) Increased training to prevent the contraction of cancer for peace officers.

This response will not address items (1) or (3) as they are implicit activities which result from the new mandate.

(2) Increased Workers' Compensation Insurance Coverage

The test claim seeks reimbursement for:

> "In lieu of additional cost of claims caused by the cancer or leukemia of its peace officers, to pay the additional costs of insurance premiums covering those claims pursuant to Labor Code Section 3212.1[1]

While admitting that the test claim legislation may have resulted in a new state mandated program for paying the cost of increased workers' compensation claims, the DOF disagrees that, "*in lieu of*" the costs of those increased claims, these costs may best be paid through increased costs of insurance against those increased claims. If the costs of those claims are reimbursable, then the costs of insuring against those claims is also reimbursable. Workers' compensation insurance is a reasonable method of insurance risk management.

The response of the DOF should be ignored as legally incompetent for its failure to comply with Section 1183.02 of Title 2, California Code of Regulations and its response is both legally and factually incorrect.

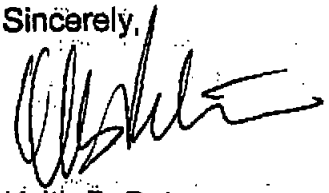
---

[1] Test Claim, Page 11, Lines 2-4.

CERTIFICATION

I certify by my signature below, under penalty of perjury, that the statements made in this document are true and complete to the best of my own personal knowledge or information and belief.

Sincerely,



Keith B. Petersen

C: Per Mailing List Attached

Original List Date: 3/12/2003
Last Updated:
List Print Date: 04/17/2003
Claim Number: 02-TC-15
Issue: Cancer Presumption (K-14)

Mailing Information: Other

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

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Claimant Representative
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Tel: (916) 445-8913
Fax: (916) 327-0225

Ms. Susan Geanacou
Department of Finance (A-15)
915 L Street, Suite 1190
Sacramento, CA 95814
Tel: (916) 445-3274
Fax: (916) 324-4888

COMMISSION ON STATE MANDATES
980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
E: (916) 323-3562
(916) 445-0278
E-mail: csminfo@csm.ca.gov

June 2, 2004

Mr. Keith Petersen
SixTen and Associates
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

And Affected State Agencies and Interested Parties (see enclosed mailing list)

Re: *Cancer Presumption (K-14)*; 02-TC-15
Santa Monica Community College District, Claimant
Statutes 1982, Chapter 1568 (AB 3011);
Statutes 1984, Chapter 114 (AB 1399);
Statutes 1988, Chapter 1038 (SB 1145);
Statutes 1989, Chapter 1171 (SB 89);
Statutes 1999, Chapter 595 (AB 539);
Statutes 2000, Chapter 887 (SB 1820)
Labor Code Section 3212.1

Dear Mr. Petersen:

The draft staff analysis for this test claim is enclosed for your review and comment.

Written Comments

Any party or interested person may file written comments on the draft staff analysis by **June 23, 2004**. You are advised that the Commission's regulations require comments filed with the Commission to be simultaneously served on other interested parties on the mailing list, and to be accompanied by a proof of service on those parties. If you would like to request an extension of time to file comments, please refer to section 1183.01, subdivision (c)(1), of the Commission's regulations.

Hearing

This test claim is set for hearing **July 29, 2004,** at 9:30 a.m. in Room 126 of the State Capitol, Sacramento, California. The final staff analysis will be issued on or about July 8, 2004. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1183.01, subdivision (c)(2), of the Commission's regulations.

Please contact Camille Shelton, Senior Commission Counsel, if you have any questions regarding the above.

Sincerely,

PAULA HIGASHI
Executive Director

Enc.

J:/mandates/2001/02-TC-15/DSA
Hearing Date:

ITEM ___
TEST CLAIM
DRAFT STAFF ANALYSIS

Labor Code Section 3212.1

Statutes 1982, Chapter 1568
Statutes 1984, Chapter 114
Statutes 1988, Chapter 1038
Statutes 1989, Chapter 1171
Statutes 1999, Chapter 595 (AB 539)
Statutes 2000, Chapter 887 (SB 1820)

Cancer Presumption (K-14)

(02-TC-15)

Santa Monica Community College District, Claimant

EXECUTIVE SUMMARY

The Executive Summary will be included with the Final Staff Analysis.

STAFF ANALYSIS

Claimants

Santa Monica Community College District

Chronology

02/27/03	Claimants file test claim with Commission
03/12/03	Test claim deemed complete
04/16/03	Department of Finance requests extension of time to file comments on test claim
04/17/03	Request for extension of time is granted
05/15/03	Department of Finance requests extension of time to file comments on test claim
05/16/03	Request for extension of time is granted
06/12/03	Department of Finance files comments on test claim
06/30/03	Claimant files rebuttal
--/--/--	Draft staff analysis is issued

Background

This case addresses an evidentiary presumption given to certain firefighters and peace officers in workers compensation cases. Normally, before an employer is liable for payment of workers compensation benefits, the employee must show that the injury arose out of and in the course of employment, and that the injury was proximately caused by the employment. The burden of proof is normally on the employee to show proximate cause by a preponderance of the evidence.[1]

The Legislature eased the burden of proving industrial causation for certain public employees that provide vital and hazardous services by establishing a series of presumptions.[2] In 1982, the Legislature enacted Labor Code section 3212.1, which provided a limited presumption, easing the burden of proving industrial causation for specified firefighters that developed cancer during employment. In 1989, certain peace officers were also given the cancer presumption. In these cases, there was a presumption that the cancer arose out of and in the course of employment, and the employer was liable for full hospital, surgical, and medical treatment, disability indemnity, and death benefits, if the firefighter or peace officer could show that:

- He or she was exposed, while in the service of the department or unit, to a known carcinogen as defined by the International Agency for Research on Cancer, or as defined by the director; and that
- The carcinogen is reasonably linked to the disabling cancer.

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[1] Labor Code sections 3202.5 and 3600. Labor Code section 3202.5 defines preponderance of the evidence as such evidence, "when weighed with that opposed to it, has more convincing force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence."

[2] See, Labor Code sections 3212, 3212.1 – 3212.7, and 3213.

Labor Code section 3212.1 further provided that the presumption of industrial causation was disputable and could be controverted by the employer by other evidence that the cancer was caused by non-industrial factors.[3]

Following the enactment of Labor Code section 3212.1, the courts struggled with the employee's burden of proving that the carcinogen was reasonably linked to the cancer. In *Zipton v. Workers' Compensation Appeals Board*[4], the survivors of a firefighter, who died at age 39 of metastatic undifferentiated epithelial cancer, were held ineligible for workers compensation benefits because the nature of the diagnosis made it impossible to reasonably link the carcinogens and the cancer. Metastatic cancer is a secondary cancer growth that migrates from the primary site of the disease to another part of the body. The primary site of the disease was unknown.[5] The court stated the following about the reasonable link requirement:

> While the legislative history reveals an intent on the part of the Legislature to ease the burden of proof of industrial causation by removing the barrier of proximate cause, in application a reasonable link requirement is no less than the logical equivalent of proximate cause. Moreover, we discern that the requirement was precipitated by a fear of financial doom [by self-insured state and local agencies], but that this fear may be unfounded.
>
> In summary, it may be that there is no purpose to be served by the reasonable link requirement. If indeed metastatic cancer, primary site unknown, is a common medical diagnosis in cancer cases, and therefore results in a pattern of defeating cancer claims of firefighters and police officers by requiring a burden of proof which is medically impossible to sustain, the Legislature may wish to reexamine the reasonable link requirement.[6]

In a case after *Zipton*, the First District Court of Appeal noted that Labor Code section 3212.1 does not provide the same level of presumption enumerated in other presumption statutes. Rather, Labor Code section 3212.1 contained a "limited and disputable presumption."[7] The court also disagreed with the interpretation in *Zipton* that the reasonable link standard was the same as the proximate cause standard. The court held the following:

> We hold that more is required under section 3212.1 than the mere coincidence of exposure and cancer. But a showing of proximate cause is not required. Rather, if the evidence supports a reasonable inference that the occupational exposure

---

[3] The courts have described the rebuttable presumption as follows: "Where facts are proven giving rise to a presumption ..., the burden of proof shifts to the party, against whom it operates [i.e., the employer], to prove the nonexistence of the presumed fact, to wit, an industrial relationship." (*Zipton v. Workers' Compensation Appeals Board* (1990) 218 Cal.App.3d 980, 988, fn. 4.)

[4] *Zipton, supra,* 218 Cal.App.3d 980.

[5] *Id.* at page 991.

[6] *Id.* at page 990.

[7] *Riverview Fire Protection District v. Workers' Compensation Appeals Board* (1994) 23 Cal.App.4th 1120, 1124.

> contributed to the worker's cancer, then a "reasonable link" has been shown, and the disputable presumption of industrial causation may be invoked.[8]

In 1999, the Legislature enacted the test claim statute (Stats. 1999, ch. 595), which amended Labor Code section 3212.1 to address the court's criticism of the reasonable link standard in *Zipton*.[9] The test claim statute, as amended in 1999, eliminates the employee's burden of proving that a carcinogen is reasonably linked to the cancer before the presumption that the cancer arose out of and in the course of employment is triggered. Thus, the employee need only show that he or she was exposed, while in the service of the department or unit, to a known carcinogen as defined by the International Agency for Research on Cancer, or as defined by the director, for the presumption of industrial injury to arise.

The employer still has a right to dispute the employee's claim. But, when disputing the claim, the burden of proving that the carcinogen is not reasonably linked to the cancer has been shifted to the employer. Labor Code section 3212.1, subdivision (d), as amended in 1999, now states the following:

> The cancer developing or manifesting itself in these cases shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by evidence that the primary site of the cancer has been established and that the carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer. Unless so controverted, the appeals board is bound to find in accordance with the presumption.

The 1999 test claim statute also specifies that leukemia is included as a type of cancer for which the presumption of industrial injury can apply.

Finally, the 1999 test claim statute retroactively applies the amendments to section 3212.2 to workers compensation claims filed or pending on January 1, 1997. Labor Code section 3212.1, subdivision (e), states that "[t]he amendments to this section enacted during the 1999-2000 Regular Session shall apply to claims for benefits filed or pending on or after January 1, 1997, including, but not limited to, claims for benefits filed on or after that date that have previously been denied, or that are being appealed following denial."

In 2000, the Legislature enacted the second test claim statute (Stats. 2000, ch. 887) to extend the cancer presumption to peace officers in an arson-investigating unit, as defined in Penal Code section 830.37, subdivisions (a) and (b).

Prior Test Claim Decisions on Labor Code Section 3212.1

In 1982, the Board of Control approved a test claim on Labor Code section 3212.1, as originally added by Statutes 1982, chapter 1568 (*Firefighter's Cancer Presumption*). The parameters and guidelines authorize insured local agencies and fire districts to receive reimbursement for increases in workers compensation premium costs attributable to Labor Code section 3212.1. The parameters and guidelines also authorize self-insured local agencies to receive reimbursement for staff costs, including legal counsel costs, in defending the section 3212.1

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[8] *Id.* at page 1128.

[9] Assembly Floor Analysis on Assembly Bill 539, dated September 8, 1999.

claims, and benefit costs including medical costs, travel expenses, permanent disability benefits, life pension benefits, death benefits, and temporary disability benefits paid to the employee or the employee's survivors.[10]

In 1992, the Commission adopted a statement of decision approving a test claim on Labor Code section 3212.1, as amended by Statutes 1989, chapter 1171 (*Cancer Presumption – Peace Officers*, CSM 4416.) The parameters and guidelines authorize reimbursement to local law enforcement agencies that employ peace officers defined in Penal Code sections 830.1 and 830.2 for the same costs approved in the Board of Control decision in the *Firefighter's Cancer Presumption* test claim.[11]

Claimant's Position

The claimant contends that the test claim legislation constitutes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. The claimant asserts that school districts and community college districts are eligible to receive reimbursement for the following activities:

- Develop policies and procedures to handle claims by district police officers.
- Pay additional costs of claims caused by the shifting of the burden of proof of the cause of the cancer from the police officer employee to the district.
- Pay additional costs for insurance premiums.
- Training police officer employees to take precautionary measures to prevent cancer on the job.
- Review claims dating back to January 1, 1997, to determine whether the cancer arose out of or in the course of employment.
- Pay previously denied claims dating back to January 1, 1997, for those claims that the district cannot meet the new burden of proof as required by Labor Code section 3212.1.

Position of the Department of Finance

The Department of Finance filed comments on June 10, 2003, concluding that the test claim legislation may create a reimbursable state-mandated program.[12]

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[13] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[14] "Its

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[10] Exhibit D.

[11] Exhibit D.

[12] Exhibit B.

[13] Article XIII B, section 6 provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: (a) Legislative mandates requested by the local agency

purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[15] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[16] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[17]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[18] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[19] Finally, the newly required activity or increased level of service must impose costs mandated by the state.[20]

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affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[14] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 735.

[15] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

[16] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174. In *Department of Finance v. Commission on State Mandates, supra*, 30 Cal.4th at page 742, the court agreed that "activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds - even if the local entity is obligated to incur costs as a result of its discretionary decision to participate in a particular program or practice." The court left open the question of whether non-legal compulsion could result in a reimbursable state mandate, such as in a case where failure to participate in a program results in severe penalties or "draconian" consequences. (*Id.*, at p. 754.)

[17] *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836.

[18] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

[19] *Lucia Mar, supra*, 44 Cal.3d 830, 835.

[20] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[21] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[22]

Issue 1: Are school districts and community college districts eligible claimants for this test claim?

For the reasons provided below, staff finds that school districts and community college districts are not eligible claimants for this test claim because the test claim statute, Labor Code section 3212.1, does not provide a rebuttable cancer presumption to employees of a school district or community college district.

Labor Code section 3212.1, subdivision (a), lists the employees that are given the cancer presumption. Labor Code section 3212.1, subdivision (a), states the following:

> This section applies to active firefighting members, whether volunteers, partly paid, or fully paid, of all of the following fire departments: (1) a fire department of a city, county, city and county, district, or other public municipal corporation or political subdivision, (2) a fire department of the University of California and the California State University, (3) the Department of Forestry and Fire Protection, and (4) county forestry or firefighting department or unit. This section also applies to peace officers, as defined in Section 830.1, subdivision (a) of Section 830.2, and subdivisions (a) and (b) of Section 830.37, of the Penal Code, who primarily engaged in active law enforcement activities.

The claimant has not claimed any costs relating to firefighting employees. Declarations from Santa Monica Community College District and Clovis Unified School District, which were filed by the claimant with the test claim, allege costs for district police officers only.[23] In addition, the state has not expressly authorized school districts and community college districts to employ firefighters, and has not mandated that they do so. Thus, there is no evidence in the record that school districts or community college districts employ firefighters that are subject to the test claim statute.

Moreover, based on the plain language of Labor Code section 3212.1, the peace officers employed by school districts and community college districts do not receive the rebuttable cancer presumption enjoyed by peace officers employed by state and local agencies. Labor Code section 3212.1, subdivision (a), expressly provides that the cancer presumption applies to the peace officers defined in Penal Code sections 830.1, 830.2, subdivision (a), and 830.37, subdivisions (a) and (b). These code sections provide the definition for peace officers employed by counties, cities, port district police, the district attorney, the Department of Justice, the

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[21] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

[22] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817; *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280.

[23] Exhibit A.

California Highway Patrol, the University of California, the California State University, the Department of Fish and Game, the Department of Parks and Recreation, and the Department of Forestry and Fire Protection, the Department of Alcoholic Beverage Control, and the Board of Directors of the California Exposition and State Fair.

Peace officers employed by school districts and community college districts are defined in Penal Code section 830.32.[24] The test claim statute does not expressly apply to peace officers defined in Penal Code section 830.32.

Therefore, staff finds that school districts and community college districts are not eligible claimants for this test claim.

Issue 2: Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?

Assuming for the sake of argument only that Labor Code section 3212.1 applied to peace officers or firefighters employed by school districts and community college districts, the test claim statute is still not subject to article XIII B, section 6 because state law does not mandate school districts and community college districts to employ peace officers and firefighters.

The California Constitution, article IX, Education, establishes and permits the formation of school districts, including community college districts, and county boards of education, all for the purpose of encouraging "the promotion of intellectual, scientific, moral and agricultural improvement."[25] Although the Legislature is permitted to authorize school districts "to act in any manner which is not in conflict with the laws and purposes for which school districts are

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[24] Penal Code section 830.32 states the following:

> The following persons are peace officers whose authority extends to any place in the state for the purpose of performing their primary duty or when making an arrest pursuant to Section 836 as to any public offense with respect to which there is immediate danger to person or property, or of the escape of the perpetrator of that offense, or pursuant to Section 8597 or 8598 of the Government Code. Those peace officers may carry firearms only if authorized and under terms and conditions specified by their employing authority.
>
> (a) Members of a California Community College police department appointed pursuant to Section 72330 of the Education Code, if the primary duty of the police officer is the enforcement of the law as prescribed in Section 72330 of the Education Code.
>
> (b) Persons employed as members of police department of a school district pursuant to Section 39670 of the Education Code, if the primary duty of the police officer is the enforcement of the law as prescribed in Section 39670 of the Education Code.
>
> (c) Any peace officer employed by a K-12 public school district or California Community College district who has completed training as prescribed by subdivision (f) of Section 832.3 shall be designated a school police officer.

[25] California Constitution, article IX, section 1.

established,"[26] the Constitution does not require school districts to operate fire and police departments as part of their essential educational function. Article I, section 28, subdivision (c), of the California Constitution does require K-12 school districts to maintain safe schools. However, there is no constitutional requirement to maintain safe schools through school district fire and police departments independent of the public safety services provided by the cities and counties a school district serves.[27] In *Leger v. Stockton Unified School District*, the court interpreted the safe schools provision as follows:

> [H]owever, section 28(c) declares a general right without specifying *any* rules for its enforcement. It imposes no express duty on anyone to make schools safe. It is wholly devoid of guidelines, mechanisms, or procedures from which a damages remedy could be inferred. Rather, "it merely indicates principles, without laying down rules by means of which those principles may be given the force of law." [Citation omitted.][28]

The Legislature is permitted to authorize school districts to act in any manner that is not in conflict with the Constitution. The Legislature, however, has not authorized or required school districts and community college districts to employ firefighters.

In addition, the Legislature does not require school districts and community college districts to employ peace officers. Pursuant to Education Code section 38000:[29]

> [t]he governing board of any school district *may* establish a security department ... or a police department ...[and] may employ personnel to ensure the safety of school district personnel and pupils and the security of the real and personal property of the school district. In addition, a school district may assign a school police reserve officer who is deputized pursuant to Section 35021.5 to a schoolsite to supplement the duties of school police personnel pursuant to this section. It is the intention of the Legislature in enacting this section that a school district police or security department is supplementary to city and county law enforcement agencies and is not vested with general police powers. (Emphasis added.)

Education Code section 72330, derived from the same 1959 Education Code section, provides the law for community colleges. "The governing board of a community college district *may* establish a community college police department ... [and] may employ personnel as necessary to enforce the law on or near the campus. ... This subdivision shall not be construed to require the employment by a community college district of any additional personnel." (Emphasis added.)

In *Department of Finance v. Commission on State Mandates*, the California Supreme Court found that "if a school district elects to participate in or continue participation in any *underlying*

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[26] California Constitution, article IX, section 14.

[27] Article I, section 28, subdivision (c) of the California Constitution provides "All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful." (Emphasis added.)

[28] *Leger v. Stockton Unified School Dist.* (1988) 202 Cal.App.3d 1448, 1455.

[29] Formerly numbered Education Code section 39670; derived from 1959 Education Code section 15831.

voluntary education-related funded program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate."[30] The court further stated, on page 731 of the decision, that:

> *[W]e reject claimants' assertion that they have been legally compelled to incur* notice and agenda *costs*, and hence are entitled to reimbursement from the state, based merely upon the circumstance that notice and agenda provisions are mandatory elements of education-related program in which claimants have participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled.* [Emphasis added.]

The decision of the California Supreme Court interpreting the state-mandate issue is relevant to this test claim. The Commission is not free to disregard clear statements of the California Supreme Court. Thus, pursuant to state law, school districts and community college districts remain free to discontinue providing their own fire or police department and employing firefighters or peace officers. Thus, the activity of disputing a worker's compensation claim filed by a firefighter or peace officer employee flows from the discretionary decision to employ such officers and does not impose a reimbursable state mandate. Therefore, the test claim legislation is not subject to article XIII B, section 6 of the California Constitution.

CONCLUSION

Based on the foregoing, staff concludes that school districts and community college districts are not eligible claimants for this test claim. Staff further concludes that Labor Code section 3212.1, as amended by the test claim legislation, is not subject to article XIII B, section 6 of the California Constitution because it does not impose a mandate on school districts and community college districts.

Staff Recommendation

Staff recommends that the Commission deny this test claim.

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[30] *Department of Finance v. Commission on State Mandates, supra*, 30 Cal.4th at page 743.

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June 15, 2004

Paula Higashi, Executive Director
Commission on State Mandates
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Re: CSM No. 02-TC-15
Test Claim of Santa Monica Community College District
Cancer Presumption (K-14)

Dear Ms. Higashi:

I have received the draft staff analysis to the above referenced test claim and respond on behalf of Santa Monica Community College District, test claimant.

A. Introduction

Staff's analysis includes comments relative to fire departments and firefighters. The test claim is clear that it does not include fire departments and firefighters.[1] Therefore, this response will respond only to those portions of the Staff analysis which pertains to school district and community college district police officers.

B. School and Community College Districts Are Included in the Test Claim Legislation

1. School Districts and Community College Districts are Included in Labor Code Section 3212.1

At page 7 of its analysis, Staff finds that school districts and community college districts are not eligible claimants because the test claim statute, Labor Code section 3212.1, does not provide a rebuttable presumption to employees of school districts or community college districts. The reasoning given by Staff is that "the plain language of Labor Code section 3212.1...expressly provides that the cancer presumption applies to

[1] See: Test Claim at page 2, lines 3-7

the peace officers defined in Penal Code sections 830.1, 830.2, subdivision (a) and 830.37, subdivisions (a) and (b)" and that these code sections provide for the definition of peace officers of entities other than school districts and community college districts. Staff is incorrect.

Penal Code section 830.1, subdivision (a),[2] includes, *inter alia*, police officers of a district authorized by statute to maintain a police department. The relevant question, then, is whether school districts and community college districts are authorized by statute to maintain police departments.

Chapter 1592, Statutes of 1970, section 2, added Education Code Section 25429 which provided that "[T]he governing board of a community college district may establish a community college police department..." Chapter 1010, Statutes of 1976, section 2, recodified and renumbered section 25429 as Education Code section 72330. Although subsequently amended several times, the authority of community college districts to establish and maintain a police department continues to this date.

Chapter 1165, Statutes of 1989, Section 3, amended Education Code Section 72330[3]

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[2] Penal Code Section 830.1, added by Chapter 1222, Statutes of 1968, amended by Chapter 710, Statutes of 2003, Section 3:

"(a) Any sheriff, undersheriff, or deputy sheriff, employed in that capacity, of a county, any chief of police of a city or chief, director, or chief executive officer of a consolidated municipal public safety agency that performs police functions, any police officer, employed in that capacity and appointed by the chief of police or chief, director, or chief executive of a public safety agency, of a city, any chief of police, or police officer of a district, including police officers of the San Diego Unified Port District Harbor Police, authorized by statute to maintain a police department, any marshal or deputy marshal of a superior court or county, any port warden or port police officer of the Harbor Department of the City of Los Angeles, or any inspector or investigator employed in that capacity in the office of a district attorney, is a peace officer. The authority of these peace officers extends to any place in the state, as follows:..." (Emphasis added)

[3]Education Code Section 72330, (formerly Section 25429), added by Chapter 1592, Statutes of 1970, Section 2, as amended by Chapter 1165, Statutes of 1989, Section 3:

"The governing board of a community college district may establish a community

to change the reference to peace officers defined "by Section 830.31 of the Penal Code" to those defined "in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code". Penal Code sections 830.1, 830.2, subdivision (a) and 830.37, subdivisions (a) and (b), are all included within Chapter 4.5. Therefore, the 1989 amendment to section 72330 includes community college police officers within Penal Code sections 830.1, 830.2, subdivision (a) and 830.37, subdivisions (a) and (b).

Chapter 945, Statutes of 1982, section 1, amended Education Code Section 39670 to provide that the governing board of any school district may establish a school district police department. Chapter 277, Statutes of 1996, sections 5 and 6, repealed section 39670 and added section 38000. Section 38000 continues to provide that the governing board of any school district may establish a police department.

Labor Code section 3212.1 includes police officers of a district which is authorized by statute to maintain a police department. School districts and community college districts are authorized by statute to maintain police departments. Therefore, school districts and community college districts are included within the provisions of Penal Code section 3212.1.

2. Penal Code Section 830.32 is Irrelevant to Labor Code Section 3212.1

Staff next concludes that "[T]he test claim statute does not expressly apply to peace officers defined in Penal Code section 830.32." Penal Code section 830.32 is irrelevant to the applicability provisions of Labor Code section 3212.1.

a. Community Colleges

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college police department, under the supervision of a community college chief of police, and employ, in accordance with the provisions of Chapter 4 (commencing with Section 88000) of Part 51 that personnel as may be necessary to enforce the law on or near the campus of the community college and on or near other grounds or properties owned, operated, controlled, or administered by the community college or by the state acting on behalf of the community college. Each campus of a multicampus community college district may designate a chief of police.

Persons employed and compensated as members of a community college police department, when so appointed and duly sworn, are peace officers as defined ~~by Section 830.31 of the Penal Code~~ in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code."

Chapter 1592, Statutes of 1970, section 2, added Education Code Section 25429[4] which first authorized Community Colleges to establish police departments. However, they were peace officers only upon the campus of the college and in or about other grounds or properties of the district.

Chapter 1010, Statutes of 1976, section 2, recodified and renumbered section 25429 as Education Code Section 72330.

Chapter 1340, Statutes of 1980, section 9, added Penal Code section 830.31[5] which

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[4] Education Code Section 25429, added by Chapter 1592, Statutes of 1970, Section 2:

"The governing board of a community college district may establish a community college police department and employ, in accordance with the provisions of Chapter 3 (commencing with Section 13280) of Division 10 such personnel as may be necessary for its needs.

Persons employed and compensated as members of a community college police department, when so appointed and duly sworn, are peace officers only upon the campus of the community college and in or about other grounds or properties owned, operated, controlled, or administered by the community college, or the state on behalf of the community college."

[5] Penal Code Section 830.31, added by Chapter 1340, Statutes of 1980, Section 9:

"The following persons are peace officers whose authority extends to any place in the state for the purpose of performing their primary duty or when making an arrest pursuant to Section 836 as to any public offense with respect to which there is immediate danger to person or property, or of the escape of the perpetrator of such offense, or pursuant to Section 8597 or Section 8598 of the Government Code. Such peace officers may carry firearms only if authorized and such under terms and conditions as are specified by their employing agency.

(a) Members of an arson-investigating unit, regularly employed and paid as such, of a fire protection agency of the state, of a county, city, or district, and members of a fire department or fire protection agency of the state, or a county, city, or district regularly paid and employed as such, provided that the primary duty of arson investigators shall be the detection and apprehension of persons who have violated any fire law or committed insurance fraud, and the primary duty of fire department or fire protection agency members other than arson investigators when acting as peace

described certain persons as peace officers whose authority extends to any place in the state. Subdivision (c) included members of a community college police department.

Chapter 1165, Statutes of 1989, sections 3 and 25, repealed Penal Code section

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officers shall be the enforcement of laws relating to fire prevention and fire suppression.

(b) Persons designated by a local agency as park rangers, and regularly employed and paid as such, provided that the primary duty of any such peace officer shall be the protection of park property and the preservation of the peace therein.

(c) Members of a community college police department appointed pursuant to Section 72330 of the Education Code, provided that the primary duty of any such peace officer shall be the enforcement of the law as prescribed in Section 72330 of the Education Code.

(d) A welfare fraud or child support investigator or inspector, regularly employed and paid as such by a county, provided that the primary duty of any such peace officer shall be the enforcement of the provisions of the Welfare and Institution Code and Section 270 of this code.

(e) The coroner and deputy coroners, regularly employed and paid as such, of a county, provided that the primary duty of any such peace officer are those duties set forth in Sections 27469 and 27491 to 27491.4, inclusive, of the Government Code.

(f) A member of the San Francisco Bay Area Rapid Transit District Police Department appointed pursuant to Section 28767.5 of the Public Utilities Code, provided that the primary duty of any such peace officer shall be the enforcement of the law in or about properties owned, operated, or administered by the district or when performing necessary duties with respect to patrons, employees, and properties of the district.

(g) Harbor police regularly employed and paid as such by a county, city, or district other than peace officers authorized under Section 830.1, and the port warden and special officers of the Harbor Department of the City of Los Angeles, provided that the primary duty of any such peace officer shall be the enforcement of law in or about the properties owned, operated, or administered by the harbor or port or when performing necessary duties with respect to patrons, employees, and properties of the harbor or port.

(h) Persons designated as a security officer by a municipal utility district pursuant to Section 12820 of the Public Utilities Code, provided that the primary duty of any such officer shall be the protection of the properties of the utility district and the protection of the persons thereon."

830.31 and added section 830.32.[6] Section 830.32, subdivision (a), continues the provisions of repealed section 830.31, subdivision (c), which provides that the authority of members of a community college police department extends to any place in the state.

Therefore, it is clear that Penal Code section 830.32(a) did not authorize community college police departments. Community college police departments were authorized in 1970 by Education Code section 25429 (now, section 72330). Sections 830.31 and then 830.32 merely extended the authority of community college police officers from only upon the campus of the college and in or about other grounds or properties of the district to any place in the state.

b. School Districts

[6] Penal Code Section 830.32, added by Chapter 1165, Statutes of 1989, Section 25, amended by Chapter 135, Statutes of 2000, Section 135:

"The following persons are peace officers whose authority extends to any place in the state for the purpose of performing their primary duty or when making an arrest pursuant to Section 836 as to any public offense with respect to which there is immediate danger to person or property, or of the escape of the perpetrator of that offense, or pursuant to Section 8597 or 8598 of the Government Code. Those peace officers may carry firearms only if authorized and under terms and conditions specified by their employing agency.

(a) Members of a California Community College police department appointed pursuant to Section 72330 of the Education Code, if the primary duty of the police officer is the enforcement of the law as prescribed in Section 72330 of the Education Code.

(b) Persons employed as members of a police department of a school district pursuant to Section 38000 of the Education Code, if the primary duty of the police officer is the enforcement of the law as prescribed in Section 38000 of the Education Code.

(c) Any peace officer employed by a K-12 public school district or California Community College district who has completed training as prescribed by subdivision (f) of Section 832.3 shall be designated a school police officer.

Chapter 987, Statutes of 1967, section 1, amended Education Code section 15831[7]. As amended, the governing board of any school district was authorized to establish a security patrol to ensure security in or about the school district premises.

Chapter 1010, Statutes of 1976, section 2, recodified and renumbered section 15831 as Education Code section 39670.

Chapter 945, Statutes of 1982, section 1, amended Education Code section 39670[8] to also authorize the establishment of a district police department.

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[7] Education Code Section 15831, added by Chapter 240, Statutes of 1961, Section 1, as amended by Chapter 987, Statutes of 1967, Section 1:

"The governing board of any school district may establish a security patrol and employ, in accordance with the provisions of Chapter 3 (commencing with Section 13580) of Division 10 such personnel as may be necessary to ensure the security of school district personnel and pupils in or about school district premises and the security of the real and personal property of the school district and to cooperate with local law enforcement agencies in all matters involving the security of personnel, pupils, and real and personal property of the school district. It is the intention of this provision that a school district patrol department shall be supplementary to city and county law enforcement agencies and shall under no circumstances be vested with general police powers."

[8] Education Code Section 39670, (formerly Section 15831), added by Chapter 240, Statutes of 1961, Section 1, as amended by Chapter 945, Statutes of 1982, Section 1:

"The governing board of any school district may establish a security department or school district police department under the supervision of a school district chief of security, chief of police, or other official designated by the superintendent of the school district, and employ, in accordance with the provisions of Chapter 5 (commencing with Section 45100) of Part 25 of Division 3 of this title such personnel as may be necessary to ensure the ~~security~~ safety of school district personnel and pupils, and the security of the real and personal property of the school district ~~and to cooperate with local law enforcement agencies in all matters involving the security of the personnel, pupils, and real and personal property of the school district~~. It is the intention of ~~this provision~~ the Legislature in enacting this section that a school district security or police department shall be supplementary to city and county law enforcement agencies and shall under no circumstances be vested with general police powers."

Chapter 1165, Statutes of 1989, section 25, added Penal Code section 830.32.[9] Subdivision (b) provided that persons employed by a police department of a school district pursuant to section 39670 were peace officers whose authority extends to any place in the state.

Chapter 288, Statutes of 1996, section 5, added Education Code section 38000[10] which, in substance, replaced former section 39670 which was repealed by Chapter 288/96, section 6.

Therefore, it is clear that Penal Code section 830.32(b) did not authorize school police departments. School police departments were first established in 1961 when they were referred to as a "security patrols" to ensure the security of personnel and pupils in or

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[9] See: Footnote 6

[10] Education Code Section 38000, added by Chapter 277, Statutes of 1996, Section 5:

"(a) The governing board of any school district may establish a security department under the supervision of a chief of security or a police department under the supervision of a chief of police, as designated by, and under the direction of, the superintendent of the school district. In accordance with Chapter 5 (commencing with Section 45100) of Part 25, the governing board may employ personnel to ensure the safety of school district personnel and pupils and the security of the real and personal property of the school district. In addition, a school district may assign a school police reserve officer who is deputized pursuant to Section 35021.5 to a schoolsite to supplement the duties of school police personnel pursuant to this section. It is the intention of the Legislature in enacting this section that a school district police or security department is supplementary to city and county law enforcement agencies and is not vested with general police powers.

(b) The governing board of a school district that establishes a security department or a police department shall set minimum qualifications of employment for the chief of security or chief of police, respectively, including, but not limited to, prior employment as a peace officer or completion of any peace officer training course approved by the Commission on Peace Officer Standards and Training. A chief of security or chief of police shall comply with the prior employment or training requirement set forth in this subdivision as of January 1, 1993, or a date one year subsequent to the initial employment of the chief of security or chief of police by the school district, whichever occurs later. This subdivision shall not be construed to require the employment by a school district of any additional personnel."

about school district premises. Section 830.32 merely extended the authority of school police officers to any place in the state.

Staff's attempt to couple the scope of authority granted to school districts and community college districts by Penal Code section 830.32 to their inclusion in Labor Code section 3212.1 is not well taken. Penal Code section 830.32 is irrelevant to a proper analysis of whether or not district police are included in Labor Code section 3212.1.

C. Legal Compulsion is not Always Necessarily Required for a Finding of a Reimbursable Mandate

Staff concludes that state law does not mandate school districts and community college districts to employ peace officers and, thus, the test claim legislation does not impose a state mandate on school districts and community college districts. The basis of its conclusion is "...there is no constitutional requirement to maintain safe schools through school district...police departments independent of the public safety services provided by the cities and counties a school district serves", citing *Leger v. Stockton Unified School District* (1988) 202 Cal.App.3d 1448, 1455.

Based upon this erroneous conclusion, staff suggests the following remedy:

> "Thus, pursuant to state law, school districts and community college districts remain free to discontinue providing their own...police department and employing...peace officers." (Draft Staff Analysis, at page 10)

1. Students and Staff Have an Inalienable Right to Safe, Secure and Peaceful Schools

A. Staff Mistakenly Relies on the Tort Language of *Leger*

At page 9 of the Draft Analysis, Staff refers to Article 1, section 28, subdivision (c)[11] (hereinafter, section 28(c)) of the California Constitution - a portion of "The Victims Bill of Rights" initiative - approved by the people, June 8, 1982, which staff admits

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[11] California Constitution, Article 1, section 28, subdivision (c):

"Right to Safe Schools. All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful."

"require(s) K-12 school districts to maintain safe schools." Staff goes on to argue, however, that there is no constitutional requirement to maintain safe schools through school security or a school district police department independent of the public safety services provided by the cities and counties a school district serves.

As support for its self-serving conclusion that there is no constitutional requirement to maintain school police departments, Staff quotes[12] a well excised portion of the opinion, at page 1455, which states that a constitutional provision is not self executing when it "merely indicates principles, without laying down rules by means of which those principles may be given the force of law."

Staff's error is trying to stretch rules of tort law to fit an issue of constitutional law. Section 28(c) was intended to encompass safety only from criminal behavior. *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 248

In *Leger*[13], the complaint alleged that employees of the district negligently failed to protect plaintiff from an attack by a nonstudent in a school restroom. The complaint attempted to establish ***tort liability*** by alleging that Section 28(c) created a ***duty*** of due care, which is an essential element of the ***tort of negligence***. The *Leger* court held:

> "Article 1, section 28, subdivision (c) of the California Constitution is not self-executing in the sense of providing a right to recover money damages for its violation."
>
> (The court then discusses the application of section 28(c) in a constitutional sense - see: section 1B infra)
>
> "The question here is whether section 28(c) is 'self-executing' in a different sense...In particular, whether it provides citizens with a specific remedy by way of damages for its violation in the absence of legislation granting such a remedy.
>
> "...Here, however, section 28(c)...imposes no express duty on anyone to make schools safe. It is wholly devoid of guidelines, mechanisms, or

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[12] Staff indents and blocks off 6 lines to appear as if it is a direct quotation from *Leger*. In fact, only a portion of the last sentence is a direct quotation.

[13] *Leger* is a pleading case appealing the trial court's sustaining defendants' general demurrer, without leave to amend.

> procedures from which a damages remedy could be inferred." (Opinion, at pages 1453-1455, emphasis supplied)

Therefore, the quotation offered by Staff applies only to a civil action seeking money damages for personal injury, a tort action.

B. The Constitutional Provisions of *Leger* Support the Test Claim

The portion of the *Leger* decision (omitted by Staff) discussing the constitutional import of section 28(a) supports a conclusion that districts are, indeed, obligated to provide safe schools. The court first refers to Article 1, section 26, of the California Constitution which provides: "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." The court then goes on to say:

> "Under this constitutional provision, all branches of government are required to comply with constitutional directives (citations) or prohibitions (citation). Thus, in the absence of express language to the contrary, every constitutional provision is self-executing in the sense that agencies of government are prohibited from taking official actions that contravene constitutional provisions. (Ibid) 'Every constitutional provision is self-executing to this extent, that everything done in violation of it is void.' (Citation)." (*Leger*, at page 1454, emphasis supplied)

Where there is a self-executing provision, the right given may be enjoyed and protected, or the duty imposed may be enforced.

> "...the Constitution furnishes a rule for its own construction. That rule, unchanged since its enactment in 1879, is that constitutional provisions are 'mandatory and prohibitory, unless by express words they are declared to be otherwise.' (Art.1, §26, Cal.Const.) (footnote omitted) the rule applies to all sections of the Constitution alike and is binding upon all branches of the state government, including this court, in its construction of (constitutional provisions) (Citation) (¶) Section 26 of article 1 'not only commands that its provisions shall be obeyed, but that disobedience of them is prohibited'." *Unger v. Superior Court* (1980) 102 Cal.App.3d 681, 687 (interpreting article 11, section 6 - Judicial, school, county, and city offices shall be non-partisan)

California courts have held other inalienable rights to be self-executing. *Porten v. University of San Francisco* (1976) 64 Cal.App.3d 825, 829 (right to privacy); *Laguna*

Publishing Co. v. Golden Rain Foundation of Laguna Hills (1982) 131 Cal.App.3d 816, 851, fn 16 (right to free speech and press).

The *Leger* court went even further to restate the long standing rule that the responsibility of school districts for the safety of children *is even greater* than the responsibility of the police for the public in general:

> "A contrary conclusion would be wholly untenable in light of the fact that 'the right of all students to a school environment fit for learning cannot be questioned. Attendance is mandatory and the aim of all schools is to teach. Teaching and learning cannot take place without the physical and mental well-being of the students. The school premises, in short, must be safe and welcoming. ...[¶] The public school setting is one in which governmental officials are directly in charge of children and their environs, including where they study, eat and play. ...Further, the responsibility of school officials for each of their charges, the children, is heightened as compared to the responsibility of the police for the public in general'." (Opinion, at page 1459)

Therefore, under the constitutional law provisions of *Leger*, Article 1, section 26, of the California Constitution mandates that all branches of government are required to comply with the constitutional directive of Article 1, section 28, and protect both students' and staff's inalienable right to attend campuses which are safe, secure and peaceful. Therefore, districts, themselves, are required to provide safe schools. To say that school districts are "free to discontinue" providing police services and "free to discontinue" employment of peace officers is contrary to the will of the people of California in their "Victims Bill of Rights" that commands that all students and staff of public schools have an inalienable right to be provided with schools that are safe, secure and peaceful.

2. Discontinuing Campus Police Departments is an Irrelevant Standard

The legislature has decided that school police departments are an appropriate method of securing the inalienable right to safe schools.

History of Campus Police Departments

A. Community Colleges

In 1970, former Education Code Section 25429[14] provided that the governing board of a community college district may establish a community college police department and employ such personnel as may be necessary for its needs. Persons so employed were peace officers only in or about the campus of the community college and other grounds or properties owned, operated, controlled, or administered by the community college.

Chapter 1010, Statutes of 1976, Section 2 recodified and renumbered Education Code Section 25429 as Education Code Section 72330[15].

Chapter 1340, Statutes of 1980, Section 9, added Penal Code Section 830.31[16], effective September 30, 1980, which identified those persons who are peace officers whose authority extends to any place in the state for the purpose of performing their primary duty or when making an arrest. Subdivision (c) included members of a community college police department appointed pursuant to Education Code Section 72330. Therefore, the former parochial jurisdiction of community college police departments was extended to any place in the state.

Chapter 470, Statutes of 1981, Section 77, amended Education Code Section 72330[17]

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[14] See: Footnote 4

[15]Education Code Section 72330, (formerly Section 25429), added by Chapter 1592, Statutes of 1970, Section 2, as recodified and renumbered by Chapter 1010, Statutes of 1976, Section 2 (Operative as of April 30, 1977):

"The governing board of a community college district may establish a community college police department and employ, in accordance with the provisions of Chapter 3 4 (commencing with Section ~~13500~~ 88000) of ~~Division 10~~ Part 51 of this division such personnel as may be necessary for its needs.

Persons employed and compensated as members of a community college police department, when so appointed and duly sworn, are peace officers only upon the campus of the community college and in or about other grounds or properties owned, operated, controlled, or administered by the community college, or the state on behalf of the community college."

[16] See: Footnote 5

[17]Education Code Section 72330, (formerly Section 25429), added by Chapter 1592, Statutes of 1970, Section 2, as amended by Chapter 470, Statutes of 1981, Section 77:

to clarify that community college police are peace officers as defined by Section 830.31 of the Penal Code, but only for the purpose of carrying out the duties of their employment.

Chapter 945, Statutes of 1982, Section 5, amended Education Code Section 72330[18] to provide that a community college police department shall be under the supervision of a community college chief of police and that each campus of a multicampus community college district may designate a chief of police.

"The governing board of a community college district may establish a community college police department and employ, in accordance with the provisions of Chapter 4 (commencing with Section 88000) of Part 51 ~~of this division~~ such personnel as may be necessary for its needs.

Persons employed and compensated as members of a community college police department, when so appointed and duly sworn, are peace officers as defined by Section 830.31 of the Penal Code, but only for the purpose of carrying out the duties of their employment, and only upon the campus of the community college and in or about other grounds or properties owned, operated, controlled, or administered by the community college, or the state on behalf of the community college."

[18]Education Code Section 72330, (formerly Section 25429), added by Chapter 1592, Statutes of 1970, Section 2, as amended by Chapter 945, Statutes of 1982, Section 5:

"The governing board of a community college district may establish a community college police department, under the supervision of a community college chief of police, and employ, in accordance with the provisions of Chapter 4 (commencing with Section 88000) of Part 51 such personnel as may be necessary ~~for its needs~~ to enforce the law on or near the campus of the community college and on or near other grounds or properties owned, operated, controlled, or administered by the community college or by the state acting on behalf of the community college. Each campus of a multicampus community college district may designate a chief of police.

Persons employed and compensated as members of a community college police department, when so appointed and duly sworn, are peace officers as defined by Section 830.31 of the Penal Code ~~, but only for the purpose of carrying out the duties of their employment, and only upon the campus of the community college and in or about other grounds or properties owned, operated, controlled, or administered by the community college, or the state on behalf of the community college~~."

Chapter 1165, Statutes of 1989, Section 3, amended Education Code Section 72330[19] to change the reference to peace officers defined "by Section 830.31 of the Penal Code" to those defined "in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code".

Chapter 1165, Statutes of 1989, Section 23, repealed Penal Code Section 830.31, and Section 25 added Penal Code Section 830.32[20] which defines those "peace officers" whose authority extends to any place in the state. Subdivision (a) includes members of a community college police department appointed pursuant to Education Code Section 72330.

Chapter 409, Statutes of 1991, Section 4, amended Education Code Section 72330[21]

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[19] See: Footnote 3

[20] Penal Code Section 830.32, added by Chapter 1165, Statutes of 1989, Section 25:

"The following persons are peace officers whose authority extends to any place in the state for the purpose of performing their primary duty or when making an arrest pursuant to Section 836 as to any public offense with respect to which there is immediate danger to person or property, or of the escape of the perpetrator of that offense, or pursuant to Section 8597 or 8598 of the Government Code. Those peace officers may carry firearms only if authorized and under terms and conditions specified by their employing agency.

(a) Members of a community college police department appointed pursuant to Section 72330 of the Education Code, if the primary duty of the peace officer is the enforcement of the law as prescribed in Section 72330 of the Education Code.

(b) Persons employed as members of a police department of a school district pursuant to Section 39670 of the Education Code, if the primary duty of the peace officer is the enforcement of the law as prescribed in Section 39670 of the Education Code."

[21] Education Code Section 72330, (formerly Section 25429), added by Chapter 1592, Statutes of 1970, Section 2, as amended by Chapter 409, Statutes of 1991, Section 4:

"(c) The governing board of a community college district that establishes a community college police department shall set minimum qualifications of employment for the community college chief of police, including, but not limited to, prior employment

to add subdivision (c) which requires the governing board of a community college to set minimum qualifications for the community college chief of police and requires the chief of security or chief of police to comply with the training requirements of the subdivision.

Chapter 746, Statutes of 1998, Section 3, amended Penal Code Section 830.32[22] to add subdivision (c) to provide that peace officers employed by a California Community College district, who have completed training as prescribed by subdivision (f) of Section 832.3, shall be designated as school police officers.

So, it can be seen that the legislature has expanded the role of community college peace officers from "only in or about the campus and other grounds or properties owned by the college" since 1970, in the following 34 years, to full-fledged police departments with offices on each campus and authorized to enforce the law anywhere in the state.

B. School Districts

In 1967, Education Code Section 15831[23] provided that the governing board of any

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as a peace officer or completion of any peace officer training course approved by the Commission on Peace Officer Standards and Training. A chief of security or chief of police shall be required to comply with the prior employment or training requirement set forth in this subdivision as of January 1, 1993, or a date one year subsequent to the initial employment of the chief of security or chief of police by the community college district, whichever occurs later. This subdivision shall not be construed to require the employment by a community college district of any additional personnel."

[22] See: Footnote 6

[23]Education Code Section 15831, added by Chapter 240, Statutes of 1961, Section 1, as amended by Chapter 987, Statutes of 1967, Section 1:

"The governing board of any school district may establish a security patrol and employ, in accordance with the provisions of Chapter 3 (commencing with Section 13580) of Division 10 such personnel as may be necessary to ensure the security of school district personnel and pupils in or about school district premises and the security of the real and personal property of the school district and to cooperate with local law enforcement agencies in all matters involving the security of personnel, pupils, and real and personal property of the school district. It is the intention of this provision that a school district patrol department shall be supplementary to city and county law

school district may establish a security patrol and to employ such personnel as may be necessary to ensure the security of school district personnel and pupils and the security of the real and personal property of the school district.

Chapter 1010, Statutes of 1976, Section 2 recodified and renumbered Education Code Section 15831 as Education Code Section 39670[24].

Chapter 306, Statutes of 1977, Section 2, amended Education Code Section 39670[25]

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enforcement agencies and shall under no circumstances be vested with general police powers."

[24]Education Code Section 39670, (formerly Section 15831), added by Chapter 240, Statutes of 1961, Section 1, as recodified and renumbered by Chapter 1010, Statutes of 1976, Section 2 (Operative as of April 30, 1977):

"The governing board of any school district may establish a security patrol and employ, in accordance with the provisions of Chapter ~~3~~ 5 (commencing with Section ~~13580~~ 45100) of Part 25 of Division ~~10~~ 3 of this title such personnel as may be necessary to ensure the security of school district personnel and pupils in or about school district premises and the security of the real and personal property of the school district and to cooperate with local law enforcement agencies in all matters involving the security of personnel, pupils, and real and personal property of the school district. It is the intention of this provision that a school district patrol department shall be supplementary to city and county law enforcement agencies and shall under no circumstances be vested with general police powers."

[25]Education Code Section 39670, (former Section 15831), added by Chapter 240, Statutes of 1961, Section 1, as amended by Chapter 306, Statutes of 1977, Section 2:

"The governing board of any school district may establish a security ~~patrol~~ department and employ, in accordance with the provisions of Chapter 5 (commencing with Section 45100) of Part 25 of Division 3 of this title such personnel as may be necessary to ensure the security of school district personnel and pupils ~~in or about school district premises~~ and the security of the real and personal property of the school district and to cooperate with local law enforcement agencies in all matters involving the security of personnel, pupils, and real and personal property of the school district. It is the intention of this provision that a school district ~~patrol~~ security department shall be supplementary to city and county law enforcement agencies and shall under no

to read "security department" instead of "security patrol".

Chapter 945, Statutes of 1982, Section 1, amended Education Code Section 39670[26] to provide that the governing board of any school district may also establish a school district police department under the supervision of a school district chief of security, chief of police, or other official designated by the superintendent of the school district in addition to "security departments". The phrase "to cooperate with local law enforcement agencies in all matters involving the security of the personnel, pupils, and real and personal property of the school district" was deleted.

Chapter 1165, Statutes of 1989, Section 23, repealed Penal Code Section 830.31, and Section 25 added Penal Code Section 830.32[27] which defines those "peace officers" whose authority extends to any place in the state. Subdivision (b) includes members of a school district police department employed pursuant to Education Code Section 39670.

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circumstances be vested with general police powers."

[26] See: Footnote 8

[27] Penal Code Section 830.32, added by Chapter 1165, Statutes of 1989, Section 25:

"The following persons are peace officers whose authority extends to any place in the state for the purpose of performing their primary duty or when making an arrest pursuant to Section 836 as to any public offense with respect to which there is immediate danger to person or property, or of the escape of the perpetrator of that offense, or pursuant to Section 8597 or 8598 of the Government Code. Those peace officers may carry firearms only if authorized and under terms and conditions specified by their employing agency.

(a) Members of a community college police department appointed pursuant to Section 72330 of the Education Code, if the primary duty of the peace officer is the enforcement of the law as prescribed in Section 72330 of the Education Code.

(b) Persons employed as members of a police department of a school district pursuant to Section 39670 of the Education Code, if the primary duty of the peace officer is the enforcement of the law as prescribed in Section 39670 of the Education Code."

Chapter 277, Statutes of 1996, Section 5, added Education Code Section 38000[28] which substantially restates former Education Code Section 39670 (which was then repealed by Section 6) except, now, a school district may also assign a deputized school police reserve officer to a schoolsite to supplement the duties of school police personnel.

Chapter 746, Statutes of 1998, Section 3, amended Penal Code Section 830.32[29] to

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[28] Education Code Section 38000, added by Chapter 277, Statutes of 1996, Section 5:

"(a) The governing board of any school district may establish a security department under the supervision of a chief of security or a police department under the supervision of a chief of police, as designated by, and under the direction of, the superintendent of the school district. In accordance with Chapter 5 (commencing with Section 45100) of Part 25, the governing board may employ personnel to ensure the safety of school district personnel and pupils and the security of the real and personal property of the school district. In addition, a school district may assign a school police reserve officer who is deputized pursuant to Section 35021.5 to a schoolsite to supplement the duties of school police personnel pursuant to this section. It is the intention of the Legislature in enacting this section that a school district police or security department is supplementary to city and county law enforcement agencies and is not vested with general police powers.

(b) The governing board of a school district that establishes a security department or a police department shall set minimum qualifications of employment for the chief of security or chief of police, respectively, including, but not limited to, prior employment as a peace officer or completion of any peace officer training course approved by the Commission on Peace Officer Standards and Training. A chief of security or chief of police shall comply with the prior employment or training requirement set forth in this subdivision as of January 1, 1993, or a date one year subsequent to the initial employment of the chief of security or chief of police by the school district, whichever occurs later. This subdivision shall not be construed to require the employment by a school district of any additional personnel."

[29] Penal Code Section 830.32, added by Chapter 1165, Statutes of 1989, Section 25, as amended by Chapter 746, Statutes of 1998, Section 3:

"(c) Any peace officer employed by a K-12 public school district or California Community College district who has completed training as prescribed by subdivision (f) of Section 832.3 shall be designated a school police officer."

add subdivision (c) to provide that peace officers employed by a K-12 public school district, who have completed training as prescribed by subdivision (f) of Section 832.3, shall be designated as school police officers.

Chapter 135, Statutes of 2000, Section 135, amended subdivision (b) of Penal Code Section 830.32[30] to change references from Education Code Section 39670 to Section 38000.

So, it can be seen again, that the legislature, in attempting to make school districts safe, secure and peaceful, has expanded the responsibility of school district police departments from merely establishing security patrols in 1961 over the following 43 years into full-fledged police departments with police officers whose authority extends to any place in the state.

C. The Duties and Obligations of Campus Police Have Been Greatly Expanded

Chapter 659, Statutes of 1999, Section 1, amended Family Code Section 6240[31] to

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[30] See: Footnote 6

[31] Family Code Section 6240, added by Chapter 219, Statutes of 1993, Section 154, as amended by Chapter 659, Statutes of 1999, Section 1:

"As used in this part:
(a) "Judicial officer" means a judge, commissioner, or referee designated under Section 6241.
(b) "Law enforcement officer" means one of the following officers who requests or enforces an emergency protective order under this part:
(1) A police officer.
(2) A sheriff's officer.
(3) A peace officer of the Department of the California Highway Patrol.
(4) A peace officer of the University of California Police Department.
(5) A peace officer of the California State University and College Police Departments.
(6) A peace officer of the Department of Parks and Recreation, as defined in subdivision (f) of Section 830.2 of the Penal Code.
(7) A housing authority patrol officer, as defined in subdivision (d) of Section 830.31 of the Penal Code.
(8) A peace officer for a district attorney, as defined in Section 830.1 or 830.35 of the Penal Code.

include, peace officers of a California community college police department and peace officers employed by a police department of a school district within the definition of a "law enforcement officer" as used in Part 3 - "Emergency Protective Orders", commencing with Section 6240. Section 6250[32] allows a judicial officer to issue an ex parte emergency protective order when a law enforcement officer asserts reasonable grounds to believe any of the following: (a) that a person is in immediate and present danger of domestic violence, (b) that a child is in immediate and present danger of abuse by a family or household member, (c) that a child is in immediate and present danger of being abducted by a parent or relative, or (d) that an elder or dependent adult is in immediate and present danger of abuse. Therefore, the legislature has expanded the powers of California community colleges and school districts to include the authority

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(9) A parole officer, probation officer, or deputy probation officer, as defined in Section 830.5 of the Penal Code.

(10) A peace officer of a California Community College police department, as defined in subdivision (a) of Section 830.32.

(11) A peace officer employed by a police department of a school district, as defined in subdivision (b) of Section 830.32.

(c) "Abduct" means take, entice away, keep, withhold, or conceal."

[32] Family Code Section 6250, added by Chapter 219, Statutes of 1993, Section 154, as amended by Chapter 561, Statutes of 1999, Section 1:

"A judicial officer may issue an ex parte emergency protective order where a law enforcement officer asserts reasonable grounds to believe any of the following:

(a) That a person is in immediate and present danger of domestic violence, based on the person's allegation of a recent incident of abuse or threat of abuse by the person against whom the order is sought.

(b) That a child is in immediate and present danger of abuse by a family or household member, based on an allegation of a recent incident of abuse or threat of abuse by the family or household member.

(c) That a child is in immediate and present danger of being abducted by a parent or relative, based on a reasonable belief that a person has an intent to abduct the child or flee with the child from the jurisdiction or based on an allegation of a recent threat to abduct the child or flee with the child from the jurisdiction.

(d) That an elder or dependent adult is in immediate and present danger of abuse as defined in Section 15610.07 of the Welfare and Institutions Code, based on an allegation of a recent incident of abuse or threat of abuse by the person against whom the order is sought, except that no emergency protective order shall be issued based solely on an allegation of financial abuse, . [sic — punctuation.]

to obtain emergency protective orders to help prevent domestic violence, child abuse, child abductions and elder abuse.

Chapter 659, Statutes of 1999, Section 1.5, added Family Code Section 6250.5,[33] which allows a judicial officer to issue an ex parte emergency protective order to a peace officer of a community college or school district when that peace officer asserts reasonable grounds to believe that there is a demonstrated threat to campus safety, when the issuance of that order is consistent with a memorandum of understanding between the college or school police department and the local sheriff or police chief. Therefore, the authority and responsibility of community college and district peace officers was again expanded to obtain emergency protective orders when there is reasonable grounds to believe that there is a demonstrated threat to campus safety.

Penal Code Section 646.9 defines the crime of stalking. Chapter 659, Statutes of 1999, Section 2, amended subdivision (a) of Penal Code Section 646.91[34] to add

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[33] Family Code Section 6250.5, added by Chapter 659, Statutes of 1999, Section 1.5:

"A judicial officer may issue an ex parte emergency protective order to a peace officer defined in subdivisions (a) and (b) of Section 830.32 if the issuance of that order is consistent with an existing memorandum of understanding between the college or school police department where the peace officer is employed and the sheriff or police chief of the city in whose jurisdiction the peace officer's college or school is located and the peace officer asserts reasonable grounds to believe that there is a demonstrated threat to campus safety."

[34] Penal Code Section 646.91, added by Chapter 169, Statutes of 1997, Section 2, as amended by Chapter 659, Statutes of 1999, Section 2:

"(a) Notwithstanding any other law, a judicial officer may issue an ex parte emergency protective order where a peace officer, as defined in Section 830.1, 830.2, or 830.32, asserts reasonable ~~ground~~ grounds to believe that a person is in immediate and present danger of stalking based upon the person's allegation that he or she has been willfully, maliciously, and repeatedly followed or harassed by another person who has made a credible threat with the intent of placing the person who is the target of the threat in reasonable fear for his or her safety, or the safety of his or her immediate family, within the meaning of Section 646.9.

(b) A peace officer who requests an emergency protective order shall reduce the order to writing and sign it.

(c) An emergency protective order shall include all of the following:

(1) A statement of the grounds asserted for the order.

(2) The date and time the order expires.

(3) The address of the superior court for the district or county in which the protected party resides.

(4) The following statements, which shall be printed in English and Spanish:

(A) "To the protected person: This order will last until the date and time noted above. If you wish to seek continuing protection, you will have to apply for an order from the court at the address noted above. You may seek the advice of an attorney as to any matter connected with your application for any future court orders. The attorney should be consulted promptly so that the attorney may assist you in making your application."

(B) "To the restrained person: This order will last until the date and time noted above. The protected party may, however, obtain a more permanent restraining order from the court. You may seek the advice of an attorney as to any matter connected with the application. The attorney should be consulted promptly so that the attorney may assist you in responding to the application."

(d) An emergency protective order may be issued under this section only if the judicial officer finds both of the following:

(1) That reasonable grounds have been asserted to believe that an immediate and present danger of stalking, as defined in Section 646.9, exists.

(2) That an emergency protective order is necessary to prevent the occurrence or reoccurrence of the stalking activity.

(e) An emergency protective order may include either of the following specific orders as appropriate:

(1) A harassment protective order as described in Section 527.6 of the Code of Civil Procedure.

(2) A workplace violence protective order as described in Section 527.8 of the Code of Civil Procedure.

(f) An emergency protective order shall be issued without prejudice to any person.

(g) An emergency protective order expires at the earlier of the following times:

(1) The close of judicial business on the fifth court day following the day of its issuance.

(2) The seventh calendar day following the day of its issuance.

(h) A peace officer who requests an emergency protective order shall do all of the following:

peace officers of a community college or school district to the list of peace officers who are charged with the responsibility of obtaining an ex parte emergency protective order based upon a victim's allegation that he or she has been willfully, maliciously and repeatedly followed or harassed by another person who has made a credible threat and the victim is in reasonable fear for his or her safety, or the safety of his or her immediate family. Subdivision (b) requires the requesting peace officer to sign the emergency order. Subdivision (h) requires the requesting peace officer to (1) serve the order on the restrained person, if he or she can be reasonably located, (2) to give a

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(1) Serve the order on the restrained person, if the restrained person can reasonably be located.

(2) Give a copy of the order to the protected person, or, if the protected person is a minor child, to a parent or guardian of the protected child if the parent or guardian can reasonably be located, or to a person having temporary custody of the child.

(3) File a copy of the order with the court as soon as practicable after issuance.

(i) A peace officer shall use every reasonable means to enforce an emergency protective order.

(j) A peace officer who acts in good faith to enforce an emergency protective order is not civilly or criminally liable.

(k) A peace officer who requests an emergency protective order under this section shall carry copies of the order while on duty.

(l) A peace officer described in subdivision (a) or (b) of Section 830.32 who requests an emergency protective order pursuant to this section shall also notify the sheriff or police chief of the city in whose jurisdiction the peace officer's college or school is located after issuance of the order.

(m) "Judicial officer," as used in this section, means a judge, commissioner, or referee.

(n) Nothing in this section shall be construed to permit a court to issue an emergency protective order prohibiting speech or other activities that are constitutionally protected or protected by the laws of this state or by the United States or activities occurring during a labor dispute, as defined by Section 527.3 of the Code of Civil Procedure, including but not limited to, picketing and hand billing.

(o) The Judicial Council shall develop forms, instructions, and rules for the scheduling of hearings and other procedures established pursuant to this section.

(p) Any intentional disobedience of any emergency protective order granted under this section is punishable pursuant to Section 166. Nothing in this subdivision shall be construed to prevent punishment under Section 646.9, in lieu of punishment under this section, if a violation of Section 646.9 is also pled and proven."

copy of the order to the protected person, or a minor protected person's parent or guardian, and (3) file a copy of the order with the court as soon as practicable after issuance. Subdivision (i) requires the peace officer to use every reasonable means to enforce an emergency protective order. Subdivision (k) requires the requesting peace officer to carry copies of the order while on duty. Therefore, community college and school district peace officers are now required to sign emergency orders prohibiting "stalking", to serve the order on the restrained person if he or she can be reasonably located, to give a copy of the order to the protected person, to file a copy of the order with the court, and to carry copies of the order while on duty.

Penal Code Section 12028.5 defines domestic violence incidents and provides for the temporary taking custody of firearms at the scene of domestic violence incidents and provides procedures to be taken subsequent to the taking of temporary custody of those firearms. Chapter 659, Statutes of 1999, Section 3, amended Section 12028.5[35],

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[35] Penal Code Section 12028.5, added by Chapter 901, Statutes of 1984, Section 1, as amended by Chapter 659, Statutes of 1999, Section 3:

"(a) As used in this section, the following definitions shall apply:

(1) "Abuse" means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself, herself, or another.

(2) "Family violence" has the same meaning as domestic violence as defined in subdivision (b) of Section 13700, and also includes any abuse perpetrated against a family or household member.

(3) "Family or household member" means a spouse, former spouse, parent, child, any person related by consanguinity or affinity within the second degree, or any person who regularly resides or who regularly resided in the household.

The presumption applies that the male parent is the father of any child of the female pursuant to the Uniform Parentage Act (Part 3 (commencing with Section 7600) of Division 12 of the Family Code).

(4) "Deadly weapon" means any weapon, the possession or concealed carrying of which is prohibited by Section 12020.

(b) A sheriff, undersheriff, deputy sheriff, marshal, deputy marshal, or police officer of a city, as defined in subdivision (a) of Section 830.1, a peace officer of the Department of the California Highway Patrol, as defined in subdivision (a) of Section 830.2, a member of the University of California Police Department, as defined in subdivision (c) of Section 830.2, an officer listed in Section 830.6 while acting in the course and scope of his or her employment as a peace officer, a member of a

California State University Police Department, as defined in subdivision (d) of Section 830.2, a peace officer of the Department of Parks and Recreation, as defined in subdivision (f) of Section 830.2, a peace officer, as defined in subdivision (d) of Section 830.31, a peace officer as defined in subdivisions (a) and (b) of Section 830.32, and a peace officer, as defined in Section 830.5, who is at the scene of a family violence incident involving a threat to human life or a physical assault, may take temporary custody of any firearm or other deadly weapon in plain sight or discovered pursuant to a consensual search as necessary for the protection of the peace officer or other persons present. Upon taking custody of a firearm or other deadly weapon, the officer shall give the owner or person who possessed the firearm a receipt. The receipt shall describe the firearm or other deadly weapon and list any identification or serial number on the firearm. The receipt shall indicate where the firearm or other deadly weapon can be recovered and the date after which the owner or possessor can recover the firearm or other deadly weapon. No firearm or other deadly weapon shall be held less than 48 hours. Except as provided in subdivision (e), if a firearm or other deadly weapon is not retained for use as evidence related to criminal charges brought as a result of the family violence incident or is not retained because it was illegally possessed, the firearm or other deadly weapon shall be made available to the owner or person who was in lawful possession 48 hours after the seizure or as soon thereafter as possible, but no later than 72 hours after the seizure. In any civil action or proceeding for the return of firearms or ammunition or other deadly weapon seized by any state or local law enforcement agency and not returned within 72 hours following the initial seizure, except as provided in subdivision (c), the court shall allow reasonable attorney's fees to the prevailing party.

(c) Any peace officer, as defined in subdivisions (a) and (b) of Section 830.32, who takes custody of a firearm or deadly weapon pursuant to this section shall deliver the firearm within 24 hours to the city police department or county sheriff's office in the jurisdiction where the college or school is located.

(d) Any firearm or other deadly weapon which has been taken into custody that has been stolen shall be restored to the lawful owner, as soon as its use for evidence has been served, upon his or her identification of the firearm or other deadly weapon and proof of ownership.

(e) Any firearm or other deadly weapon taken into custody and held by a police, university police, or sheriff's department or by a marshal's office, by a peace officer of the Department of the California Highway Patrol, as defined in subdivision (a) of Section 830.2, by a peace officer of the Department of Parks and Recreation, as defined in subdivision (f) of Section 830.2, by a peace officer, as defined in subdivision (d) of Section 830.31, or by a peace officer, as defined in Section 830.5, for longer than 12 months and not recovered by the owner or person who has lawful possession at the

time it was taken into custody, shall be considered a nuisance and sold or destroyed as provided in subdivision (c) of Section 12028. Firearms or other deadly weapons not recovered within 12 months due to an extended hearing process as provided in subdivision (i), are not subject to destruction until the court issues a decision, and then only if the court does not order the return of the firearm or other deadly weapon to the owner.

(f) In those cases where a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat, the agency shall advise the owner of the firearm or other deadly weapon, and within 10 days of the seizure, initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned.

(g) The law enforcement agency shall inform the owner or person who had lawful possession of the firearm or other deadly weapon, at that person's last known address by registered mail, return receipt requested, that he or she has 30 days from the date of receipt of the notice to respond to the court clerk to confirm his or her desire for a hearing, and that the failure to respond shall result in a default order forfeiting the confiscated firearm or other deadly weapon. For the purposes of this subdivision, the person's last known address shall be presumed to be the address provided to the law enforcement officer by that person at the time of the family violence incident. In the event the person whose firearm or other deadly weapon was seized does not reside at the last address provided to the agency, the agency shall make a diligent, good faith effort to learn the whereabouts of the person and to comply with these notification requirements.

(h) If the person requests a hearing, the court clerk shall set a hearing no later than 30 days from receipt of that request. The court clerk shall notify the person, the law enforcement agency involved, and the district attorney of the date, time, and place of the hearing. Unless it is shown by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, the court shall order the return of the firearm or other deadly weapon and shall award reasonable attorney's fees to the prevailing party.

(i) If the person does not request a hearing or does not otherwise respond within 30 days of the receipt of the notice, the law enforcement agency may file a petition for an order of default and may dispose of the firearm or other deadly weapon as provided in Section 12028.

(j) If, at the hearing, the court does not order the return of the firearm or other deadly weapon to the owner or person who had lawful possession, that person may petition the court for a second hearing within 12 months from the date of the initial hearing. If the owner or person who had lawful possession does not petition the court

subdivision (b), to add community college and school district peace officers to those officers required to take custody of firearms and comply with Section 12028.5. Therefore, community college and school district peace officers, who are at the scene of a family violence incident involving a threat to human life or a physical assault, are now required to take temporary custody of any firearm or other deadly weapon in plain sight or discovered pursuant to a consensual search as necessary for the protection of the peace officer or other persons present.

Chapter 659, Statutes of 1999, Section 3, renumbered former subdivisions (c) through (j) of Section 12028.5 as subdivisions (d) through (k) respectively. Subdivision (f) requires, in those cases where a law enforcement agency has reasonable cause to believe that the return of the firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat, to advise the owner of the firearm or other deadly weapon and, within 10 days of the seizure, initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned. Therefore, when a community college district or school district peace officer seizes a firearm or other deadly weapon at the scene of a domestic violence incident, and the officer has reasonable cause to believe that the return of the firearm or other deadly weapon would likely result in endangering the victim or the person reporting the assault or threat, the district, is required to refer the seizure to district counsel for the filing of a petition to determine if the firearm or other deadly weapon should be returned.

Chapter 1 of Title 5 of the Penal Code, commencing with Section 13700, is entitled "Law Enforcement Response to Domestic Violence". Chapter 659, Statutes of 1999, Section 5, amended Subdivision (c) of Education Code Section 13700[36] to include

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within this 12-month period for a second hearing or is unsuccessful at the second hearing in gaining return of the firearm or other deadly weapon, the firearm or other deadly weapon may be disposed of as provided in Section 12028.

(k) The law enforcement agency, or the individual law enforcement officer, shall not be liable for any act in the good faith exercise of this section."

[36] Penal Code Section 13700, added by Chapter 1609, Statutes of 1984, Section 3, as amended by Chapter 659, Statutes of 1999, Section 5:

"As used in this title:

(a) "Abuse" means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another.

(b) "Domestic violence" means abuse committed against an adult or a fully

community college and school district peace officers within the definition of peace officers subject to the Title on Responses to Domestic Violence. Section 13701[37], at

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emancipated minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship. For purposes of this subdivision, "cohabitant" means two unrelated adult persons living together for a substantial period of time, resulting in some permanency of relationship. Factors that may determine whether persons are cohabiting include, but are not limited to, (1) sexual relations between the parties while sharing the same living quarters, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) whether the parties hold themselves out as husband and wife, (5) the continuity of the relationship, and (6) the length of the relationship.

(c) "Officer" means any officer or employee of a local police department or sheriff's office, and any peace officer of the Department of the California Highway Patrol, the Department of Parks and Recreation, the University of California Police Department, or the California State University and College Police Departments, as defined in Section 830.2, a housing authority patrol officer, as defined in subdivision (d) of Section 830.31, or a peace officer as defined in subdivisions (a) and (b) of Section 830.32.

(d) "Victim" means a person who is a victim of domestic violence."

[37] Penal Code Section 13701, added by Chapter 1609, Statutes of 1984, Section 3, as amended by Chapter 659, Statutes of 1999, Section 5:

"As used in this title:

(a) "Abuse" means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another.

(b) "Domestic violence" means abuse committed against an adult or a fully emancipated minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship. For purposes of this subdivision, "cohabitant" means two unrelated adult persons living together for a substantial period of time, resulting in some permanency of relationship. Factors that may determine whether persons are cohabiting include, but are not limited to, (1) sexual relations between the parties while sharing the same living quarters, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) whether the parties hold themselves out as husband and wife, (5) the continuity of the relationship, and (6) the length of the relationship.

(c) "Officer" means any officer or employee of a local police department or sheriff's office, and any peace officer of the Department of the California Highway

subdivision (a), requires every law enforcement agency (including school and district police departments) in the state to develop, adopt and implement written policies and standards for officers' responses to domestic violence calls to reflect the fact that domestic violence is alleged criminal conduct and that a request for assistance in a situation involving domestic violence is the same as any other request for assistance where violence has occurred. Subdivision (b) requires the written policies to encourage the arrest of domestic violence offenders if there is probable cause to believe that an offense has been committed and requires the arrest of the offender if there is probable cause to believe that a protective order has been violated. Therefore, community colleges and school districts with peace officers are required to develop, adopt and implement written policies pertaining to responses to domestic violence calls and to arrest offenders.

Again, we see the legislature, anticipating their continued existence, depends and relies upon campus police departments by including them when making provisions for emergency protective orders, domestic violence situations, stalking, serving and enforcement of temporary restraining orders, taking custody of firearms, initiating petitions in superior court and making arrests on campus of domestic violence offenders.

Application of History to Inalienable Right

In 1982, the people of the State of California acknowledged that the right to safe schools is an inalienable right.

In attempting to make our schools safe, secure and peaceful, the Legislature has enacted laws intended to accomplish that goal. The Legislature has relied on school police departments by authorizing them to become involved in emergency protective orders, domestic matters, stalking prevention, serving restraining orders, and taking custody of weapons.

The people and the legislature has not directly specified how the constitutional duty to provide safe schools is to be accomplished. They left this decision to local agencies

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Patrol, the Department of Parks and Recreation, the University of California Police Department, or the California State University and College Police Departments, as defined in Section 830.2, a housing authority patrol officer, as defined in subdivision (d) of Section 830.31, or a peace officer as defined in subdivisions (a) and (b) of Section 830.32.

(d) "Victim" means a person who is a victim of domestic violence."

who have first hand knowledge of what is necessary for their respective communities. It is a local decision. Whether to satisfy this duty by the utilization of a school police department or by contracting with another local agency to provide the service is a local decision based upon the needs of that community. To say that districts are "free to discontinue" providing their own police departments is another way of saying that their collective judgment on how to best fulfill their duty to provide safe schools can be ignored. Staff's suggestion that a constitutional duty to protect an inalienable right can be satisfied by discarding a system chosen by the legislature and the people is unacceptable.

The Staff Analysis Errs in Other Respects

3. Other Local Agencies Have Not Been Held to the Same Standard

Staff applies a different standard to school districts and community college districts than it does to other police departments.

Article XI, section 1,[38] subdivision (b), states that "The Legislature shall provide for...an elected county sheriff..." There is nothing in section 1(b) which requires the county to maintain a law enforcement agency or employ peace officers. There is nothing in the

[38] California Constitution, Article 11, Section 1, adopted June 2, 1970, as last amended on June 7, 1988:

"(a) The State is divided into counties which are legal subdivisions of the State. The Legislature shall prescribe uniform procedure for county formation, consolidation, and boundary change. Formation or consolidation requires approval by a majority of electors voting on the question in each affected county. A boundary change requires approval by the governing body of each affected county. No county seat shall be removed unless two-thirds of the qualified electors of the county, voting on the proposition at a general election, shall vote in favor of such removal. A proposition of removal shall not be submitted in the same county more than once in four years.

(b) The Legislature shall provide for county powers, an elected county sheriff, an elected district attorney, an elected assessor, and an elected governing body in each county. Except as provided in subdivision (b) of Section 4 of this article, each governing body shall prescribe by ordinance the compensation of its members, but the ordinance prescribing such compensation shall be subject to referendum. The Legislature or the governing body may provide for other officers whose compensation shall be prescribed by the governing body. The governing body shall provide for the number, compensation, tenure, and appointment of employees."

section which mandates a sheriff's department or a posse of deputy sheriffs. The section only requires that a sheriff be elected.

As for city police forces, Article 11, section 5,[39] subdivision (b), states that "[I]t shall be competent in all city charters to provide...for: (1) the constitution, regulation, and government of the city police force..." The constitution merely states that it shall be competent to provide for a city police force in city charters. Using the usual meaning of the English language, "shall be competent to provide" means that cities have the authority to do so, it is not a mandate to do so. Whether a city actually maintains a police force is a discretionary act.

Therefore, test claimant asserts that a different standard is being applied to school districts and community college districts than is applied to counties and cities. The constitutional provision which gives students and staff of public schools the inalienable right to attend campuses which are safe, secure and peaceful is translated by Staff to conclude that districts are not required to maintain a law enforcement agency or employ peace officers. Whereas, as to counties, the fact that "the Legislature shall provide for...an elected county sheriff..." is interpreted to mean that counties are required to maintain a police force; and, as to cities, the provision that "it shall be competent to provide for the government of a city police force" in city charters is somehow enhanced

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[39] California Constitution, Article 11, Section 5, Adopted June 2, 1970:

"(a) It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.

(b) It shall be competent in all city charters to provide, in addition to those provisions allowable by this Constitution, and by the laws of the State for: (1) the constitution, regulation, and government of the city police force (2) subgovernment in all or part of a city (3) conduct of city elections and (4) plenary authority is hereby granted, subject only to the restrictions of this article, to provide therein or by amendment thereto, the manner in which, the method by which, the times at which, and the terms for which the several municipal officers and employees whose compensation is paid by the city shall be elected or appointed, and for their removal, and for their compensation, and for the number of deputies, clerks and other employees that each shall have, and for the compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees."

to read that cities are "required" to maintain a police force.

4. Staff's Inconsistency is Arbitrary and Unreasonable

It is a matter of record that the Commission, many times in the past, has approved reimbursements for school police, e.g.,:

465/76	Peace Officer Procedural Bill of Rights
1249/92	Threats Against Peace Officers
1120/96	Peace Officers' Survivors Health Benefits
126/93	Law Enforcement Sexual Harassment Training
875/85	Photographic Record of Evidence
284/98	Law Enforcement College Jurisdiction Agreements
908/96	Sex Offenders: Disclosure by Law Enforcement Officers

Indeed, in the Law Enforcement College Jurisdiction Agreement mandate, community college police services were the only services determined by the Commission to be reimbursable.

Staff has given no compelling legal reason for this change in course. To do so now, without a compelling reason, is both arbitrary and unreasonable.

Test claimant takes notice of the fact that staff has previously responded to this objection.[40] In its prior Final Staff Analysis,[41] Staff wrote: "Prior Commission decisions are not controlling in this case....the failure of a quasi-judicial agency to consider prior decisions is not a violation of due process and does not constitute an arbitrary action by the agency", citing *Weiss v. State Board of Equalization*. (1953) 40 Cal.2d 772

The *Weiss* opinion states the whole rule:

> "Probably deliberate change in or deviation from established administrative policy should be permitted *so long as the action is not arbitrary or unreasonable.* This is the view of most courts. (Citations)" *Weiss v. State Board of Equalization* (supra, at page 777)

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[40] Final Staff Analysis, for Test Claim 00-TC-24, Peace Officer Personnel Records: Unfounded Complaints and Discovery, page 12

[41] Test Claimant also takes notice that this conclusion was not made until the final staff analysis and was not fully briefed at the time of the Commission hearing.

The rule of law which is the subject of this objection is the rule of *"stare decisis"*.[42] The *Weiss* court explained why the rule exists: "'Consistency in administrative rulings is essential, for to adopt different standards for similar situations is to act arbitrarily.'" The California Supreme Court recently explained:

> "...the doctrine of stare decisis, 'is based on the assumption that certainty, predictability and stability in the law are the major objectives of the legal system; i.e., that parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law'." *Sierra Club v. San Joaquin Local Agency Formation Commission* (1999) 21 Cal.4th 489, 504

So, Staff is mistaken when it asserts that *Weiss* holds that the failure of a quasi-judicial agency to consider prior decisions is not a violation of due process and does not constitute an arbitrary action by the agency, when the *Weiss* decision actually states it is "probably" permissible so long as the action is not arbitrary or unreasonable, and that same decision states that "to adopt different standards for similar situations is to act arbitrarily."

Reliance on prior decisions is also a factor:

> "The significance of stare decisis is highlighted when legislative reliance is potentially implicated. (citation) Certainly, '[*s*]*tare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response." *Sierra Club v. San Joaquin Local Agency Formation Commission* (supra, at 504)

An acceptable answer, then, needs to concentrate on the facts before coming to a conclusion whether or not the action taken is arbitrary or unreasonable. In *Weiss*, there was no element of reasonable reliance. Plaintiff was seeking a liquor license near a school and complained that denial was unreasonable when other businesses had been granted licenses before him. The court, in *Weiss*, answered this argument with "H]ere

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[42] "New Latin, to stand by things that have been settled: the doctrine under which courts adhere to precedent on questions of law in order to insure certainty, consistency, and stability in the administration of justice with departure from precedent permitted for compelling reasons (as to prevent the perpetuation of injustice)." Merriam-Webster's Dictionary of Law © 1996

the board was not acting arbitrarily even if it did change its position because it may have concluded that another license would be too many in the vicinity of the school." (Opinion, at page 777) Simply stated, the *Weiss* court held that the licensing board had a rational reason for acting as it did.

In the present case, for many years, school districts and community college districts have maintained police departments as their means of fulfilling their obligation to provide safe schools. They have learned from the Commission (from its prior decisions set forth above) that they would be reimbursed for peace officer activities mandated by the Legislature. Relying on these prior decisions of the Commission, they have incurred costs (in the instant case, since 1998) for activities mandated by the test claim legislation. This is not a situation where the Commission acts prospectively and makes a U-turn, it is a situation where the Commission acts retroactively and denies reimbursement for costs already incurred by districts in reliance on the Commission's prior decisions.

Staff has offered no compelling reason[43] (because there is none) why mandated activities of district peace officers were reimbursable in previous rulings and now activities of district peace officers are not reimbursable, other than what appears to be a whim or current fancy. This 180 degree change of course does not insure certainty, consistency and stability in the administration of justice. This comes square within the *Weiss* explanation that "to adopt different standards for similar situations is to act arbitrarily."

5. Staff Misinterprets the "Kern" Case

As a final argument, staff states:

> "...the California Supreme Court found that 'if a school district elects to participate in or continue participation in any *underlying voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate'." (Citing: *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727,743 ("Kern")

[43] Test claimant anticipates that Staff will respond that its compelling reason is that a recent decision of the Supreme Court ("*Kern*", *infra*) establishes a new rule of law, i.e., discretionary activities of local agencies are not reimbursable. To the contrary, this has been the law since 1984. *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 783

(Emphasis supplied by Staff)

Staff badly misconstrues the scope of "Kern".

The controlling case law on the subject of legal compulsion, vis-a-vis non-legal compulsion, is still City of Sacramento v. State of California (1990) 50 Cal.3rd 51 (hereinafter referred to as *Sacramento II).*

(1) *Sacramento II* Facts:

The adoption of the Social Security Act of 1935 provided for a Federal Unemployment Tax ("FUTA"). FUTA assesses an annual tax on the gross wages paid by covered private employers nationwide. However, employers in a state with a federally "certified" unemployment insurance program receive a "credit" against the federal tax in an amount determined as 90 percent of contributions made to the state system. A "certified" state program also qualifies for federal administrative funds.

California enacted its unemployment insurance system in 1935 and had sought to maintain federal compliance.

In 1976, Congress enacted Public Law number 94-566 which amended FUTA to require, for the first time, that a "certified" state plan include coverage of public employees. States that did not alter their unemployment compensation laws accordingly faced a loss of both the federal tax credit and the administrative subsidy.

In response, the California Legislature adopted Chapter 2, Statutes of 1978 (hereinafter chapter 2/78), to conform to Public Law 94-566, and required the state and all local governments to participate in the state unemployment insurance system on behalf of their employees.

(2) *Sacramento I* Litigation

The City of Sacramento and the County of Los Angeles filed claims with the State Board of Control seeking state subvention of the costs imposed on them by chapter 2/78. The State Board denied the claim. On mandamus, the Sacramento Superior Court overruled the Board and found the costs to be reimbursable. In City of Sacramento v. State of California (1984) 156 Cal.App.3d 182 (hereinafter *Sacramento I*) the Court of Appeal affirmed concluding, *inter alia*, that chapter 2/78 imposed state-mandated costs reimbursable under section 6 of article XIII B. The court also held, however, that the potential loss of federal funds and tax credits did not render Public Law 94-566 so coercive as to constitute a "mandate of the federal government" under

Section 9(b).[44]

In other words, *Sacramento I* concluded that the loss of federal funds and tax credits did not amount to "compulsion".

(3) *Sacramento II* Litigation

After remand, the case proceeded through the courts again. In *Sacramento II*, the court held that the obligations imposed by chapter 2/78 failed to meet the "program" and "service" standards for mandatory subvention because it imposed no "unique" obligation on local governments, nor did it require them to provide new or increased governmental services to the public. The Court of Appeal decision, finding the expenses reimbursable, was reversed.

However, the court disapproved that portion of *Sacramento I* which held that the loss of federal funds and tax credits did not amount to "compulsion".

(4) *Sacramento II* "Compulsion" Reasoning

The State argued that the test claim legislation required a clear legal compulsion not present in Public Law 94-566. The local agencies responded that the consequences of California's failure to comply with the federal "carrot and stick" scheme were so substantial that the state had no realistic "discretion" to refuse.

In disapproving *Sacramento I*, the court explained:

> "If California failed to conform its plan to new federal requirements as they arose, its businesses faced a new and serious penalty - full, double unemployment taxation by both state and federal governments." (Opinion, at page 74)

The State then argued that California was not compelled to comply because it could have chosen to terminate its own unemployment insurance system, leaving the state's employers faced only with the federal tax. The court replied to this suggestion:

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[44] Section 1 of article XIII B limits annual "appropriations". Section 9(b) provides that "appropriations subject to limitation" do not include "Appropriations required to comply with mandates of the courts or the federal government which, without discretion, require an expenditure for additional services or which unavoidably make the provision of existing services more costly."

> "However, we cannot imagine the drafters and adopters of article XIII B intended to force the state to such draconian ends. (¶) ...The alternatives were so far beyond the realm of practical reality that they left the state 'without discretion' to depart from federal standards." (Opinion, at page 74, emphasis supplied)

In other words, terminating its own unemployment program after 43 years or more in operation was not an acceptable option because it was so far beyond the realm of practical reality so as to be a draconian response, leaving the state without any real discretion to do otherwise. The only reasonable alternative was to comply with the new legislation.

The Supreme Court in *Sacramento II* concluded by stating that there is no final test for a determination of "mandatory" versus "optional":

> "Given the variety of cooperative federal-state-local programs, we here attempt no final test for 'mandatory' versus 'optional' compliance with federal law. A determination in each case must depend on such factors as the nature and purpose of the federal program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal." (Opinion, at page 76)

(5) Statutory Compulsion is not Required

In "Kern", at page 736, the Supreme Court first made it clear that the decision did not hold, as suggested here by Staff, that legal compulsion is always necessary in order to find a reimbursable mandate:

> "For the reasons explained below, although we shall analyze the legal compulsion issue, we find it unnecessary in this case to decide whether a finding of legal compulsion is *necessary* in order to establish a right to reimbursement under article XIII B, section 6, because we conclude that even if there are some circumstances in which a state mandate may be found in the absence of legal compulsion, the circumstances presented in this case do not constitute such a mandate." (Emphasis in the original, underlining added)

After concluding that the facts in *Kern* did not rise to the standard of non-legal compulsion, the court affirmed that other circumstances such as were presented in

Sacramento II could result in non-legal compulsion:

> "In sum, the circumstances presented *in the case before us* do not constitute the type of non-legal compulsion that reasonably could constitute, in claimants' phrasing, a 'de facto' reimbursable state mandate. Contrary to the situation that we described in (Sacramento II), a claimant that elects to discontinue participation in one of the programs *here at issue* does not face 'certain and severe...penalties' such as 'double...taxation' or other 'draconian' consequences (citation), but simply must adjust to the withdrawal of grant money along with the lifting of program obligations." (Opinion, at page 754, emphasis supplied to illustrate holding is limited to facts presented)

The test for determining the existence of a mandate is whether compliance with the test claim legislation is a matter of true choice, that is, whether participation is truly voluntary. *Hayes v. Commission on State Mandates*, (1992) 11 Cal.App.4th 1564, 1582

The process for such a determination is found in *Sacramento II*, that is, the determination in each case must depend on such factors as the nature and purpose of the program; whether its design suggests an intent to coerce; when district participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal.

Staff has not considered this process of balancing the various relevant factors in its determination that police departments of school districts and community college districts are not required by state law. Therefore, its conclusion is without a necessary legal foundation.

CERTIFICATION

I certify by my signature below, under penalty of perjury under the laws of the State of California, that the statements made in this document are true and complete to the best of my own personal knowledge or information and belief.

Sincerely,

Keith B. Petersen

C: Per Mailing List Attached

Attachments

Pursuant to the standard practice that copies of court decisions (other than published court decisions arising from state mandate determinations) that may impact the alleged mandate be attached to comments and rebuttals, copies of the following cases (in order of citation) are attached hereto and are incorporated herein by reference:

1. Leger v. Stockton Unified School District (1988) 202 Cal.App.3d 1448
249 Cal.Rptr. 688

2. Brosnahan v. Brown (1982) 32 Cal.3d 236
186 Cal.Rptr. 30; 651 P.2d 274

3. Unger v. Superior Court (Marin County Democratic Central Com.) (1980)
102 Cal.App.3d 681; 162 Cal.Rptr. 611

4. Porten v. University of San Francisco (1976) 64 Cal.App.3d 825
134 Cal.Rptr. 839

5. Laguna Publishing Co. v. Golden Rain Foundation (1982) 131 Cal.App.3d 816
182 Cal.Rptr. 813

6. Weiss v. State Board of Equalization (1953) 40 Cal.2d 772
256 P.2d 1

7. Sierra Club v. San Joaquin Local Agency Formation Commission (1999)
21 Cal.4th 489; 87 Cal.Rptr. 2d 702; 981 P.2d 543

DECLARATION OF SERVICE

RE: Cancer Presumption (K-12) 02-TC-15
CLAIMANT: Santa Monica Community College District

I declare:

I am employed in the office of SixTen and Associates, which is the appointed representative of the above named claimant(s). I am 18 years of age or older and not a party to the within entitled matter.

On the date indicated below, I served the attached: letter of June 15, 2004, addressed as follows:

Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

FAX: (916) 445-0278

AND per mailing list attached

☒ **U.S. MAIL:** I am familiar with the business practice at SixTen and Associates for the collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at SixTen and Associates is deposited with the United States Postal Service that same day in the ordinary course of business.

☐ **OTHER SERVICE:** I caused such envelope(s) to be delivered to the office of the addressee(s) listed above by:

(Describe)

☐ **FACSIMILE TRANSMISSION:** On the date below from facsimile machine number (858) 514-8645, I personally transmitted to the above-named person(s) to the facsimile number(s) shown above, pursuant to California Rules of Court 2003-2008. A true copy of the above-described document(s) was(were) transmitted by facsimile transmission and the transmission was reported as complete and without error.

☐ A copy of the transmission report issued by the transmitting machine is attached to this proof of service.

☐ **PERSONAL SERVICE:** By causing a true copy of the above-described document(s) to be hand delivered to the office(s) of the addressee(s).

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on 6/15/04, at San Diego, California.

Diane Bramwell

Original List Date: 3/12/2003
Last Updated: 6/1/2004
List Print Date: 06/02/2004
Claim Number: 02-TC-15
Issue: Cancer Presumption (K-14)

Mailing Information: Draft Staff Analysis

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

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ATTACHMENT "1"

Leger v. Stockton Unified School District (1988)

202 Cal.App.3d 1448; 249 Cal.Rptr. 688

[No. C000367. Third Dist. July 25, 1988.]

JAIME LEGER et al., Plaintiffs and Appellants, v. STOCKTON UNIFIED SCHOOL DISTRICT et al., Defendants and Respondents.

SUMMARY

A high school student sued his school district and his high school's principal and wrestling coach, alleging they negligently failed to protect him from an attack by a nonstudent in a high school restroom. The trial court sustained defendants' general demurrer to the first amended complaint without leave to amend. The student was battered while changing clothes for wrestling practice. The court's ruling was based in part on Gov. Code, § 845, exempting public entities and employees from liability for deficiencies in police protection services. (Superior Court of San Joaquin County, No. 172920, K. Peter Saiers, Judge.)

The Court of Appeal reversed. The court held Cal. Const., art. I, § 28, subd. (c), the right to safe schools, is not self-executing in the sense of supplying a right to sue for damages, and also that it therefore imposes no mandatory duty on a school district or its employees to make a high school safe and supplies no basis for liability under Gov. Code, § 815.6, for particular injuries proximately resulting from the failure to discharge such a duty. However, the court further held defendants had a duty to use reasonable care to protect the student in the pleaded circumstances, since the school district (under Gov. Code, § 820) and its employees (under Gov. Code, § 815.2) had the same liability as would have obtained in the private sector. Gov. Code, § 845, did not immunize defendants, as the student did not allege failure to provide police protection. (Opinion by Sims, J., with Sparks, Acting P. J., and Watkins, J.,* concurring.)

* Assigned by the Chairperson of the Judicial Council.

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) **Pleading § 22—Demurrer as Admission.**—A general demurrer admits the truthfulness of properly pleaded factual allegations of the complaint.

(2a-2d) **Government Tort Liability § 14—Constitutional Right to Safe Schools—Enforceability.**—The right to safe schools (Cal. Const., art. I, § 28, subd. (c)) is not self-executing in the sense of supplying a right to sue for damages. It declares a general right without specifying any rules for its enforcement, imposes no express duty on anyone to make schools safe, and is devoid of guidelines, mechanisms, or procedures from which a damages remedy could be inferred. Also, there is no indication in the history of the right (e.g., in the ballot arguments) to suggest it was intended to support an action for damages in the absence of enabling and defining legislation.

[See Cal.Jur.3d (Rev), Criminal Law, § 2040 et seq.]

(3) **Constitutional Law § 5—Operation and Effect—As Limitation of Power.**—In accordance with the requirement of Cal. Const., art. I, § 26, that all branches of government comply with constitutional directives and prohibitions, and in the absence of express language to the contrary, every constitutional provision is self-executing in the sense that agencies of government are prohibited from taking official actions that contravene constitutional provisions, and everything done in violation of the Constitution is void.

(4) **Constitutional Law § 7—Mandatory, Directory, and Self-executing Provisions—Distinctions.**—A constitutional provision may be mandatory without being self-executing. It is self-executing if no legislation is necessary to give effect to it, and if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law. A constitutional provision is presumed to be self-executing unless a contrary intent is shown.

[See Am.Jur.2d, Constitutional Law, § 139 et seq.]

(5) **Government Tort Liability § 14—Mandatory Duty to Make Schools Safe.**—Because Cal. Const., art. I, § 28, subd. (c), the right to safe

schools, does not supply the necessary rule for its implementation, but is simply a declaration of rights, it imposes no mandatory duty on a school district or its employees to make a high school safe and supplies no basis for liability under Gov. Code, § 815.6, for particular injuries proximately resulting from the failure to discharge such a duty.

(6) **Government Tort Liability § 16—Claims—Constitutional Torts—Civil Remedy.**—The civil remedy for constitutional torts is a direct claim by the victim of the official wrongdoing to secure compensation for the denial of his constitutional rights.

(7a-7f) **Government Tort Liability § 15—Supervision of Students—Negligence—Pleading—Battery of Student by Nonstudent.**—In a high school student's action against his school district and its employees for negligently failing to protect him from an attack by a nonstudent in a school restroom, the trial court erred in sustaining defendants' general demurrer to the first amended complaint, since defendants had a duty to use reasonable care to protect plaintiff in the pleaded circumstances. Plaintiff alleged he was attacked while changing clothes for wrestling practice and that defendants knew or should have known the rest room was an unsupervised location unsafe for students and that attacks by nonstudents were likely there. Since liability would thus have existed in the private sector, defendants had similar liability under Gov. Code, §§ 820 (the school district) and 815.2 (the employees), where no other statutory immunity obtained.

(8) **Negligence § 9—Duty of Care—Question of Law.**—The existence of a duty of care is a question of law, for legal duties express conclusions that in certain cases it is appropriate to impose liability for injuries suffered.

(9) **Negligence § 9.4—Duty of Care—Special Relationship.**—As a general rule, one owes no duty to control the conduct of another or to warn those in danger of such conduct. Such a duty may arise, however, if (a) a special relation exists between the actor and the third person that imposes a duty on the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other that gives the other a right to protection.

(10a, 10b) **Government Tort Liability § 15—Supervision of Students—Negligence—Duty of Care—Special Relationship.**—A special relationship is formed between a school district (including its individual employees responsible for student supervision) and its students so as

to impose an affirmative duty to take all reasonable steps to protect the students.

(11) **Government Tort Liability § 15—Supervision of Students—Negligence—Duty of Care—Standard of Care.**—A school district and its employees owe the student a duty to use the degree of care that a person of ordinary prudence, charged with comparable duties, would exercise in the same circumstances.

(12a, 12b) **Government Tort Liability § 15—Supervision of Students—Negligence—Duty of Care—Foreseeability.**—The existence of a duty of care of a school district and its employees toward a student depends in part on whether a particular harm to the student is reasonably foreseeable. School authorities who know of threats of violence that they believe are well-founded may not refrain from taking reasonable preventive measures simply because violence has yet to occur.

[Liability of university, college, or other school for failure to protect student from crime, note, 1 **A.L.R.4th** 1099.]

(13) **Appellate Review § 128—Rulings on Demurrers.**—Whether a plaintiff can prove his allegations, or whether it will be difficult to prove them, are not appropriate questions for a reviewing court when ruling on a demurrer.

(14) **Government Tort Liability § 15—Supervision of Students—Negligence—Duty of Care—Availability of Funds.**—The availability of funds is a valid policy consideration in determining whether to impose a duty of care on a school district.

(15) **Government Tort Liability § 2—As Governed by Statute.**—In California, all government tort liability must be based on statute.

(16) **Courts § 37—Doctrine of Stare Decisis—Propositions Not Considered.**—It is axiomatic that cases are not authority for propositions not considered.

(17) **Schools § 52—Parents and Students—Supervision—Private Schools—Duty.**—A private school is not required to provide constant supervision over pupils at all times. No supervision is required where the school has no reason to think any is required. There is a duty to

provide supervision with respect to a particular activity if the school officials could reasonably anticipate that supervision was required.

[Tort liability of private schools and institutions of higher learning for negligence of, or lack of supervision by, teachers and other employees or agents, note, 38 A.L.R.3d 908.]

(18) **Schools § 52—Parents and Students—Supervision—Private Schools—Negligence—Dangers—Jury Question—Respondeat Superior.**—Where a student is injured in performing a task on the direction of school authorities without supervision, the question of private school negligence is one for the jury if there is evidence of the existence of a danger known to the school authorities, who neglect to guard the student against such danger, or if there is an unknown danger that the school, by the exercise of ordinary care as a reasonably prudent person, would have discovered. Where the liability of the private school is sought to be predicated on alleged negligence of teachers or other employees or agents of the school, it is generally recognized that liability on the part of the school may be established under the doctrine of repondeat superior if negligence within the scope of their employment is shown.

(19) **Government Tort Liability § 11—Police and Correctional Activities—Immunity—Purpose.**—Gov. Code, § 845, exempting public entities and employees from liability for deficiencies in police protection service, was designed to protect from judicial review in tort litigation the political and budgetary decisions of policy-makers, who must determine whether to provide police officers or their functional equivalents.

COUNSEL

Laura E. Bainbridge for Plaintiffs and Appellants.

Mayall, Hurley, Knutsen, Smith & Green and Peter J. Whipple for Defendants and Respondents.

OPINION

SIMS, J.—In this case, we hold that the complaint of a high school student states a cause of action for damages against his school district and its

employees. The complaint alleges employees of the district negligently failed to protect plaintiff Jaime Leger from an attack by a nonstudent in a school restroom, where they knew or reasonably should have known the restroom was unsafe and attacks by nonstudents were likely to occur.

Plaintiff contends the trial court erroneously sustained the demurrer of defendants Stockton Unified School District (District), Dean Bettker, and Greg Zavala to plaintiff's first amended complaint without leave to amend.

(1) Since a general demurrer admits the truthfulness of properly pleaded factual allegations of the complaint (*Peterson* v. *San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 804 [205 Cal.Rptr. 842, 685 P.2d 1193]), we recount the pertinent allegations: At all relevant times defendant Bettker was the principal of Franklin High School, and defendant Zavala was a wrestling coach. Each such defendant was an employee of defendant District and was acting within the scope of his employment respecting the matters stated in the complaint.

Plaintiff, a student at Franklin High School, was injured on the school campus when he was battered by a nonstudent on February 14, 1983. Plaintiff was attacked in a school bathroom where he was changing his clothes before wrestling practice. Defendants knew or should have known the bathroom was an unsupervised location unsafe for students and that attacks by nonstudents were likely to occur there.

The complaint pled three legal theories of relief against defendants. The first count alleged a violation of plaintiff's inalienable right to attend a safe school. (Cal. Const., art. I, § 28, subd. (c).) The second count alleged the constitutional provision imposed a mandatory duty on defendants, within the meaning of Government Code section 815.6, to make plaintiff's school safe, the breach of which entitled him to damages. The third count alleged defendants negligently failed to supervise him or the location where he was changing his clothes for wrestling practice, knowing or having reason to know the location was unsafe for unsupervised students.

DISCUSSION

I

Article I, section 28, subdivision (c) of the California Constitution is not self-executing in the sense of providing a right to recover money damages for its violation.

(2a) Plaintiff first argues that article I, section 28, subdivision (c) of the California Constitution is self-executing and by itself provides a right to

recover damages. That provision, enacted as a part of "the Victim's Bill of Rights," reads: "*Right to Safe Schools.* All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful." (Referred to hereafter for convenience as section 28(c).)

Article I, section 26 of the California Constitution provides: "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise."

(3) Under this constitutional provision, all branches of government are required to comply with constitutional directives (*Mosk* v. *Superior Court* (1979) 25 Cal.3d 474, 493, fn. 17 [159 Cal.Rptr. 494, 601 P.2d 1030]; *Bauer-Schweitzer Malting Co.* v. *City and County of San Francisco* (1973) 8 Cal.3d 942, 946 [106 Cal.Rptr. 643, 506 P.2d 1019]) or prohibitions (*Sail'er Inn, Inc.* v. *Kirby* (1971) 5 Cal.3d 1, 8 [95 Cal.Rptr. 329, 485 P.2d 529, 46 A.L.R.3d 351]). Thus, in the absence of express language to the contrary, *every* constitutional provision is self-executing in the sense that agencies of government are prohibited from taking official actions that contravene constitutional provisions. (*Ibid.*) "Every constitutional provision is self-executing to this extent, that everything done in violation of it is void." (*Oakland Paving Co.* v. *Hilton* (1886) 69 Cal. 479, 484 [11 P. 3]; see *Sail'er Inn, Inc.* v. *Kirby, supra,* 5 Cal.3d at p. 8.)

(2b) The question here is whether section 28(c) is "self-executing" in a different sense. Our concern is whether section 28(c) provides any rules or procedures by which its declaration of rights is to be enforced, and, in particular, whether it provides citizens with a specific *remedy* by way of damages for its violation in the absence of legislation granting such a remedy. (See *Laguna Publishing Co.* v. *Golden Rain Foundation* (1982) 131 Cal.App.3d 816, 858 [182 Cal.Rptr. 813] (dis. opn. of Kaufman, J.).)

(4) "A provision may be mandatory without being self-executing. It is self-executing if no legislation is necessary to give effect to it, and if there is nothing to be done by the Legislature to put it into operation. A constitutional provision contemplating and requiring legislation is not self-executing. [Citation.] In other words, it must be regarded as self-executing if the nature and extent of the right conferred and the liability imposed are fixed by the Constitution itself, so that they can be determined by an examination and construction of its terms and there is no language indicating that the subject is referred to the Legislature for action [citation]; and such provisions are inoperative in cases where the object to be accomplished is made to depend in whole or in part on subsequent legislation." (*Taylor* v. *Madigan* (1975) 53 Cal.App.3d 943, 951 [126 Cal.Rptr. 376].)

The following rule has been consistently applied in California to determine whether a constitutional provision is self-executing in the sense of providing a specific method for its enforcement: " 'A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.' " (*Older* v. *Superior Court* (1910) 157 Cal. 770, 780 [109 P. 478], quoting Cooley, Constitutional Limitations (7th ed. 1903) p. 121; see *Winchester* v. *Howard* (1902) 136 Cal. 432, 440 [69 P. 77]; *Chesney* v. *Byram* (1940) 15 Cal.2d 460, 462 [101 P.2d 1106]; *People* v. *Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 637 [268 P.2d 723]; *California Housing Finance Agency* v. *Elliott* (1976) 17 Cal.3d 575, 594 [131 Cal.Rptr. 361, 551 P.2d 1193].)

We recognize that a constitutional provision is presumed to be self-executing unless a contrary intent is shown. (*Winchester* v. *Howard, supra,* 136 Cal. at p. 440; 5 Witkin, Summary of Cal. Law (8th ed. 1974) Constitutional Law, § 38, p. 3278.) (2c) Here, however, section 28(c) declares a general right without specifying *any* rules for its enforcement. It imposes no express duty on anyone to make schools safe. It is wholly devoid of guidelines, mechanisms, or procedures from which a damages remedy could be inferred. Rather, " 'it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.' " (5) (See fn. 1.) (*Older* v. *Superior Court, supra,* 157 Cal. at p. 780, citation omitted.)[1]

(2d) Although not cited by plaintiff, we note that in *White* v. *Davis* (1975) 13 Cal.3d 757 [120 Cal.Rptr. 94, 533 P.2d 222], the court held that the constitutional provision protecting the right of privacy (Cal. Const., art. I, § 1)[2] was self-executing and supported a cause of action for an injunction. (13 Cal.3d at pp. 775-776.)

White's conclusion was based upon an "election brochure 'argument,' a statement which represents . . . the only 'legislative history' of the constitu-

[1] For this reason, and contrary to plaintiff's contention, section 28(c) does not supply a basis for liability under Government Code section 815.6, which provides: "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." Because section 28(c) does not supply the necessary rule for its implementation, but is simply a declaration of rights, it imposes no mandatory duty upon defendants to make Franklin High School safe. (See *Nunn* v. *State of California* (1984) 35 Cal.3d 616, 624-626 [200 Cal.Rptr. 440, 677 P.2d 846].)

[2] Article I, section 1 provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

tional amendment . . . ." (*Id.*, at p. 775.) The court reasoned that a statement in the brochure that the amendment would create " 'a legal and enforceable right of privacy for every Californian' " showed that the privacy provision was intended to be self-executing. (*Ibid.*)

By way of contrast, there is no indication in any of the sparse "legislative history" of section 28(c) to suggest it was intended to support an action for damages in the absence of enabling and defining legislation. The ballot arguments do not so much as hint at such a remedy. "The Victim's Bill of Rights" itself declares that, "The rights of victims pervade the criminal justice system, encompassing . . . the . . . basic expectation that persons who commit felonious acts causing injury to innocent victims will be appropriately detained in custody, tried by the courts, and sufficiently punished *so that the public safety is protected and encouraged as a goal of highest importance.* [¶] *Such public safety extends to public . . . senior high school campuses, where students and staff have the right to be safe and secure in their persons.* [¶] *To accomplish these goals, broad reforms in the procedural treatment of accused persons and the disposition and sentencing of convicted persons are necessary* and proper as deterrents to criminal behavior and to serious disruption of people's lives." (Art. I, § 28, subd. (a)., italics added.) Thus, the goal of public safety, including the safety of those in our schools, is to be reached through reforms in the criminal laws (see *Brosnahan* v. *Brown* (1982) 32 Cal.3d 236, 247-248 [186 Cal.Rptr. 30, 651 P.2d 274]); a private right to sue for damages is nowhere mentioned nor implied. Since the enactment of section 28(c) was accomplished without "legislative history" comparable to that relied on by the court in *White* v. *Davis, supra,* 13 Cal.3d 757, that case does not aid plaintiff's theory.

We hold that section 28(c) is not self-executing in the sense of supplying a right to sue for damages.[3] (*Older* v. *Superior Court, supra,* 157 Cal. at p. 780.)

Plaintiff relies upon *Porten* v. *University of San Francisco* (1976) 64 Cal.App.3d 825 [134 Cal.Rptr. 839], and *Laguna Publishing Co.* v. *Golden Rain Foundation, supra,* 131 Cal.App.3d 816 for the proposition a self-executing constitutional provision supports an action for damages. *Porten,* following *White* v. *Davis, supra,* 13 Cal.3d 757, held a plaintiff could sue for

[3]This conclusion does not mean that section 28(c) is without practical effect. To implement section 28(c), the Legislature has enacted chapter 1.1 of part 1, title 15 of the Penal Code (§§ 627-627.10) establishing procedures by which nonstudents can gain access to school grounds and providing punishments for violations. The Legislature has also enacted chapter 2.5 of part 19 of division 1 of title 1 of the Education Code (§§ 32260-32296), the Interagency School Safety Demonstration Act of 1985, "to encourage school districts, county offices of education, and law enforcement agencies to develop and implement interagency strategies, programs, and activities which will improve school attendance and reduce the rates of school crime and vandalism." (Ed. Code, § 32261.)

damages for violation of his state constitutional right of privacy. (*Porten, supra,* 64 Cal.App.3d at p. 832.) We have no occasion here to determine whether we agree with *Porten,* because it is premised on the violation of a different, self-executing provision of the Constitution. Although not cited by plaintiff, *Fenton* v. *Groveland Community Services Dist.* (1982) 135 Cal.App.3d 797 [185 Cal.Rptr. 758] is similarly distinguishable because it relies upon the self-executing nature of article II, section 2 of our Constitution, guaranteeing a right to vote. (*Fenton, supra,* at p. 805.)

Laguna Publishing Co. v. *Golden Rain Foundation, supra,* 131 Cal.App.3d 816, also fails to support plaintiff's theory. There, the court held plaintiff could pursue recovery of damages for violation of its right to free speech guaranteed by article I, section 2 of our state Constitution. (Pp. 853-854.) However, contrary to plaintiff's suggestion, *Laguna Publishing* was not premised upon the self-executing nature of the subject constitutional provision. (See *id.,* at p. 851.) (6) (See fn. 4.) Rather, *Laguna Publishing* followed *Melvin* v. *Reid* (1931) 112 Cal.App. 285 [297 P. 91] in allowing a cause of action for violation of free speech rights without regard to the self-executing nature of the constitutional provision.[4] (*Laguna Publishing Co., supra,* at pp. 852-853.) The court also relied upon Civil Code sections 1708 and 3333. (*Ibid.*) The case is therefore inapposite to the theory advanced by plaintiff.

[4]To the extent *Laguna Publishing* follows *Melvin* v. *Reid, supra,* 112 Cal.App. 285, the case represents a specie of "constitutional tort." " 'The civil remedy for *constitutional* torts is a direct claim by the victim of the official wrongdoing to secure compensation for the denial of his *constitutional* rights.' [Citation.]" (*Fenton* v. *Groveland Community Services Dist., supra,* 135 Cal.App.3d at p. 803, italics in original; see *Bivens* v. *Six Unknown Fed. Narcotics Agents* (1971) 403 U.S. 388 [29 L.Ed.2d 619, 91 S.Ct. 1999]; *Gay Law Students Assn.* v. *Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458, 474-475 [156 Cal.Rptr. 14, 595 P.2d 592]; *Stalnaker* v. *Boeing Co.* (1986) 186 Cal.App.3d 1291, 1302-1308 [231 Cal.Rptr. 323].) "Without question, the rebirth of reliance on state bills of rights is one of the most fascinating developments in civil rights law of the last two decades." (Friesen, *Recovering Damages for State Bills of Rights Claims* (1985) 63 Tex.L.Rev. 1269.) "The literature on the renewed use of state constitutions is already too long to collect conveniently in a footnote." (*Id.,* at fn. 2; see, e.g., Wells, *The Past and the Future of Constitutional Torts: From Statutory Interpretation to Common Law Rules* (1986) 19 Conn.L.Rev. 53; Comment, *The Right to Safe Schools: A Newly Recognized Inalienable Right* (1983) 14 Pac. L.J. 1309; Love, *Damages: A Remedy for the Violation of Constitutional Rights* (1979) 67 Cal.L.Rev. 1242; Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell* v. *Hood* (1968) 117 U.Pa.L.Rev. 1.)

"Whether a cause of action can be inferred from the Constitution, without any explicit statutory authorization, is a complex question and one which is mired in the dark ages of constitutional law." (Yudof, *Liability for Constitutional Torts and the Risk-Averse Public School Official* (1976) 49 So.Cal.L.Rev. 1322, 1354, fn. omitted.) Plaintiff has not argued that he is entitled to recover money damages for violation of a constitutional right even where the subject constitutional provision is not self-executing. We will not investigate this "complex question" on our own motion. (See 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 479, pp. 469-470.)

II

Defendant District is liable to plaintiff pursuant to Government Code sections 815.2 and 820.

(7a) Plaintiff also contends that ordinary principles of tort law imposed a duty upon defendants to use reasonable care to protect him from the attack in the pleaded circumstances. At this point, we agree.

A. *Plaintiff has pled that defendants owed him a duty of care.*

The first question is whether defendants owed plaintiff a duty of care. (*Williams* v. *State of California* (1983) 34 Cal.3d 18, 22 [192 Cal.Rptr. 233, 664 P.2d 137].)

(8) The existence of a duty of care is a question of law, for legal duties express conclusions that in certain cases it is appropriate to impose liability for injuries suffered. (*Tarasoff* v. *Regents of University of California* (1976) 17 Cal.3d 425, 434 [131 Cal.Rptr. 14, 551 P.2d 334, 83 A.L.R.3d 1166]; *Dillon* v. *Legg* (1968) 68 Cal.2d 728, 734 [69 Cal.Rptr. 72, 441 P.2d 912, 29 A.L.R.3d 1316].)

(9) "As a general rule, one owes no duty to control the conduct of another, nor to warn those endangered by such conduct. Such a duty may arise, however, if '(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives the other a right to protection.' (Rest. 2d Torts (1965) § 315; *Thompson* v. *County of Alameda* (1980) 27 Cal.3d 741, 751-752 [167 Cal.Rptr. 70, 614 P.2d 728]; *Tarasoff* v. *Regents of University of California* (1976) 17 Cal.3d 425 [131 Cal.Rptr. 14, 551 P.2d 334, 83 A.L.R.3d 1166].)" (*Davidson* v. *City of Westminster* (1982) 32 Cal.3d 197, 203 [185 Cal.Rptr. 252, 649 P.2d 894]; see also *Lopez* v. *Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 788-789 [221 Cal.Rptr. 840, 710 P.2d 907]; *Williams* v. *State of California, supra,* 34 Cal.3d at p. 23.)

In *Rodriguez* v. *Inglewood Unified School Dist.* (1986) 186 Cal.App.3d 707 [230 Cal.Rptr. 823], the court considered whether a school district could be held liable when a student was assaulted on campus by a nonstudent. (10a) On the question of duty, the court concluded "that a special relationship is formed between a school district and its students so as to impose an affirmative duty on the district to take all reasonable steps to protect its students." (P. 715.)

(7b), (10b) Although *Rodriguez* did not address the question, we think it obvious that the individual school employees responsible for supervising

plaintiff, such as the principal and the wrestling coach, also had a special relation with plaintiff upon which a duty of care may be founded. (See *Tarasoff* v. *Regents of University of California, supra,* 17 Cal.3d at p. 436.) A contrary conclusion would be wholly untenable in light of the fact that "the right of all students to a school environment fit for learning cannot be questioned. Attendance is mandatory and the aim of all schools is to teach. Teaching and learning cannot take place without the physical and mental well-being of the students. The school premises, in short, must be safe and welcoming. . . . [¶] The public school setting is one in which governmental officials are directly in charge of children and their environs, including where they study, eat and play. . . . Further, the responsibility of school officials for each of their charges, the children, is heightened as compared to the responsibility of the police for the public in general." (*In re William G.* (1985) 40 Cal.3d 550, 563 [221 Cal.Rptr. 118, 709 P.2d 1287].)

(11) *Rodriguez* notwithstanding, defendants still contend they should owe no duty to protect plaintiff from this attack. They correctly contend that neither school districts nor their employees are the insurers of the safety of their students. (*Dailey* v. *Los Angeles Unified Sch. Dist.* (1970) 2 Cal.3d 741, 747 [87 Cal.Rptr. 376, 470 P.2d 360].) But plaintiff makes no assertion of strict liability; rather, the complaint pleads negligence. Defendants do owe plaintiff a duty to use the degree of care which a person of ordinary prudence, charged with comparable duties, would exercise in the same circumstances. (*Ibid.*)

(12a) Of course, in the present circumstances, the existence of a duty of care depends in part on whether the harm to plaintiff was reasonably foreseeable. (See *Isaacs* v. *Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 125 [211 Cal.Rptr. 356, 695 P.2d 653].) Neither schools nor their restrooms are dangerous places per se. (Cf. *Peterson* v. *San Francisco Community College Dist., supra,* 36 Cal.3d at p. 812.) Students are not at risk merely because they are at school. (See *Chavez* v. *Tolleson Elementary School Dist.* (1979) 122 Ariz. 472 [595 P.2d 1017, 1 A.L.R.4th 1099].) A contrary conclusion would unreasonably "require virtual round-the-clock supervision or prison-tight security for school premises, . . ." (*Bartell* v. *Palos Verdes Peninsula Sch. Dist.* (1978) 83 Cal.App.3d 492, 500 [147 Cal.Rptr. 898].)

(7c) Here, however, plaintiff's first amended complaint pled that defendants knew or should have known that he was subject to an unusual risk of harm at a specific location on school grounds. Thus, the complaint alleged defendants knew or should have known that members of the junior varsity wrestling team (including plaintiff) were changing clothes before wrestling practice in the unsupervised boys' restroom, that defendants knew or should have known the unsupervised restroom was unsafe for students,

and that attacks were likely to occur there. These allegations sufficiently state that the harm to plaintiff was reasonably foreseeable in the absence of supervision or a warning. Plaintiff had no obligation to plead that prior acts of violence had occurred in the restroom. (See *Isaacs* v. *Huntington Memorial Hospital, supra,* 38 Cal.3d at p. 129.) (12b) For example, school authorities who know of threats of violence that they believe are well-founded may not refrain from taking reasonable preventive measures simply because violence has yet to occur. (See *id.,* at pp. 125-126.)

(13) Whether plaintiff can prove these allegations, or whether it will be difficult to prove them, are not appropriate questions for a reviewing court when ruling on a demurrer. (*Concerned Citizens of Costa Mesa, Inc.* v. *32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 936 [231 Cal.Rptr. 748, 727 P.2d 1029].)

Defendants argue they should owe no duty to plaintiff because school districts cannot afford the liability. (14) This court has recognized that the availability of funds is a valid policy consideration in determining whether to impose a duty of care on a school district. (*Wright* v. *Arcadia School Dist.* (1964) 230 Cal.App.2d 272, 278 [40 Cal.Rptr. 812]; *Raymond* v. *Paradise Unified School Dist.* (1963) 218 Cal.App.2d 1, 8 [31 Cal.Rptr. 847]; see also *Bartell* v. *Palos Verdes Peninsula Sch. Dist., supra,* 83 Cal.App.3d at p. 500.)

(7d) However, the record contains no information bearing upon the budgets of school districts generally, nor of this defendant District in particular, nor upon the cost or availability of insurance. Nor have we been cited to materials of which we might take judicial notice. With the record in this posture, we agree with defendants, who candidly admit in their brief, "If there is a remedy to this situation, it is not with the courts but with the Legislature."

We therefore conclude plaintiff has adequately pled that defendants breached a duty of care they owed him.

B. *There is a statutory basis for liability.*

Even though *Rodriguez* v. *Inglewood Unified School Dist., supra,* determined a school district has a duty to protect students on campus from violent assaults by third parties, the court concluded the defendant school district was not liable because no statute provided for liability. (186 Cal.App.3d at pp. 715-716.) (15) "[I]n California, all government tort liability must be based on statute. . . ." (*Lopez* v. *Southern Cal. Rapid Transit Dist., supra,* 40 Cal.3d at p. 785, fn. 2, citation omitted.)

However, *Rodriguez* did not examine Government Code sections 815.2 and 820, imposing liability on a public entity for the torts of its employees.

(All further statutory references are to the Government Code unless otherwise indicated.) (16) "It is axiomatic that cases are not authority for propositions not considered." (*People* v. *Gilbert* (1969) 1 Cal.3d 475, 482, fn. 7 [82 Cal.Rptr. 724, 462 P.2d 580]; *Milicevich* v. *Sacramento Medical Center* (1984) 155 Cal.App.3d 997, 1005-1006 [202 Cal.Rptr. 484].)

Here, as we have noted, plaintiff has sued employees of the District and pursues the District on a theory of respondeat superior. (See *Perez* v. *Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 967-968 [227 Cal.Rptr. 106, 719 P.2d 676].) Section 820 provides in relevant part that except as otherwise statutorily provided, "a public employee is liable for injury caused by his act or omission to the same extent as a private person." (Subd. (a).) Section 815.2 provides in pertinent part that the entity "is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would . . . . have given rise to a cause of action against that employee . . . ." (Subd. (a).) Thus, "the general rule is that an employee of a public entity is liable for his torts to the same extent as a private person (§ 820, subd. (a)) and the public entity is vicariously liable for any injury which its employee causes (§ 815.2, subd. (a)) to the same extent as a private employer (§ 815, subd. (b))." (*Societa per Azioni de Navigazione Italia* v. *City of Los Angeles* (1982) 31 Cal.3d 446, 463, fn. omitted [183 Cal.Rptr. 51, 645 P.2d 102]; see Van Alstyne, Cal. Government Tort Liability Practice (Cont.Ed.Bar 1980) §§ 2.31-2.32, pp. 74-80.)

The next question is: would a private school and its employees be liable in the pleaded circumstances? The answer is "yes."

(17) "As a general rule, it has been held that a [private] school is not required to provide constant supervision over pupils at all times. Thus, no supervision is required where the school has no reason to think any is required. . . . [¶] *It appears that a [private] school has a duty to provide supervision with respect to a particular activity if the school officials could reasonably anticipate that supervision was required* . . . ." (Annot., Tort Liability of Private Schools and Institutions of Higher Learning for Negligence of, or Lack of Supervision By, Teachers and Other Employees or Agents (1971) 38 A.L.R.3d 908, 916, fns. omitted; italics added.)

(18) "Where a student is injured in performing a task on the direction of school authorities without supervision, the question of [private] school negligence is one for the jury if there is evidence of the existence of a danger known to the school authorities, who neglect to guard the student against such danger, or if there is an unknown danger which the school, by the exercise of ordinary care as a reasonably prudent person, would have discovered." (38 A.L.R.3d at p. 919, fn. omitted.)

"Where the liability of the [private] school is sought to be predicated on alleged negligence of teachers or other employees or agents of the school, it is generally recognized that liability on the part of the school may be established under the doctrine of respondeat superior if negligence within the scope of their employment is shown." (38 A.L.R.3d at p. 912.)

In *Schultz* v. *Gould Academy* (Me. 1975) 332 A.2d 368, the Supreme Court of Maine held a private girls' school was liable for the negligence of its night watchman who failed to prevent a criminal assault on a 16-year-old girl student by an unknown intruder in a school dormitory. At about 3 a.m., the watchmen had observed footprints in fresh snow leading up to the building and on a roof adjacent to a screened but unlocked second story window. (*Id.*, at p. 369.) The watchman saw water on stairs leading to the basement; a stairwell also connected the basement to upper floors in the dorm. (*Ibid.*) Although the watchman investigated storage rooms in the basement, he did not alert anyone to the possibility that the intruder was on the upper floors where the attack occurred. (*Id.*, at pp. 369-370, fn. 3.)

The court held that the employee and the school had a duty to guard the students against dangers of which they had actual knowledge and those which they should reasonably anticipate. (332 A.2d at p. 371.) The court concluded that, "forewarned by furtive and intrusive movements in and around the girls' dormitory, a reasonably prudent man, charged with the protection of the dormitory's young female residents would have taken some measures to avert the likelihood that one (or more) of them would be physically harmed." (*Id.*, at p. 372.)

(7e) We think the foregoing authorities state the appropriate law to be applied in California. Under these authorities, if defendants here were in the private sector, they would be liable to plaintiff upon the facts pled in the first amended complaint. We therefore conclude that the defendant employees are similarly liable under section 820, and the District is liable under section 815.2 unless some other statute grants immunity from liability.

III

On demurrer, the District is not entitled to immunity.

Defendants contend imposition of liability in such a situation would contravene section 845, which provides in relevant part that, "Neither a public entity nor a public employee is liable for failure to . . . provide police protection service or . . . for failure to provide sufficient police protection service." Defendants argue that imposing a duty on the District is tantamount to requiring them to have a police or security force. This contention

was persuasive below; the trial court granted the demurrer based in part on section 845.

(19) However, section 845 was designed to protect from judicial review in tort litigation the political and budgetary decisions of policymakers, who must determine whether to provide police officers or their functional equivalents. (*Lopez* v. *Southern Cal. Rapid Transit Dist., supra,* 40 Cal.3d at p. 792; *Taylor* v. *Buff* (1985) 172 Cal.App.3d 384, 391 [218 Cal.Rptr. 249].) (7f) Plaintiff's complaint does not plead that defendants should have provided police personnel or armed guards. There are measures short of the provision of police protection services, such as posting warning signs or closer supervision of students who frequent areas of known danger, that might suffice to meet the duty of reasonable care to protect students. (See *Lopez* v. *Southern Cal. Rapid Transit Dist., supra,* at pp. 787-788, 791-793.) We cannot assume as a matter of law, and without proof on the question, that defendants' duty could be satisfied only by the provision of a police protection service. (*Ibid.*)

The trial court erred when it sustained defendants' general demurrer to plaintiff's first amended complaint.

DISPOSITION

The judgment is reversed.

Sparks, Acting P. J., and Watkins, J.,* concurred.

* Assigned by the Chairperson of the Judicial Council.

ATTACHMENT "2"

Brosnahan v. Brown (1982)

32 Cal.3d 236; 186 Cal.Rptr. 30; 651 P.2d 274

[S.F. No. 24441. Sept. 2, 1982.]

JAMES J. BROSNAHAN et al., Petitioners, v.
EDMUND G. BROWN, JR., as Governor, etc., et al., Respondents.

SUMMARY

Three taxpayers and voters who asserted various constitutional defects in the manner in which an initiative measure known as The Victims' Bill of Rights was submitted to the voters petitioned the Court of Appeal for writs of mandate or prohibition. On motion of respondent Attorney General, the cause was transferred to the Supreme Court (Cal. Rules of Court, rule 20), and the Supreme Court denied the peremptory writ. The court first held that the provisions of the initiative measure, also known as Proposition 8, were reasonably germane to each other and thus satisfied the requirement that initiative measures embrace a single subject (Cal. Const., art. II, § 8, subd. (d)). The court held that each of the measure's several facets, which dealt with matters such as restitution, safe schools, bail, and prior convictions, shared the common concern of promoting the rights of actual or potential crime victims and that it was this goal that united all of the measure's provisions in advancing its common purpose. The court also held that Cal. Const., art. IV, § 9, providing that a statute may not be amended by reference to its title and that a section of a statute may not be amended unless the section is reenacted, is not applicable to constitutional amendments, such as Cal. Const., art. I, § 28 ("truth-in-evidence" provision of Prop. 8), which have the effect of amending or repealing statutes. Even assuming art. IV, § 9, controlled constitutional amendments which themselves amend a statute, the court held that Proposition 8 did not amend any statute or section of a statute within the meaning of such provision. Although the initiative measure added new statutory sections and may also have repealed or modified by implication only preexisting statutory provisions, the court held art. IV, § 9, was not intended to apply in such situations. Thus, the failure of the initiative measure to identify the statutory provisions that were amended or repealed by implication did not render it void. Finally, the court held

that Proposition 8 did not on its face constitute an impermissible impairment of essential government functions and did not constitute a revision of the state Constitution, rather than a mere amendment thereof. (Opinion by Richardson, J., with Newman, Kaus and Reynoso, JJ., concurring. Separate dissenting opinion by Bird, C. J. Separate dissenting opinion by Mosk, J., with Broussard, J., concurring.)

HEADNOTES

(1) **Initiative and Referendum § 6—State Elections—Initiative Measures—Single Subject Rule.**—The provisions of a statewide initiative measure, known as The Victims' Bill of Rights, were reasonably germane to each other and thus satisfied the requirement that initiative measures embrace a single subject (Cal. Const., art. II, § 8, subd. (d)). Each of the measure's several facets, which dealt with matters such as restitution, safe schools, bail, and prior convictions, shared the common concern of promoting the rights of actual or potential crime victims, and it was this goal that united all of the measure's provisions in advancing its common purpose.

[See **Cal.Jur.3d**, Initiative and Referendum, § 19; **Am.Jur.2d**, Initiative and Referendum, § 24.]

(2) **Criminal Law § 191—Mentally Disordered Sex Offenders—Repeal of Article.**—Cal. Const., art. IV, § 9, provides that a statute may not be amended by reference to its title and that a section of a statute may not be amended unless the section is reenacted as amended. However, any procedural defect in the adoption, by initiative measure, of Welf. & Inst. Code, § 6331 (repeal of article on Mentally Disordered Sex Offenders (MDSOs)) was harmless. Although § 6331 declared "inoperative" the "article" within which such section was contained without identifying the text of such article, the entire article dealing with MDSOs was repealed in 1981 (Stats. 1981, ch. 928, § 2), thus rendering § 6331 a nullity.

(3) **Bail and Recognizance § 1—Validity of Constitutional Amendments.**—An initiative measure which added a new constitutional provision regarding the right to release on bail or on one's own recognizance (Cal. Const., art. I, § 28, subd.(e)) and which repealed the

previous bail provision (Cal. Const., art. I, § 12) was not defective, even though it failed to set out in full the text of the repealed provision. Although Cal. Const., art. IV, § 9, provides that a statute may not be amended by reference to its title and that a section of a statute may not be amended unless the section is reenacted as amended, such provision by its terms refers to the amendment of a statute and does not purport to affect constitutional amendments. In addition, the relevant voters' pamphlet set forth the entire text of the former bail provision in "strikeout type," indicating that such provision would be "deleted" by the initiative measure.

(4) **Statutes § 16—Repeal—By Implication—Constitutional Amendments.**—Cal. Const., art. IV, § 9, providing that a statute may not be amended by reference to its title and that a section of a statute may not be amended unless the section is reenacted as amended, is not applicable to constitutional amendments, such as Cal. Const., art. I, § 28 (providing that relevant evidence shall not be excluded in criminal proceedings), which have the effect of amending or repealing statutes. Even assuming art. IV, § 9, controlled constitutional amendments which themselves amend a statute, the amendment at issue, which was enacted as part of an initiative measure on victims' rights, did not amend any statute or section of a statute within the meaning of art. IV, § 9. Although the measure added new statutory sections and may also have repealed or modified by implication only preexisting statutory provisions, art. IV, § 9, was not intended to apply in such a situation. Thus, the failure of the initiative measure to identify the statutory provisions that were amended or repealed by implication did not render it void. It would have been unrealistic to require the proponents of the initiative to anticipate and specify in advance every change in existing statutory provisions which could be expected to result from the adoption of the measure.

(5) **Initiative and Referendum § 6—State Elections—Initiative Measures—Impairment of Essential Government Functions.**—An initiative measure known as The Victims' Bill of Rights did not on its face constitute an impermissible impairment of essential government functions, so as to render it invalid. Even assuming the accuracy of a prediction that the measure's restrictions on plea bargaining would aggravate court congestion, plea bargaining was not an essential prerequisite to the administration of justice, and

any effect on the criminal justice system from such restrictions was largely speculative. Also speculative was a supposed breakdown of the criminal justice system resulting from giving crime victims an opportunity to appear in both felony and misdemeanor cases and from imposing greater punishment on defendants whose multiple offenses were tried separately. Finally, the possibility that implementation of the initiative's sentencing and safe schools provisions might entail substantial additional public funding was not a proper ground for its invalidation.

(6) **Constitutional Law § 3—Adoption and Alteration—Distinction Between Revision and Amendment.**—An initiative measure known as The Victims' Bill of Rights did not constitute a revision of the state Constitution, rather than a mere amendment thereof, so as to require its adoption pursuant to a constitutional convention or legislative submission to the people. The measure's quantitative changes, which amounted to repealing one constitutional section and adding another, were not so extensive as to change directly the substantial entirety of the Constitution by the deletion or alteration of numerous existing provisions. Further, while the measure accomplished substantial qualitative changes in the criminal justice system, even in combination such changes fell considerably short of constituting such far reaching changes in the basic governmental plan as to amount to a constitutional revision.

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OPINION

RICHARDSON, J.—We consider multiple constitutional challenges to an initiative measure which was adopted by the voters of this state at the June 1982 Primary Election. Designated on the ballot as Proposition 8 and commonly known as "The Victims' Bill of Rights," this initiative incorporated several constitutional and statutory provisions which were directed, in the words of the measure's preamble, towards "ensuring a bill of rights for victims of crime, including safeguards in the criminal justice system to fully protect those rights . . . ." (Cal. Const., art. I, § 28, subd. (a).)

Petitioners are three taxpayers and voters who assert various constitutional defects in the manner Proposition 8 was submitted to the voters, and who object to the expenditure of public funds to implement it. Respondents are certain public officials and courts charged with the responsibility of implementing, enforcing or applying the new measure.

In an earlier, related proceeding, we ordered the measure to be placed on the primary election ballot, reserving for our further consideration the substantive issues herein presented pending the outcome of the

election. (*Brosnahan* v. *Eu* (1982) 31 Cal.3d 1, 4 [181 Cal.Rptr. 100, 641 P.2d 200].) The present petition, seeking writs of mandate or prohibition, was originally filed in the Court of Appeal. On motion of respondent Attorney General, we transferred the cause to this court. (Rule 20, Cal. Rules of Court.) It is uniformly agreed that the issues are of great public importance and should be resolved promptly. Accordingly, under well settled principles, it is appropriate that we exercise our original jurisdiction. (See *Amador Valley Joint Union High Sch. Dist.* v. *State Bd. of Equalization* (1978) 22 Cal.3d 208, 219 [149 Cal.Rptr. 239, 583 P.2d 1281] [hereafter *Amador*]; *Clean Air Constituency* v. *California State Air Resources Bd.* (1974) 11 Cal.3d 801, 808-809 [114 Cal.Rptr. 577, 523 P.2d 617].)

Our inquiry here is limited, framed in the following manner by the petition itself: "This petition for extraordinary relief attacks neither the merits nor the wisdom of the [initiative's] multiple proposals. Petitioners challenge only the manner in which those proposals were submitted to the voters . . . ." At this time we neither consider nor anticipate possible attacks, constitutional or otherwise, which in the future may be directed at the various substantive changes effected by Proposition 8. As in *Amador*, we examine here "only those principal, fundamental challenges to the validity of [Prop. 8] as a whole . . . . 'Analysis of the problems which may arise respecting the interpretation or application of particular provisions of the act should be deferred for future cases in which those provisions are more directly challenged.' [Citation.]" (*Amador*, 22 Cal.3d at p. 219.) We will conclude that, notwithstanding the existence of some unresolved uncertainties, as to which we reserve judgment, the initiative measure under scrutiny here survives each of petitioners' four constitutional objections.

Preliminarily, we stress that "it is a fundamental precept of our law that, although the legislative power under our constitutional framework is firmly vested in the Legislature, '*the people* reserve to themselves the powers of initiative and referendum.' (Cal. Const., art. IV, § 1.) It follows from this that, '"[the] power of initiative must be *liberally construed* . . . to promote the democratic process."' [Citations.]" (*Amador* at pp. 219-220, italics added.) Indeed, as we so very recently acknowledged in *Amador*, it is our solemn duty jealously to guard the sovereign people's initiative power, "it being one of the most precious rights of our democratic process." (*Id.*, at p. 248.) Consistent with prior precedent, *we are required to resolve any reasonable doubts in favor of the exercise of this precious right.* (*Ibid.*)

Bearing in mind these fundamental principles, we next summarize the basic provisions of Proposition 8. As in *Amador*, we caution that our summary description and interpretation of the measure by no means preclude subsequent challenges to the legality of its provisions, apart from the specific constitutional issues resolved herein. (*Id.*, at p. 220.)

I. SUMMARY OF PROPOSITION 8

As previously noted, the measure denominated "The Victims' Bill of Rights," accomplishes several changes in the criminal justice system in this state for the purpose of protecting or promoting the rights of victims of crime. Thus, section 28 is added to article I of the California Constitution, section 12 of article I (relating to the right to bail) is repealed, and certain additions are made to the Penal and Welfare and Institutions Codes. The primary changes or additions are as follows:

a. *Preamble; Victims' Rights and Public Safety*

Section 28, subdivision (a), is added to article I of the state Constitution expressing a "grave statewide concern" to enact "safeguards in the criminal justice system" for the protection of victims of crime. The preamble recites generally that the rights of victims include, among others, the right to restitution for financial losses, and the expectation that felons will be "appropriately detained in custody, tried by the courts, and sufficiently punished so that public safety is protected and encouraged ...." In addition, the provision states that "[s]uch public safety extends to public ... school campuses, where students and staff have the right to be safe and secure in their persons." The preamble concludes by observing that "broad reforms in the procedural treatment of accused persons and the disposition and sentencing of convicted persons are necessary and proper as deterrents to criminal behavior and to serious disruption of people's lives."

b. *Restitution*

Section 28, subdivision (b), is added to the Constitution to assure generally that persons who "suffer losses as a result of criminal activity shall have the right to restitution" from the persons convicted of those crimes. "Restitution shall be ordered ... in every case, ... unless compelling and extraordinary reasons exist to the contrary."

c. *Safe Schools*

Section 28, subdivision (c), declares the "inalienable right" of public school students and staff "to attend campuses which are safe, secure and peaceful."

d. *Truth-in-evidence*

Section 28, subdivision (d), provides that (except as provided by statutes enacted by a two-thirds vote of both houses of the Legislature) "relevant evidence shall not be excluded in any criminal proceeding ...." The provision applies equally to juvenile criminal proceedings, but does not affect "any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103," or rights of the press.

e. *Bail*

Section 28, subdivision (e), relates to bail and replaces repealed section 12 of article I. The new provision requires that "primary consideration" be given to "public safety," and authorizes the judge or magistrate to consider "the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing" in ruling on bail matters. In addition, the provision forbids release on one's "own recognizance" of a person charged with any "serious felony" (see Pen. Code, § 1192.7, subd. (c)). (As noted below, all or part of subd. (e) may not have taken effect because of the passage of a competing measure (Prop. 4) by a larger vote.)

f. *Prior Convictions*

Section 28, subdivision (f), permits the unlimited use in a criminal proceeding of "any prior felony conviction" for impeachment or sentence enhancement, and requires proof thereof "in open court" when the prior conviction is an element of any felony offense.

g. *Diminished Capacity; Insanity*

The addition of section 25 to the Penal Code abolishes the defense of diminished capacity (subd. (a)); places upon the defendant who pleads insanity the burden of proving his or her incapability of "knowing or

understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense" (subd. (b)); and permits consideration of evidence of diminished capacity or mental disorder "only at the time of sentencing or other disposition or commitment" (subd. (c)).

h. *Habitual Criminals*

Section 667 is added to the Penal Code to require that persons convicted of a "serious felony" receive a sentence enhancement of five years for each prior conviction of such a felony "on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively." (Subd. (a).)

i. *Victim's Statements*

New sections 1191.1 and 3043 in the Penal Code, and section 1767 in the Welfare and Institutions Code, permit the victim of any crime or the next of kin the right to prior notice of, and to attend, all sentencing proceedings (subd. (a)), or parole eligibility or parole setting hearings in criminal (subd. (b)) or Youth Authority (subd. (c)) proceedings. The victim or next of kin may appear and "express his or her views concerning the crime and the person responsible." The sentencing or parole authority shall consider these views in making its decision and shall state "whether the person would pose a threat to public safety" if granted probation or released on parole.

j. *Plea Bargaining*

Section 1192.7 is added to the Penal Code to prohibit plea bargaining if the indictment or information charges "any serious felony" or any offense of driving while intoxicated, "unless there is insufficient evidence to prove the people's case, or testimony of a material witness cannot be obtained, or a reduction or dismissal would not result in a substantial change in sentence." (Subd. (a).) Subdivision (c) contains a list of the various offenses deemed to be "serious felonies."

k. *Sentencing to Youth Authority*

The addition of section 1732.5 to the Welfare and Institutions Code provides that no person convicted of murder, rape or other "serious fel-

ony" committed when he or she was 18 years or older shall be committed to Youth Authority.

l. Mentally Disordered Sex Offenders

New section 6331 of the Welfare and Institutions Code renders "inoperative" the article dealing with mentally disordered sex offenders (MDSOs). (As this article was repealed in 1981, the initiative does not appear to accomplish any change in the law.)

m. *Severability*

Section 10 of the initiative recites that if any section or clause thereof is held invalid, such invalidity shall not affect any remaining provisions which can be given effect without the invalid provision.

n. *Amendments*

A two-thirds vote of both houses of the Legislature is required to amend most of the statutory provisions adopted by Proposition 8.

Having summarized its principal elements, we examine petitioners' four challenges to the validity of Proposition 8.

II. THE SINGLE SUBJECT RULE

Our Constitution provides that "An initiative measure embracing more than one subject may not be submitted to the electors or have any effect." (Art. II, § 8, subd. (d).) In determining whether a measure "embrac[es] more than one subject," we have previously held that "an initiative measure does not violate the single-subject requirement if, despite its varied collateral effects, *all of its parts are 'reasonably germane'* to each other," and to the general purpose or object of the initiative. (*Amador*, 22 Cal.3d at p. 230, italics added; see *Fair Political Practices Com.* v. *Superior Court* (1979) 25 Cal.3d 33, 38-39 [157 Cal.Rptr. 855, 599 P.2d 46] [hereafter *FPPC*]; *Perry* v. *Jordan* (1949) 34 Cal.2d 87, 90-92 [207 P.2d 47].)

In *Amador*, for example, we upheld a four-pronged taxation measure which limited real property tax rates and assessments and restricted state and local taxes, on the ground that such restrictions were reasonably germane to the general subject of property tax relief. (22 Cal.3d at

p. 231.) Even more recently in *FPPC*, we rejected a single-subject challenge to a lengthy political reform measure which contained the following multiple complex features: (1) establishment of a fair political practices commission; (2) creation of disclosure requirements for candidates' financial supporters; (3) limitation on campaign spending; (4) regulation of lobbyist activities; (5) enactment of conflict of interest rules; (6) adoption of rules relating to voter pamphlet summaries of arguments; (7) location of the ballot position of candidates; and (8) specification of auditing and penalty procedures to aid in the act's enforcement. (See 25 Cal.3d at p. 37.)

In *FPPC*, we reemphasized that the single subject rule is to be "construed liberally," and that "Numerous provisions, *having one general object*, if fairly indicated in the title, may be united in one act." (*Id.*, at p. 38, italics added.) In amplification, we used this language in *FPPC* in describing the overriding principle which controls our disposition of the single-subject attack against Proposition 8: "*Consistent with our duty to uphold the people's right to initiative process, we adhere to the reasonably germane test and, in doing so, find that the measure before us complies with the one subject requirement . . . . In keeping with the policy favoring the initiative, the voters may not be limited to brief general statements but may deal comprehensively and in detail with an area of law.*" (25 Cal.3d at p. 41, italics added.)

Our own precedent is both venerable and current. While *FPPC* is only three years old, its underlying thesis was enunciated by us fifty years ago. In *FPPC* we cited with approval *Evans* v. *Superior Court* (1932) 215 Cal. 58, 61-62 [8 P.2d 467]. *Evans* is most instructive. We there upheld the adoption, in a single act, of extensive probate legislation consisting of *one thousand and seven hundred* sections covering a wide spectrum of topics within the general "area" of "probate law," which sections previously were contained in part in several codes and statutes. This "one general object" included such disparate subjects as the essential elements of wills, the rights of succession, the details of the administration and distribution of decedents' estates, and the procedures, duties, and rights of guardianships of the persons and estates of minors and incompetents. (215 Cal. at p. 61.) Despite the extremely broad sweep of this legislation, we concluded that all of these matters were "reasonably germane" to the general object of the legislation and did not embrace more than a single subject. Expanding on this concept, in *Evans*, we said "The legislature may insert in a single act all legislation germane to the general subject as expressed in its title and within

the field of legislation suggested thereby. [Citation.] Provisions which are logically germane to the title of the act and are included within its scope may be united. The general purpose of a statute being declared, the details provided for its accomplishment will be regarded as necessary incidents. [Citations.] . . . A provision which conduces to the act, or which is auxiliary to and promotive of its main purpose, or has a necessary and natural connection with such purpose is germane within the rule. [Citation.]" (Pp. 62-63.)

(1) On the basis of the foregoing authorities, it is readily apparent that Proposition 8 meets the "reasonably germane" standard. Each of its several facets bears a common concern, "general object" or "general subject," promoting the rights of actual or potential crime victims. As explained in the initiative's preamble, the 10 sections were designed to strengthen procedural and substantive safeguards for victims in our criminal justice system. These changes were aimed at achieving more severe punishment for, and more effective deterrence of, criminal acts, protecting the public from the premature release into society of criminal offenders, providing safety from crime to a particularly vulnerable group of victims, namely school pupils and staff, and assuring restitution for the victims of criminal acts.

Just as *Evans*, *Amador* and *FPPC* upheld broad and multifaceted "reform" measures pertaining to the subjects of probate, property taxation, and politics, respectively, Proposition 8 constitutes a reform aimed at certain features of the criminal justice system to protect and enhance the rights of crime victims. This goal is the readily discernible common thread which unites all of the initiative's provisions in advancing its common purpose.

Focusing on the initiative's "safe schools" provision, petitioners contend that it concerns an entirely unrelated matter, isolated from criminal behavior, and therefore embraces a separate subject. Petitioners argue specifically that the right to safe schools is an undefined, amorphous concept which could encompass such diverse hazards as acts of nature, acts of war, environmental risks, or building code violations. A careful look at the preamble of Proposition 8 refutes this contention. New article I, section 28, subdivision (a), of the Constitution recites that the enactment of laws "ensuring a bill of rights for victims of *crime*, including safeguards in the *criminal justice system* .... is a matter of grave statewide concern. The rights of victims pervade the *criminal* justice system," and include not only reimbursement for losses

from "*criminal* acts" but also the expectation that "persons who commit *felonious* acts" shall be detained, tried and punished "so that the public safety is protected." (Italics added.) The preamble then continues, "*Such public safety* extends to public ... school campuses, where students and staff have the right to be safe and secure in their persons." The preamble further concludes that "broad reforms ... are necessary and proper as deterrents to *criminal* behavior." (Italics added.) Clearly, the right to safety encompassed within article I, section 28, subdivision (c), was intended to be, is aimed at, and is limited to, the single subject of safety from *criminal* behavior.

We are reinforced in our conclusion that Proposition 8 embraces a single subject by observing that the measure appears to reflect public dissatisfaction with several prior judicial decisions in the area of criminal law. As explained in the ballot argument favoring Proposition 8, "This proposition will overcome some of the adverse decisions by our higher courts," which had created "additional rights for the criminally accused and placed more restrictions on law enforcement officers." (Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Prim. Elec. (Jun. 8, 1982), argument in favor of Prop. 8, p. 34.) While we might disagree with both the accuracy of this premise and the overall wisdom of the initiative measure, nonetheless, it is not our function to pass judgment on the propriety or soundness of Proposition 8. In our democratic society in the absence of some compelling, overriding constitutional imperative, we should not prohibit the sovereign people from either expressing or implementing their own will on matters of such direct and immediate importance to them as their own perceived safety. (See *Amador*, pp. 228-229.)

Petitioners, however, would engraft upon the "reasonably germane" test of *Evans, Amador* and *FPPC* a further requirement that the several provisions of an initiative measure must be "interdependent." Petitioners argue that, unlike the "interlocking" relationship of the various elements of the tax reform measure upheld in *Amador* (see 22 Cal.3d at p. 231), Proposition 8 contains disparate provisions covering a variety of "unrelated" matters such as school safety, restitution, bail, diminished capacity, and the like.

No preceding case has ever suggested that such interdependence is a constitutional prerequisite. In *Evans*, for example, we carefully explained that "Numerous provisions, having one general object, if fairly indicated in the title, *may* be unified in one act. Provisions governing

projects so related and interdependent as to constitute a single scheme *may* be properly included within a single act. [Citation.] The legislature *may* insert in a single act all legislation germane to the general subject as expressed in its title and within the field of legislation suggested thereby. [Citation.]" (215 Cal. at pp. 62-63, italics added.)

In context, it is obvious that *Evans'* reference to interdependence merely illustrated *one type* of multifaceted legislation which would meet the single subject test. Significantly, as noted, in *Evans* we upheld extensive probate legislation concerning such diverse and unrelated topics as the rights of intestate succession, the powers of guardians over the persons and estates of incompetent persons, and the sale and leasing of estate property, on the express ground that all of these provisions "have one general object." (P. 65.)

Moreover, in *Amador*, while acknowledging that the provisions of the tax measure under scrutiny were "interdependent" and "interlocking" (22 Cal.3d at p. 231), we did not suggest that any such relationship was *essential* to the measure's validity. Indeed, immediately preceding the foregoing observation, we had stated that the property tax initiative satisfied *both* the traditional reasonably germane test *and* the so-called "functional relationship" test which was proposed in the dissent in *Schmitz* v. *Younger* (1978) 21 Cal.3d 90, 97-100 [145 Cal.Rptr. 517, 577 P.2d 652] (dis. opn. by Manuel, J.). (See 22 Cal.3d at p. 230.) Thus, petitioners' assumption that *Amador* requires that an initiative's several provisions be "interdependent" is incorrect.

Finally, as previously indicated, in *FPPC* we upheld a comprehensive political reform package despite the lack of any apparent "interdependence" of many of its varied provisions. Thus, for example, the section of the initiative denying an incumbent a favored position on the ballot (Gov. Code, § 89000) clearly did not "interlock" with the separate provisions mandating every administrative agency to adopt a conflict of interest code (*id.*, §§ 87300-87312). Similarly, and quite obviously, neither of the foregoing portions of the initiative was in any sense in a "dependent" relationship with another section of the initiative which established that "the election precinct of a person signing a statewide petition shall not be required to appear on the petition when it is filed with the county clerk" (*id.*, § 85203). Each of these diverse provisions, while generally related to a political reform program, clearly would not have satisfied a strict "interdependence" test.

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Petitioners, sensing the evident inconsistency between *FPPC* and their own present position, characterize the *FPPC* lead opinion as a mere "plurality" opinion entitled to little weight. Yet six of the seven justices in that case voted to *sustain* the multifaceted provisions of the Fair Political Practices Act against a single-subject attack. It was only Justice Manuel who dissented on this point. His observations regarding the act's multifarious character and his conceptual differences with his six colleagues are very revealing for, in his view: "The regulation of the election process, no matter how broadly defined, has little to do with the regulation of the day-to-day activities of lobbyists. The adoption of codes governing conflicts of interest in all state agencies ... is yet another matter. Although each of these might conceivably form a part of a unified legislative program directed toward the policy objective of 'political reform,' each concerns an entirely different and discrete *subject*." (25 Cal.3d at p. 57; italics in original.)

If Justice Manuel's characterization of the Fair Political Practices Act is accurate, and if we are to follow our own precedent, our holding in *FPPC* necessarily controls the disposition of the present case, for on their face the various provisions of Proposition 8 certainly are no less germane, interdependent or interrelated than the provisions of the statute which we so recently sustained in *FPPC* against a similar single-subject attack.

Petitioners argue that because Proposition 8 is designed to protect the rights of *potential* as well as actual victims of crime, its objective somehow thereby becomes too broad. Yet surely the Fair Political Practices Act which we readily upheld in *FPPC* was subject to the same criticism, for it too was aimed at protecting the general citizenry *in their role as potential victims of political corruption.* Obviously, the fact that a multifaceted measure seeks to protect the general public from harm (whether from present *or* future criminal acts, political corruption or excessive taxation) presents no constitutional impediment to its validity.

Petitioners speculate that the multiplicity of Proposition 8's provisions enhanced the danger of election "logrolling," whereby certain groupings of voters, each constituting numerically a minority, but in aggregate a majority, may approve a measure which lacks genuine popular support in order to secure the benefit of one favored but isolated and severable provision. Yet, as we emphasized in *FPPC*, such a risk "is inherent in any initiative containing more than one sentence or even an

'and' in a single sentence unless the provisions are redundant .... [¶] The enactment of laws whether by the Legislature or by the voters in the last analysis always presents the issue whether on balance the proposed act's benefits exceed its shortcomings." (25 Cal.3d at p. 42.) Indeed, almost all laws whether enacted by a legislature or adopted directly by the people through an initiative contain both benefits and burdens. The decision to enact laws, whether directly by the people or through their representatives, involves the weighing of pros and cons. The resolution of few public issues is free from this balancing process and exercise of choices.

As in *FPPC*, so in *Amador* we rejected the contention that the single-subject rule requires a showing that each one of a measure's several provisions was capable of gaining voter approval independently of the other provisions. We expressed our conclusion that "Aside from the obvious difficulty of ever establishing satisfactorily such 'independent voter approval,' this standard would defeat many legitimate enactments containing isolated, arguably 'unpopular,' provisions reasonably deemed necessary to the integrated functioning of the enactment as a whole. We avoid an overly strict judicial application of the single-subject requirement, for to do so could well frustrate legitimate efforts by the people to accomplish integrated reform measures." (*Amador*, 22 Cal.3d at p. 232.)

One commentator, examining the purpose of the rule within this context, has noted that "The one-subject rule ... attacks log-rolling by striking down unnatural combinations of provisions in acts—those dealing with more than one subject—on the theory that the best explanation for the unnatural combination is a tactical one—log-rolling." (Ruud, "*No Law Shall Embrace More Than One Subject*" (1958) 42 Minn.L. Rev. 389, 408.) It is highly unlikely that Proposition 8 was the product of any logrolling whatever, because it contains no "unnatural combination" of provisions on unrelated subjects which might suggest an inordinate vote-getting scheme on behalf of the proponents. All of the provisions are designed to protect victims of crime and partake of a common consistent theme, namely, to strengthen or tighten the laws in aid of crime's victims. The measure is singularly unsusceptible to such "log-rolling" criticism.

Finally, petitioners insist that the complexity of Proposition 8 may have led to confusion or deception among voters, who were assertedly uninformed regarding the contents of the measure. Yet, as was the case

in both *Amador* and *FPPC*, Proposition 8 received widespread publicity. Newspaper, radio and television editorials focused on its provisions, and extensive public debate involving candidates, letters to the editor, etc., described the pros and cons of the measure. In addition, before the election each voter received a pamphlet containing (1) the title and summary prepared by the Attorney General, (2) a detailed analysis of the measure by the Legislative Analyst, and (3) a complete "Text of the Proposed Law." This text contained the entirety of the 10 sections of the Victims' Bill of Rights and included in "strikeout type" the text of former article I, section 12, of the Constitution. Each voter also was given written arguments in favor of Proposition 8 and rebuttal thereto, and written arguments against Proposition 8 and rebuttal thereto. (See *Amador*, 22 Cal.3d at pp. 231, 243-244; *FPPC*, 25 Cal.3d at p. 42.)

Moreover, as we stated in *FPPC* in disposing of an identical contention that the measure was too complicated, "Our society being complex, the rules governing it whether adopted by legislation or initiative will necessarily be complex. Unless we are to repudiate or cripple use of the initiative, risk of confusion must be borne." (*Ibid.*)

Petitioners' entire argument that, in approving Proposition 8, the voters must have been misled or confused is based upon the improbable assumption that the people did not know what they were doing. It is equally arguable that, faced with startling crime statistics and frustrated by the perceived inability of the criminal justice system to protect them, the people knew exactly what they were doing. In any event, we should not lightly presume that the voters did not know what they were about in approving Proposition 8. Rather, in accordance with our tradition, "*we ordinarily should assume that the voters who approved a constitutional amendment '. . . have voted intelligently upon an amendment to their organic law, the whole text of which was supplied each of them prior to the election and which they must be assumed to have duly considered.*'" (*Amador, supra*, at pp. 243-244, italics added; see *Wright* v. *Jordan* (1923) 192 Cal. 704, 713 [221 P. 915].)

There are those rare occasions similar to that which prompted the people's adoption of the single-subject initiative rule in 1948 (Cal. Const., art. II, § 8, subd. (d)) in which our intervention is justified. The proposed initiative may be so all encompassing, so multifaceted as to demand a conclusion of unconstitutionality. We faced such a measure in *McFadden* v. *Jordan* (1948) 32 Cal.2d 330 [196 P.2d 787], in which

21,000 words were proposed to be added to 15 of the 25 constitutional articles. This initiative dealt with such widely disparate subjects as gambling, civic centers, mining, fishing, city budgets, liquor control, senate reapportionment, and oleomargarine. We concluded that the measure constituted an improper revision of our constitutional scheme. In *McFadden*, we likewise could not fairly and reasonably have decided that any single subject was served by such a grabbag of social, political, economic and administrative enactments. Proposition 8 is manifestly not such a measure.

For all of the foregoing reasons, we conclude that Proposition 8 does not violate the single-subject requirement of article II, section 8, subdivision (d), of the California Constitution.

We do not suggest, of course, that initiative proponents are given blank checks to draft measures containing unduly diverse or extensive provisions bearing no reasonable relationship to each other or to the general object which is sought to be promoted. The single-subject rule indeed is a constitutional safeguard adopted to protect against multifaceted measures of undue scope. For example, the rule obviously forbids joining disparate provisions which appear germane only to topics of excessive generality such as "government" or "public welfare." In the present case, however, we merely respect this court's liberal interpretative tradition, notably expressed in *Evans*, *Amador*, and *FPPC*, of sustaining statutes and initiatives which fairly disclose a reasonable and common sense relationship among their various components in furtherance of a common purpose.

III. VALIDITY OF STATUTORY AMENDMENTS

Petitioners contend that the proponents of Proposition 8 failed in several particulars to comply with the constitutionally mandated procedure for amending statutes. Article II, section 8, subdivision (b), of the state Constitution requires that the initiative measure petition set forth "the text of the proposed statute or amendment to the Constitution . . . ." It is uncontradicted that the proponents of the measure complied with this provision. Petitioners rely, however, upon article IV, section 9, which provides that "A statute shall embrace but one subject, which shall be expressed in its title. If a statute embraces a subject not expressed in its title, only the part not expressed is void. A statute may not be amended by reference to its title. A section of a statute may not be amended unless the section is re-enacted as amended." (See also Elec. Code,

§§ 3571, 3572; Gov. Code, §§ 88000, 88002, requiring that the ballot pamphlets disclose the text of any existing statutory provisions sought to be repealed or amended.)

The foregoing provision, containing a "single subject" rule applicable to statutes, also forbids amending a statute "by reference to its title" and "unless the section is re-enacted as amended." Petitioners assume that this language "requires that if a statute is to be altered, the language of the statute must be fully set forth together with the changes proposed. Reference to sections, title or codes is not sufficient." According to petitioners, Proposition 8 violated this requirement by failing to describe or identify (1) the provisions in the Welfare and Institutions Code rendered "inoperative" by the adoption of section 6331 of the code (dealing with the commitment of mentally disordered sex offenders); (2) the language of article I, section 12, of the Constitution (pertaining to right to bail) repealed by section 2 of Proposition 8; and (3) the provisions of the Evidence Code (and other codes) amended or repealed by the adoption of article I, section 28, subdivision (d), of the Constitution (forbidding the exclusion of "relevant evidence"). Petitioners list 26 statutory provisions which they suggest were "*sub silentio* amended to be inapplicable in criminal trials."

a. *Repeal of MDSO Statute*

(2) As previously noted, Proposition 8 added section 6331 to the Welfare and Institutions Code. The section declares "inoperative" the "article" within which section 6331 is contained, but fails to identify the text of that article. As we have explained, however, the entire article dealing with MDSOs was repealed in 1981. (Stats. 1981, ch. 928, § 2) and the Legislative Analyst observed in the voters' pamphlet that new section 6331 is superfluous and "has no effect." (Ballot Pamp., *supra*, p. 55.) Assuming that this conclusion is correct, the section being a nullity, any procedural defect in adopting that section must be deemed harmless, especially in view of the severability clause (§ 10) in Proposition 8.

b. *Bail Amendment*

(3) Proposition 8 added a new provision to the Constitution regarding the right to release on bail or on one's own recognizance. (Cal. Const., art. I, § 28, subd. (e).) The previous bail provision (art. I, § 12) was repealed. Petitioners contend that the initiative measure was defec-

tive in failing to set out in full the text of the repealed provision. Several reasons persuade us otherwise.

First, nothing in article IV, section 9, requiring reenactment of statutes, purports to affect *constitutional* amendments such as those before us; by its terms this provision refers to the amendment of a "statute."

Next, we observe that the voters' pamphlet for the June 1982 primary contained a "Text of Proposed Law" which set forth the entire text of former article I, section 12, in "strikeout type," indicating that this provision would be "deleted" by Proposition 8. We may fairly assume that the voters duly considered the text set forth in the voters' pamphlet prior to casting their vote. (*Amador*, 22 Cal.3d at pp. 231, 243-244.)

Finally, as previously noted, it may be that a substantial part of the bail provisions of Proposition 8 never took effect. We are advised that Proposition 4 on the June 1982 ballot received a greater number of votes than Proposition 8, in which event Proposition 4 would prevail as to those matters inconsistent with the latter measure. (See Cal. Const., art. XVIII, § 4.) Accordingly, any procedural defect in adopting the bail provisions of Proposition 8 would be harmless to a large extent and would not affect the remaining, severable provisions of the measure.

c. *Repeal of Statutes by Implication*

(4) Petitioners contend that Proposition 8 is void to the extent that it amends or repeals *by implication* various statutory provisions not identified (by section number, title or text) in the measure. In advancing this argument petitioners point to new article I, section 28, subdivision (d), of the Constitution, which provides that, with the exception of the several statutory exceptions specified therein, "relevant evidence shall not be excluded in any criminal proceeding . . . ."

Initially, we question whether the provisions of article IV, section 9, of the state Constitution apply to *constitutional amendments* (such as new art. I, § 28) which have the effect of amending or repealing statutes. The purpose of these procedural limitations was described by us in *People* v. *Western Fruit Growers* (1943) 22 Cal.2d 494, 500-501 [140 P.2d 13]: "In the absence of such a provision [forbidding amendment of a statute 'by reference to its title' and requiring 're-enactment' as amended] *legislative bodies* commonly amended an act or a section of

it by directing the insertion, omission or substitution of certain words, or by adding a provision, without setting out the entire context of the section as amended. [Citations.] The objection to this method of amendment was the uncertainty and difficulty of correctly reading the original section as later changed. [¶] To avoid the mischief inherent in the mechanics of this *legislative process*, the People of California imposed certain requirements *upon the Legislature*, but the provision should be reasonably construed and limited in its application to the specific evil which it was designed to remedy. It is not to be technically measured, nor used as a weapon for striking down legislation which may not reasonably be said to have been enacted contrary to the specified method. [Citations.]" (Italics added; see also *Scott A. v. Superior Court* (1972) 27 Cal.App.3d 292, 294-295 [103 Cal.Rptr. 683]; *Estate of Henry* (1941) 64 Cal.App.2d 76, 82 [148 P.2d 396].)

In *Wallace* v. *Zinman* (1927) 200 Cal. 585, 590-591 [254 P. 946, 62 A.L.R. 1341], the court held that the subject/title requirements of the predecessor (art. IV, § 24) to the provision under scrutiny here applied to both legislative and initiative measures. The measure in *Wallace*, however, was not a constitutional amendment which, as we recognized in that case, "need not conform" to the provisions of former section 24. (*Id.*, at p. 593.)

Furthermore, we expressly held more recently that this same predecessor provision was inapplicable to constitutional amendments which were adopted by initiative. (*Prince* v. *City & County of S.F.* (1957) 48 Cal.2d 472, 475 [311 P.2d 544].) As we stated in *Prince*, "Article IV of the Constitution deals with the 'Legislative Department' and section 24 is intended to be and has been limited to legislative enactments under the Constitution. [Citations.]" Therefore, because the "truth-in-evidence" provision of Proposition 8 is contained in a constitutional amendment (art. I, § 28, subd. (d)), that provision is not governed by the requirements of article IV, section 9.

Moreover, even were we to assume that the provisions of article IV, section 9, controlled constitutional amendments which themselves "amend" a statute, Proposition 8 did not amend any statute or section of a statute within the meaning of that provision. The measure added *new* sections to the Penal Code and the Welfare and Institutions Code, and may also have repealed or modified *by implication only* preexisting statutory provisions. Article IV, section 9, was not intended to apply in such a situation. (*Harris* v. *Fitting* (1937) 9 Cal.2d 117, 120 [69 P.2d

833]; *Evans* v. *Superior Court, supra*, 215 Cal. 58, 65-66; *Matter of Coburn* (1913) 165 Cal. 202, 211 [131 P. 352]; *Hellman v. Shoulters* (1896) 114 Cal. 136, 151-153 [44 P. 915, 45 P. 1057]; *Spencer* v. *G.A. MacDonald Constr. Co.* (1976) 63 Cal.App.3d 836, 850 [134 Cal.Rptr. 78]; *Estate of Henry, supra*, 64 Cal.App.2d 76, 82; cf. *Scott* v. *Superior Court, supra*, 27 Cal.App.3d 292, 294-295 [invalid statutory attempt to amend "any provision of law" specifying 21 years as the age of majority].)

Evans, again, is illustrative. As we have previously noted, the Legislature adopted the Probate Code (Stats. 1931, ch. 281, p. 587) in a single enactment consisting of approximately 1,700 different sections. After rejecting a "single subject" challenge, we considered whether the act was void for failure to "publish at length" any prior acts or sections "on the ground that they were revised or amended." (P. 65.) We held that the enactment was "a new and original piece of legislation. *Its terms are not revisory or amendatory of any former act.* Consequently, the provisions of the Constitution requiring that revised or amended laws shall be 'published at length as revised or amended' does not apply, *even though the provisions of the Probate Code may be inconsistent with existing statutes* .... While the act does not expressly refer to other acts and repeal them in terms, it does repeal them by necessary implication. [Citation.] ... [*T*]*he section* (sec. 24, art. IV) '*does not apply to amendments by implication.*' [Citation.]" (215 Cal. at pp. 65-66, italics added.)

It may be true, as petitioners state, that Proposition 8 has amended or repealed, by implication, various statutory provisions not specified in the text of that measure. Yet as we pointed out long ago in *Hellman*, *supra*, "To say that every statute which thus affects the operation of another is therefore an amendment of it would introduce into the law an element of uncertainty which no one can estimate. *It is impossible for the wisest legislator to know in advance how every statute proposed would affect the operation of existing laws.*" (114 Cal. at p. 152, italics added.) Similarly, it would have been wholly unrealistic to require the proponents of Proposition 8 to anticipate and specify in advance every change in existing statutory provisions which could be expected to result from the adoption of that measure.

We conclude that Proposition 8 did not violate article IV, section 9, of the California Constitution.

[Sept. 1982]

IV. EFFECT ON ESSENTIAL GOVERNMENTAL FUNCTIONS

(5) Petitioners' third challenge is that Proposition 8 is invalid as an impermissible impairment of "essential government functions." They rely on cases which hold as a general proposition that "The initiative . . . is not applicable where 'the *inevitable* effect would be greatly to impair or wholly destroy the efficacy of some other governmental power, the practical application of which is essential . . . .' [Citations.]" (*Simpson* v. *Hite* (1950) 36 Cal.2d 125, 134 [222 P.2d 225], italics added; see *Birkenfeld* v. *City of Berkeley* (1976) 17 Cal.3d 129, 143, 144 [130 Cal.Rptr. 465, 550 P.2d 1001] [mere "speculative consequences" are insufficient].) We assume, for purposes of discussion, that the principles of these cases (which involve *local* initiative or referendum measures) are equally applicable to measures of statewide application.

Petitioners conjure several supposed consequences of Proposition 8 which "will severely impair the functioning of the courts, the Department of Corrections and the public school system." As will appear, however, none of these consequences is as inevitable as petitioners suggest. Indeed, we may assume that the courts and other agencies, interpreting and applying the various provisions of Proposition 8, will approach their task with a view toward preserving, rather than destroying, the essential functions of government.

First, petitioners predict that the measure's restrictions upon plea bargaining will have a "most damaging effect" upon already crowded court calendars. Even assuming that this prediction is accurate, we cannot accept petitioners' underlying premise that an initiative measure which, as a collateral effect, may aggravate court congestion is void under the *Simpson* principle. In *Simpson* we examined an initiative measure which would have directly prevented a local board of supervisors from designating a site for court buildings. We stressed that, among other adverse effects, such an initiative "could interfere with the functioning of the courts by depriving them of the quarters which the supervisors were bound to, and in good faith sought to, furnish." (36 Cal.2d at p. 133; see also *Geiger* v. *Board of Supervisors* (1957) 48 Cal.2d 832, 839 [313 P.2d 545] [referendum inapplicable to repeal local sales and use tax]; *Chase* v. *Kalber* (1915) 28 Cal.App. 561, 569-570 [153 P. 397] [referendum inapplicable to repeal street improvement ordinance].) No such constricting effect on court operations is herein presented. While plea bargaining may well be a useful device in reduc-

ing court congestion, unlike a courthouse it is really not an *essential* prerequisite to the administration of justice. Moreover, any effect upon the criminal justice system from restrictions upon plea bargaining would be largely speculative and would not appear on the face of Proposition 8. That measure's *conditional* prohibition against plea bargaining appears to apply only to the postindictment or postinformation stage, and only with respect to "serious felonies" as defined therein. Bargaining may continue with respect to lesser offenses. Moreover, even as to serious felonies, bargaining may proceed if material witnesses or evidence become unavailable, or if the plea would not substantially reduce the expected sentence. Finally, the Legislature by a two-thirds vote may restore plea bargaining in *all* cases.

For similar reasons, we reject petitioners' assertion that a "breakdown of the justice system" will inevitably result from (1) giving crime victims an opportunity to appear in both felony and misdemeanor cases, and (2) imposing greater punishment on defendants whose multiple offenses are tried separately. Assuming arguendo that petitioners' characterization of the legal effect of Proposition 8 is correct in these respects, any supposed "breakdown" is wholly speculative. Unlike petitioners, we cannot presume that most crime victims will accept the opportunity (and accompanying embarrassment and inconvenience) of testifying at misdemeanor trials, or that most prosecutors will forego the obvious concrete advantages of consolidated trials in the hope of securing an aggravated term for "habitual" offenders.

Petitioners next predict that Proposition 8's more severe sentencing provisions will increase California's prison population to an extent exceeding the state budget for prison expenditures. Again, the point is entirely conjectural; one might as readily argue that the measure will deter persons who otherwise might resort to crime, thereby *reducing* the prison population. Either contention involves pure guesswork and, in any event, we find no authority for the proposition that an initiative measure may be declared invalid solely by reason of the high financial cost of implementing it.

Finally, petitioners assert that Proposition 8's creation of a "right of safety" for students and staff of public schools "might very well herald the end of public education as we know it." Petitioners suggest that enforcement of the right of safety might entail substantial increased expenditures for school security guards, safety devices, and payments of tort damages and legal fees at the cost of books, equipment, and more

traditional operational and maintenance expenses. Yet the implementation of comparably broad constitutional rights, such as the right to pursue *and obtain* "safety" (Cal. Const., art. I, § 1) has not produced any such financial ruin. In any event, we need not speculate on these matters for, as we have indicated, the mere possibility that implementation of Proposition 8 might entail substantial additional public funding is not a proper ground for invalidating the measure.

We conclude that Proposition 8 does not on its face constitute an undue impairment of essential governmental functions under the *Simpson* rule.

V. CONSTITUTIONAL REVISION OR AMENDMENT

(6) Petitioner's final argument is that Proposition 8 is such a "drastic and far-reaching" measure as to constitute a "revision" of the state Constitution rather than a mere "amendment" thereof. Faced with an identical argument in *Amador*, we acknowledged, "although the voters may accomplish an amendment by the initiative process, a constitutional revision may be adopted only after the convening of a constitutional convention and popular ratification or by legislative submission to the people." (22 Cal.3d at p. 221; see Cal. Const., art. XVIII.)

In evaluating this contention, we employ a dual analysis, examining both the quantitative and qualitative effects of Proposition 8 upon our constitutional scheme. (*Amador*, 22 Cal.3d at p. 223.)

On its face, the measure has a limited quantitative effect, repealing only one constitutional section (art. I, § 12, right to bail), and adding another (art. I, § 28, right to restitution, safe schools, truth-in-evidence, bail and use of prior convictions). We are satisfied that such a change is not "so extensive . . . as to change directly the 'substantial entirety' of the Constitution by the deletion or alteration of numerous existing provisions . . . ." (*Ibid.*; see *Livermore* v. *Waite* (1894) 102 Cal. 113, 118-119 [36 P. 424].)

From a qualitative point of view, while Proposition 8 does accomplish substantial changes in our criminal justice system, even in combination these changes fall considerably short of constituting "such far reaching changes in the nature of our *basic governmental plan* as to amount to a revision . . . ." (*Amador*, 22 Cal.3d at p. 223, italics added; see *McFadden* v. *Jordan, supra*, 32 Cal.2d 330, 348.)

In urging that Proposition 8 effects a constitutional revision petitioners envision two significant consequences from the measure's limitation upon plea bargaining and its creation of a right to safe schools: (1) the inability of the judiciary to perform its constitutional duty to decide cases, particularly civil cases; and (2) the abridgement of the constitutional right to public education. As we have already indicated, however, petitioners' forecast of judicial and educational chaos is exaggerated and wholly conjectural, based primarily upon essentially unpredictable fiscal or budgetary constraints. In *Amador*, we discounted similar dire predictions that the adoption of article XIII A of the state Constitution (Prop. 13 on the June 1978 primary ballot) would result in a loss of "home rule" and the conversion of our governmental framework from "republican" to "democratic" in form. (22 Cal.3d at p. 224.) We observed that "nothing on the face of the article" compels such results (p. 225), nor confirms that the article "necessarily and inevitably" will produce those feared results (p. 226).

It is further suggested that because of its reference to various sections of the Evidence Code and Penal Code, Proposition 8 thereby somehow delegates to the Legislature the power to make future constitutional amendments merely by amending the provisions of those statutes.

No such amendments have as yet taken place, of course, and the propriety or validity of any such amendment poses questions which are not presently before us. Moreover, no authority is cited for the proposition that the Constitution may not incorporate by reference the terms of an existing statute, or authorize the Legislature to define terms or modify rules upon which constitutional provisions are based. A random inspection of the Constitution readily reveals the fallacy of these arguments. There is ample contrary precedent. (As to the first proposition, see, e.g., art. IV, § 28, subd. (a); art. XIX, §§ 7, 9, and as to the second, see, e.g., art. II, § 3; art. XII, § 3; art. XIII, § 3 subd. (k).)

For the above reasons, nothing contained in Proposition 8 necessarily or inevitably will alter the basic governmental framework set forth in our Constitution. It follows that Proposition 8 did not accomplish a "revision" of the Constitution within the meaning of article XVIII.

VI. CONCLUSION

In *Associated Home Builders, etc., Inc.* v. *City of Livermore* (1976) 18 Cal.3d 582, 591 [135 Cal.Rptr. 41, 557 P.2d 473, 92 A.L.R.3d

1038], Justice Tobriner, referring to the law creating the initiative and referendum procedures, said: "Drafted in light of the theory that all power of government ultimately resides in the people, the amendment speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them. Declaring it 'the duty of the court to jealously guard this right of the people' [citation], the courts have described the initiative and referendum as articulating 'one of the most precious rights of our democratic process' [citation]. '[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it.' [Citations.]" (*Ibid.*, fns. omitted.)

Consistent with our firmly established precedent, we have jealously guarded this precious right, giving the initiative's terms a liberal construction, and resolving reasonable doubts in favor of the people's exercise of their reserved power. We conclude that Proposition 8 survives each of the four constitutional challenges raised by petitioners.

The alternative writ previously issued is discharged and the peremptory writ is denied.

Newman, J., Kaus, J., and Reynoso, J., concurred.

BIRD, C. J.—I respectfully dissent. Today, a bare majority of this court obliterates one section of the state Constitution by effectively repealing the single-subject rule. It then proceeds to wink at other violations of the Constitution, thereby setting dangerous precedents and giving future draftsmen of initiative measures the message that they may proceed unrestrained by the Constitution.

I.

Petitioners challenge the validity of Proposition 8, the "Victims' Bill of Rights" initiative, submitted to the voters on June 8, 1982. This court must decide whether the draftsmen of the initiative (1) violated the Constitution's single-subject rule (Cal. Const., art. II, § 8, subd. (d)); (2) failed to disclose on the face of the initiative the full purpose and effect of its provisions in violation of article IV, section 9; or (3) illegally revised the Constitution (see art. XVIII, §§ 1-3).

After this court declined to consider the constitutional validity of Proposition 8 before the primary election, the Secretary of State placed the measure on the June ballot. (See *Brosnahan* v. *Eu* (1982) 31 Cal.3d 1, 4 [181 Cal.Rptr. 100, 641 P.2d 200].) The initiative was approved by 56 percent of the voters.

The day after the primary election, three taxpayers filed a petition for writ of mandate and/or prohibition in the Court of Appeal, challenging the constitutionality of Proposition 8. On June 14th, the Attorney General petitioned this court to transfer the cause from the Court of Appeal. His petition was granted, the cause was transferred, and an alternative writ of prohibition was issued. Directly thereafter, the case was set for oral argument.

The issues presented are of great public importance, and the parties have properly invoked the exercise of this court's original jurisdiction. (See *Amador Valley Joint Union High Sch. Dist.* v. *State Bd. of Equalization* (1978) 22 Cal.3d 208, 219 [149 Cal.Rptr. 239, 583 P.2d 1281] [hereafter *Amador Valley*].)

This court must decide whether the "multifarious" provisions of Proposition 8 violate the people's mandate as set forth in the California Constitution that no initiative may contain more than a single subject.

The initiative contains a plethora of provisions.[1] The first section labels the proposal the "Victims' Bill of Rights." The next two amend the California Constitution, the first by repealing section 12 of article I,[2] and the second by adding a new section 28 to article I.

The new section 28 provides that (1) "all persons who suffer losses" as a result of crime have the right to restitution from those convicted of the crimes (subd. (b)); (2) students and staff of public schools have "the inalienable right" to attend "safe, secure and peaceful" campuses (subd. (c)); (3) with certain exceptions, "relevant evidence shall not be excluded in any criminal proceeding" (subd. (d)); (4) the constitutional right to bail is curtailed (subd. (e)); and (5) all prior felony convictions,

[1]See appendix for the full text of the initiative.

[2]Section 12 of article I provided, "A person shall be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great. Excessive bail may not be required. [¶] A person may be released on his or her own recognizance in the court's discretion."

"whether adult or juvenile," shall be used for impeachment or sentence enhancement in subsequent criminal proceedings (subd. (f)).

The next six sections of the initiative add five new statutes to the Penal Code and three to the Welfare and Institutions Code.[3] These sections purport to (1) prohibit the introduction of evidence concerning the lack of capacity to form the requisite mental state in a criminal trial (§ 4); (2) redefine the defense of not guilty by reason of insanity (*ibid.*); (3) provide a five-year sentence enhancement for each separate prior conviction of a "serious felony" (§ 5); (4) permit victims of crime, or next of kin of deceased victims, to attend sentencing and parole hearings in order to state their views, and require the court or parole board to consider such statements (§ 6); (5) require the court or the parole board to consider public safety before granting probation or parole (*ibid.*); (6) strictly limit plea bargaining in any case where an information or indictment charges a "serious felony" or certain other crimes (§ 7); (7) prevent the commitment to the Youth Authority of anyone convicted of a "serious felony" committed when the person was 18 years of age or older (§ 8); and (8) repeal those provisions of the Welfare and Institutions Code governing mentally disordered sex offenders (§ 9).

Article II, section 8, subdivision (d) of the California Constitution mandates that "An initiative measure embracing more than one subject may not be submitted to the electors or have any effect."[4] This single-subject limitation on initiative measures was adopted by a 2-1 margin at the 1948 general election.[5]

A similar limitation on the Legislature, requiring that statutes embrace but a single subject, has been a feature of our state Constitution since 1849. (See current art. IV, § 9.)[6] California is not unique in that

[3]Proposition 8 declares that a new section 1767 "is added to the Welfare and Institutions Code." However, two statutes with that identical section number already exist. (See Stats. 1981, ch. 588, § 2, No. 5 Deering's Adv. Legis. Service, p. 174, and Stats. 1981, ch. 591, § 1, No. 5 Deering's Adv. Legis. Service, p. 179.) How the new section is intended to interrelate with the preexisting statutes is not addressed in the initiative measure.

[4]All constitutional references are to the California Constitution unless otherwise noted.

[5]Initially adopted as article IV, section 1c, the provision was renumbered article IV, section 22 in 1966. In 1976, it was placed in section 8 of article II as subdivision (d).

[6]The legislative single-subject rule was initially a feature of article IV, section 25 of the Constitution of 1849. When a new Constitution was adopted in 1879, the rule was shifted to article IV, section 24, where it remained until the 1966 constitutional revision relocated it to its present position.

regard, for similar provisions are found in the constitutions of most states. (See Ruud, *"No Law Shall Embrace More Than One Subject"* (1958) 42 Minn.L.Rev. 389, 389.)

In California, the legislative single-subject rule has long been interpreted as requiring that all the provisions of a legislative enactment be "interdependent" and "'reasonably germane' to each other." (See, e.g., *Amador Valley, supra*, 22 Cal.3d at p. 230; *Evans* v. *Superior Court* (1932) 215 Cal. 58, 62 [8 P.2d 467], and cases cited; *Ex parte Liddell* (1892) 93 Cal. 633, 637-638 [29 P. 251].) "Provisions governing projects *so related and interdependent as to constitute a single scheme* may be properly included within a single act. . . . A provision which . . . is auxiliary to and promotive of [the act's] main purpose, or has a necessary and natural connection with such purpose is germane within the rule." (*Evans, supra*, 215 Cal. at pp. 62-63, italics added.)

This standard has frequently been applied to legislative enactments. (See, e.g., *Metropolitan Water Dist.* v. *Marquardt* (1963) 59 Cal.2d 159, 172-173 [28 Cal.Rptr. 724, 379 P.2d 28]; *Barber* v. *Galloway* (1924) 195 Cal. 1, 12-13 [231 P. 34]; see also *Tarpey* v. *McClure* (1923) 190 Cal. 593, 597 [213 P. 983] [examining whether the provisions of an act were "legitimately and intimately connected one with another"]; *Robinson* v. *Kerrigan* (1907) 151 Cal. 40, 51 [90 P. 129] [considering whether provisions were "necessary to make [an act] effective and symmetrical" or "reasonably necessary as means for attaining the object of the act"]; *Ex parte Liddell, supra*, 93 Cal. at pp. 637-638.)

The important concerns underlying the legislative single-subject limitation were noted by this court in 1881. "'The practice . . . of comprising in one bill subjects of a diverse and antagonistic nature, in order to combine in its support members who were in favor of particular measures, but neither of which could command the requisite majority on its own merits, was found to be not [only] a corruptive influence in the Legislature itself, but destructive of the best interests of the State.'" (*People* v. *Parks* (1881) 58 Cal. 624, 640.)

The initiative and referendum provisions of our state Constitution were adopted in 1911. At that time, no specific provision of the Constitution limited initiatives to a single subject. However, the policies underlying the legislative single-subject requirement apply with equal, if not greater, force to initiative measures.

Legislative enactments usually are adopted only after a lengthy process of public hearings, numerous readings and votes by each house of the Legislature. In addition, the Governor has the opportunity to review each enactment. (See Note, *The California Initiative Process: A Suggestion for Reform* (1975) 48 So.Cal.L.Rev. 922, 931-932 [hereafter, *The California Initiative Process*].)

By contrast, initiatives are drafted only by their proponents, so there is usually no independent review by anyone else. There are no public hearings. The draftsmen so monopolize the process that they completely control who is given the opportunity to comment on or criticize the proposal before it appears on the ballot.

This private process can and does have some detrimental consequences. The voters have no opportunity to propose amendments or revisions. (Compare art. XVIII, § 1 [legislatively proposed constitutional amendment or revision may be amended even after the initial approval by the Legislature if the people have not yet voted on the proposal].) "[T]he only expression left to all other interested parties who are not proponents is the 'yes' or 'no' vote they cast." (*The California Initiative Process, supra*, 48 So.Cal.L.Rev. at p. 933; *Taschner* v. *City Council* (1973) 31 Cal.App.3d 48, 64 [107 Cal.Rptr. 214].)

Since the only people who have input into the drafting of the measure are its proponents, there is no opportunity for compromise or negotiation. "The result of this inflexibility is that more often than not a proposed initiative represents the most extreme form of law which is considered politically expedient." (*Schmitz* v. *Younger* (1978) 21 Cal. 3d 90, 99 [145 Cal.Rptr. 517, 577 P.2d 652] (dis. opn. of Manuel, J.).)

Finally, the initiative process renders it difficult for the individual voter to become fully informed about any particular proposal. "Voters have neither the time nor the resources to mount an in depth investigation of a proposed initiative." (*Ibid.*; see also *The California Initiative Process, supra*, 48 So.Cal.L.Rev. at pp. 934-939.)

"'The majority of qualified electors are so much interested in managing their own affairs that they have no time carefully to consider measures affecting the general public. A great number of voters undoubtedly have a superficial knowledge of proposed laws to be voted upon, which is derived from newspaper comments or from conversation with their associates.... [T]he assertion may safely be ventured that it is

only the few persons who earnestly favor or zealously oppose the passage of a proposed law, initiated by petition, who have attentively studied its contents and know how it will probably affect their private interests. The greater number of voters do not possess this information . . . .'" (*Wallace* v. *Zinman* (1927) 200 Cal. 585, 592 [254 P. 946, 62 A.L.R. 1341].)

As a direct result of these concerns, the Legislature placed on the general election ballot in 1948 a constitutional amendment to provide that initiative measures be limited to one subject. The ballot pamphlet argument in support of this measure noted the dangers of voter confusion and lack of information inherent in the initiative process.[7] That statement informed the voters that the adoption of a single-subject restriction in the Constitution would help ensure that the electorate would have an opportunity to fully analyze and evaluate an initiative measure. (Ballot Pamp., Gen. Elec. (Nov. 2, 1948) pp. 8-9.)

The ballot pamphlet statement further emphasized the risk that a multi-subject initiative might mislead the electorate as to the true import of the measure. This, in turn, would lead the voters to adopt an initiative because they favored some of its provisions, without realizing the effect of other, less-publicized sections.

"Today, any proposition may be submitted to the voters by initiative and it may contain any number of subjects. By this device a proposition may contain 20 good features, but have *one bad one secreted* among the 20 good ones. The busy voter does not have the time to devote to the study of long, wordy, propositions and must rely upon such sketchy information as may be received through the press, radio or picked up in general conversation. If improper emphasis is placed upon one feature and the remaining features ignored, or if there is a failure to study the entire proposed amendment, the voter may be misled as to the over-all effect of the proposed amendment. [¶] [*The single-subject rule*] *entirely eliminates the possibility of such confusion inasmuch as it will limit each proposed amendment to one subject and one subject only.*" (Ballot Pamp., Gen. Elec. (Nov. 2, 1948) pp. 8-9, italics added.)

The single-subject amendment may have been spurred by the initiative measure analyzed in *McFadden* v. *Jordan* (1948) 32 Cal.2d 330

[7]Initiative ballot pamphlet arguments are the equivalent of the legislative history of a legislative enactment. (*People* v. *Knowles* (1950) 35 Cal.2d 175, 182 [217 P.2d 1]; see also *Carter* v. *Seaboard Finance Co.* (1949) 33 Cal.2d 564, 580-581 [203 P.2d 758].)

[196 P.2d 787]. (See *Amador Valley, supra*, 22 Cal.3d at p. 229.) In *McFadden*, this court invalidated an initiative proposal on the ground that it represented a revision of the Constitution, not an amendment. (See *post*, part II.) The court stressed the dangers inherent in a proposal containing "multifarious" provisions. "It does not give the people an opportunity to express approval or disapproval severally as to each major change suggested; rather does it, apparently, have the purpose of aggregating for the measure the favorable votes from electors of many suasions who, wanting strongly enough any one or more propositions offered, might grasp at that which they want, tacitly accepting the remainder. Minorities favoring each proposition severally might, thus aggregated, adopt all." (*McFadden, supra*, 32 Cal.2d at p. 346.)

These statements reflect the separate dangers posed by an initiative which contains multiple subjects. First, there is a risk that voters will be unaware of the contents of an initiative's disparate provisions. Second, there is a danger that an initiative will pass not because a majority of the voters favor any or all of its provisions, but because minorities who advocate some of its parts will aggregate their votes, giving it a *false* majority. Finally, the combination of numerous subjects in one initiative deprives the voters of their right to vote independently on the merits of each separate proposal. Voters who favor some of a measure's provisions must choose to vote for all or none.

The single-subject rule, adopted by the electorate in 1948, addresses all of these problems. The requirement that an initiative embrace but one subject narrows the breadth of the issues which a voter must examine and evaluate. It enables the voter to obtain a clear idea of the contents of an initiative from a quick survey of its general provisions. In addition, a voter's freedom of choice is protected by preventing initiative sponsors from forcing the electorate to vote for undesired provisions in order to enact favored sections.

Thus, the draftsmen of an initiative measure are required to submit their proposal in a form which enables the voters to make intelligent, informed and discriminating choices. By adopting a constitutional amendment which minimizes the potential for deception, fraud, forced compromises and false majorities, the people of this state have indicated a clear desire to protect themselves from the dangers posed by multi-subject initiatives.

The single-subject rule does not limit the initiative power of the people, but rather it requires that drafters of initiative measures state their proposals in a way which permits intelligent and informed choices, free from deception and forced compromises. It serves, therefore, to preserve the integrity of the initiative process and not to limit the power of the people.

Shortly after the single-subject rule for initiatives was adopted, this court was called upon to interpret the requirement in *Perry v. Jordan* (1949) 34 Cal.2d 87 [207 P.2d 47]. The initiative challenged in that case sought to repeal an article of the Constitution concerning aid to the aged and blind. The court found that the article attacked by the initiative constituted but one subject. That article covered the level of aid, eligibility requirements, and the machinery necessary to administer the aid program. The court held that these provisions were "'so related and interdependent as to constitute a single scheme,'" and, therefore, did not violate the single-subject rule. (*Id.*, at pp. 92-93, quoting *Evans* v. *Superior Court, supra*, 215 Cal. at p. 62.)

Recently, this court unanimously reaffirmed the standards set forth in *Perry* and *Evans*. The court held that compliance with the single-subject rule requires that an initiative's provisions be "*reasonably interrelated and interdependent, forming an interlocking 'package' . . . .*" (*Amador Valley, supra*, 22 Cal.3d at p. 231, italics added.)

The decision in *Amador Valley* emphasized the importance of the relationship among an initiative's separate features. In rejecting a single-subject attack on an initiative that added article XIII A to the Constitution, this court did not rely on the fact that the initiative's provisions fell within the general concept "taxation." Rather, the court examined the interrelationship among the initiative's four provisions:

> The first two provisions specifically limited property taxes. The third and fourth limited the method by which other state and local taxes could be altered. Petitioners in *Amador Valley* argued that the provisions regarding state and local taxation did not involve the same subject as those regarding property taxes. The court, however, concluded that the limits on nonproperty taxes were necessary to effectuate the property tax relief which was the central subject of the initiative. "[A]ny tax savings resulting from the operation of sections 1 and 2 could be withdrawn or depleted by additional or increased state or local levies of

other than property taxes . . . ." (*Id.*, at p. 231.) Therefore, all four of the initiative's sections were necessary to the success of its scheme.

Indeed, interdependence of that initiative's provisions was the precise basis on which this court carefully distinguished the decision of the Arizona Supreme Court in *Kerby* v. *Luhrs* (1934) 44 Ariz. 208 [36 P.2d 549, 94 A.L.R. 1502]. The Arizona case held that an initiative which proposed a new tax on copper production, a new method of evaluating public utility property, and a new state tax commission, violated the single-subject requirement of the Arizona Constitution.

This court observed that although the provisions at issue in the Arizona case all dealt with "taxation," they were not "interdependent" or "interlock[ing]." Any of the provisions in *Kerby* "singly, could have been adopted 'without the slightest need of adopting' the others." (*Amador Valley, supra*, 22 Cal.3d at p. 232.) By contrast, "the four elements [of the initiative measure in *Amador Valley*] *not only pertain to the general subject of taxation, but also are reasonably interdependent and functionally related to each other* . . . . Each of the four basic elements of [the initiative] was designed to interlock with the others to assure an effective tax relief program." (*Ibid.*, italics added.)

Respondents are incorrect when they argue that the requirement that an initiative's provisions be "reasonably interrelated and interdependent" was abandoned in *Fair Political Practices Com.* v. *Superior Court* (1979) 25 Cal.3d 33, 37-43 [157 Cal.Rptr. 855, 599 P.2d 46]. The plurality opinion in that case does *not* support respondent's position. First, only three justices joined the lead opinion. Neither the analysis nor the language employed in that opinion constitutes binding precedent, since it did not represent a majority view of this court. (*Del Mar Water, etc. Co.* v. *Eshleman* (1914) 167 Cal. 666, 682 [140 P. 591].)

In addition, although the plurality opinion purported to rely on the "reasonably germane" standard, it curiously failed to apply this court's longstanding interpretation of that term as requiring interdependence of all the provisions of an initiative. (See *Evans* v. *Superior Court, supra*, 215 Cal. at pp. 62-63.) Respondents stretch both law and logic when they argue that three justices of this court overruled a long line of cases sub silentio.

Finally, nothing in the *result* of *Fair Political Practices Com.* indicates that the "interdependence" test has been discarded. As former Justice Tobriner noted in his concurrence, the initiative at issue in that case satisfied even the stricter requirement that its provisions "'must be functionally related in furtherance of a common underlying purpose.'" (*Fair Political Practices Com., supra*, 25 Cal.3d at p. 50, quoting *Schmitz* v. *Younger, supra*, 21 Cal.3d at pp. 99-100 (dis. opn. of Manuel, J.). (See discussion *post*, at p. 277.)

The single-subject rule thus requires that the separate provisions of an initiative submitted to the voters not only "pertain" to the same subject, but also be "'reasonably germane' to each other." (*Amador Valley, supra*, 22 Cal.3d at p. 230.) The various parts must "interlock" so as to form a cohesive program aimed at the specific purpose of the initiative. (*Ibid.*) Evaluated in light of this standard, Proposition 8 does not meet the single-subject requirement of our state Constitution.[8]

The multiple provisions of Proposition 8 are much broader than the initiative's self-proclaimed title or the official title prepared for the ballot pamphlet by the Attorney General. The proposition denominated itself the "Victims' Bill of Rights," while the Attorney General called it the "Criminal Justice" initiative. Both of these appellations are deceptive.

Initially, only two aspects of the initiative relate directly to victims—restitution and victims' statements at sentencing and parole hearings. The numerous sections of the initiative revising criminal procedures may have an incidental effect on the victims of crime, but some may actually *harm* victims rather than protect them.

For instance, the constitutional amendment providing that all relevant evidence is admissible in criminal proceedings appears to eliminate statutory protections for victims of crime, such as the Evidence Code provision authorizing a court to bar public release of a rape vic-

[8]Some members of the court have suggested that the single-subject limitation applicable to initiatives (see art. II, § 8) imposes a stricter standard than that applicable to legislative enactments (see art. IV, § 9). (See dis. opn. of Manuel, J., in *Schmitz* v. *Younger, supra*, 21 Cal.3d at pp. 98-100; conc. opn. of Tobriner, J., in *Fair Political Practices Com.* v. *Superior Court, supra*, 25 Cal.3d at p. 50; see also conc. and dis. opn. of Mosk, J., in *Brosnahan* v. *Eu, supra*, 31 Cal.3d at p. 9, fn. 3. But see plurality opinion in *Fair Political Practices Com., supra*, at pp. 40-42.) This question need not be addressed here since the initiative so clearly violates both standards.

tim's address and telephone number. (See Evid. Code, § 352.1.) Indeed, the California State Coalition of Rape Crisis Centers, appearing as amicus curiae in support of petitioners, argues forcefully that Proposition 8 seriously weakens legal protections for rape victims. The Coalition claims that the potential now exists for the victim again to become the "second defendant" at a rape trial.[9]

The "Truth-in-Evidence" provision also curtails other rights presently enjoyed by our citizens. It appears to authorize the admission of evidence of a victim's past conduct or character that might otherwise have been excluded. (See, e.g., Evid. Code, §§ 786, 787, 1101, 1104; Gov. Code, § 7489.)

Consider also the limitation on plea bargaining which may pose a serious problem for some victims. Many victims of crime—particularly young children and victims of sexual assaults—do not want to be forced to relive their ordeal on the witness stand at a trial. They may prefer that the charges against their assailants be settled before trial by means of a reasonable plea bargain, to avoid the agony of testifying at public trial. However, in many situations Proposition 8 bars the court and the prosecutor from considering a negotiated settlement to protect the victim. Clearly, in many of its most important provisions the proposition is not a "Victims' Bill of Rights" at all.

The voters were misled by the titles proposed by the draftsmen and the Attorney General. The section of the initiative creating a right to "safe, secure and peaceful" schools is not encompassed within either of the titles set forth in the ballot pamphlet. The right to personal safety, security and peace is not limited to safety from criminal violence. The initiative purports to grant to students and staff a right to protection from *every* danger that might threaten their safety, security or peace. This undefined right could encompass such diverse hazards as acts of nature, acts of war, environmental risks, building code violations, disruptive noises, disease and pestilence, and even psychological or emotional threats, as well as crime. The right to protection from noise or fire is not the same subject as "victims' rights" or "criminal justice."[10]

[9]Further, rape crisis counselors have submitted affidavits asserting that they know of rape victims who, before Proposition 8 was enacted, intended to testify against their assailants, but who now have decided not to bring charges against alleged rapists because of the passage of Proposition 8.

[10]The Attorney General argues that this section of the initiative is intended only to guarantee protection from crime in the schools, and that, therefore, it protects "poten-

In an effort to find a formula which covers all the varied provisions of Proposition 8, the Attorney General is forced to propose a single subject that is broader than the titles presented to the voters. Apparently, he has abandoned the proponents' earlier argument in *Brosnahan* v. *Eu, supra*, 31 Cal.3d 1, that the single subject of this initiative is "public safety." He now claims that victims' rights must be interpreted more broadly to include "potential" as well as actual victims of crime. Thus, he contends that the entire proposition falls within a single subject which he defines as "reform of the criminal justice system as it relates to the actual and potential victims of crime."

The initial flaw in this argument is that it does not explain the relevance of the provision guaranteeing "safe, secure and peaceful" schools. That provision is not limited to protecting persons from crime.

The Attorney General's argument has additional shortcomings. The fact that he must transform the "Victims' Bill of Rights" into the "Victims' and Potential Victims' Bill of Rights" in an attempt to encompass all of its provisions within a "single subject" illustrates a fatal problem with this initiative. As used by the Attorney General, "potential victims" of crime includes all of us in virtually every aspect of our lives. If this court were to accept such an expansive definition of a single subject, initiatives could embrace hundreds of unconnected statutes, countless rules of court and volumes of judicial decisions, as well as completely alter the complex interrelationships of our society.

The single-subject rule would be rendered meaningless if it could be complied with simply by devising some general concept expansive enough to encompass all of an initiative's provisions. If the requirement of the rule could be so easily met, *any* initiative could be upheld by finding that all of its provisions fell within some catchall subject such as "the general welfare" or "the citizenry."

As Justice Mosk noted in *Brosnahan* v. *Eu, supra*, "The constitutional requirement is not satisfied by attaching a broad label to a measure and then claiming that its provisions are encompassed under that wide umbrella. Otherwise, initiatives which refer to 'property' or 'women' or

tial" victims. However, the language of the proposition is not so limited. It affords students and staff an "inalienable right" to "safe, secure and peaceful" schools. There is no indication that this broadly worded right was intended to protect against only one particular danger.

'public welfare' or the 'pursuit of happiness' could also be held to constitute one subject, no matter how diverse their terms." (31 Cal.3d at p. 11 (conc. and dis. opn.); see also *Fair Political Practices Com.* v. *Superior Court, supra*, 25 Cal.3d at p. 57 (dis. opn. of Manuel, J.) ["The single subject rule . . . is not concerned with umbrellas; it is concerned with *subjects*."].)

The Attorney General is correct in noting that this court has upheld measures addressing subjects as broad as "probate" (*Evans* v. *Superior Court, supra*, 215 Cal. 58), "water resources" (*Metropolitan Water Dist.* v. *Marquardt, supra*, 59 Cal.2d 159), and "real property tax relief" (*Amador Valley, supra*, 22 Cal.3d 208). However, these "single subjects" differ in two crucial respects from the subject proposed by the Attorney General in this case.

First, each of the subjects upheld in *Evans, Metropolitan Water Dist.* and *Amador Valley* is focused on a well-defined aspect of our society. None is as broad or as amorphous as "potential victims."

Equally important, the statutes and initiatives upheld in those cases passed constitutional muster because their provisions were all *interrelated*. Where the subject of a proposal encompasses multiple provisions, the measure will satisfy the requirements of the single-subject rule only if those provisions interrelate so as to form a unitary whole. This court has consistently held that the "reasonably germane" standard of the single-subject rule demands that the provisions of an act or initiative be "so related and interdependent as to constitute a single scheme . . . ." (*Evans* v. *Superior Court, supra*, 215 Cal. at p. 62; *Amador Valley, supra*, 22 Cal.3d at p. 230; *Metropolitan Water Dist.* v. *Marquardt, supra*, 59 Cal.2d at p. 173.)

The rule articulated in these cases controls here. Any single provision of Proposition 8 "could have been adopted 'without the slightest need of adopting' the others." (*Amador Valley, supra*, 22 Cal.3d at p. 232, quoting *Kerby* v. *Luhrs, supra*, 36 P.2d at p. 554.) Even if a given provision of Proposition 8 may be said to interlock with another, the remainder are completely *independent* and *unnecessary* to the effective implementation of that interlocking area.

The provision creating a right to safe schools is the most striking example of this independence. None of the other provisions of this initiative are even remotely connected to implementing that right.

Justice Mosk stated it well. "Although the measure piously declares that safe schools are a right, it does not contain one provision referring to schools. A voter or the signer of a petition would reasonably expect that a lengthy amendment which states in one of its first paragraphs that 'students and staff have the right to be safe and secure in their persons' on campus would contain some reference to and propose some protection of that right in its substantive provisions. . . . [T]his expectation is not fulfilled." (*Brosnahan v. Eu, supra*, 31 Cal.3d at pp. 11-12 (conc. and dis. opn. of Mosk, J.).)

Further, under a faithful interpretation of the single-subject rule, the remaining provisions of Proposition 8 clearly "embrac[e] more than one subject." The measure is replete with proposals for important policy changes, many of which are enormously complex. This aggregation into one initiative measure of so many far-reaching, yet unrelated, proposals sharply conflicts with the fundamental concerns underlying the single-subject rule.

The "Truth-in-Evidence" provision presents a striking illustration of the multiplicity of subjects contained in Proposition 8. That section undertakes a major revision of a complicated area of the law. It appears in effect to amend dozens of sections of the Evidence Code and overturn numerous judicial decisions.

The constitutional and practical ramifications of these changes are startling. Every criminal proceeding in the state would be affected, and each trial will have its own ad hoc rules of evidence. Yet, this wholesale revision of our state's rules of evidence was insinuated into an initiative containing such other controversial and disparate subjects as bail and own-recognizance release, the insanity defense, plea bargaining, juvenile justice, and the laws governing mentally disordered sex offenders.

The consequences of the proposition's limitation on plea bargaining could be even greater than those resulting from the changes wrought by the "Truth-in-Evidence" section. Over 95 percent of the criminal convictions in California have heretofore been reached through plea bargains. (Cal. Dept. of Justice, Crime & Delinquency in Cal. (1981) p. 48.) The voters were not informed of the possible effect of a wholesale ban in the superior court on a practice so integral to the present criminal justice system. As a result, they were never given the opportunity to weigh the possible high price they might have to pay for a vast increase in the number of criminal trials. They were never made aware

of the potential impact of this provision on the large backlog of civil cases awaiting trial. Once again, these important policy considerations were buried amongst the mass of unrelated subjects contained in Proposition 8. As a result, the people were denied their right to consider and vote selectively on the merits of this provision.

Also, consider the provision of the initiative which purports to mandate the use of all prior felony convictions, "adult or juvenile," for impeachment and sentence enhancement. With these few words, juvenile court adjudications may have been transformed into the equivalent of adult convictions. Such a change represents a fundamental alteration of the policies which have long required a distinction between the treatment of juvenile and adult offenders. Yet, the voters were forced to pass judgment on this major change as only one small portion of an all-or-nothing package involving many unrelated but equally basic changes.

Other provisions of the initiative also demonstrate that Proposition 8 confronted the voters with an unconstitutional grouping of unconnected subjects. For example, the right to restitution is not related to the rules of evidence, bail release or the use of prior convictions. The provisions governing diminished capacity and insanity, while arguably related to each other, are not interdependent with the provisions governing victims' statements at sentencing and parole hearings or with the limitations on commitments to the Youth Authority.

Legislative developments at the time Proposition 8 was drafted and petitions circulated provide further evidence of the independence of the measure's provisions. During that period a substantial number of bills were before the Legislature relating to portions of Proposition 8. According to amicus Pacific Legal Foundation, there were more than a dozen such bills, each "closely related" to one of eleven "provisions" of the initiative measure.

Significantly, each of these bills concerned but *one field of legislation and pertained to only one of the provisions of Proposition 8.* None had a scope even remotely resembling that of the initiative. By contrast, the draftsmen of this initiative sought to collect and combine into one package *all* of the diverse legislative fields addressed by all these individual bills.[11]

[11]It is interesting to note that the Legislature has provided further indication that it considered the changes attempted by Proposition 8 to be distinctly separate subjects. Thus, the Legislature placed on the June ballot Proposition 4, dealing with bail, and by

The narrow focus of the bills before the Legislature suggests that it viewed each of them as an independent subject properly submitted as a separate proposal. Certainly, the single-subject rule applies with no less force to the draftsmen of initiatives than to legislators. The sheer number and diversity of legislative bills sought to be wedged without interlock into one initiative is further evidence that the measure embraced more than one subject.

The Attorney General points to the result in *Fair Political Practices Com.* v. *Superior Court, supra*, 25 Cal.3d 33 to support his claim that Proposition 8 embraces but one subject. His reliance on that case is misplaced. The Fair Political Practices initiative concerned a comprehensive attempt to lessen the influence of wealth on California government and elections. There, the court apparently felt that each of its provisions was necessary to achieving that goal, by preventing the mere shift of wealth from one sphere of political influence to another. The provisions were also linked by common means of enforcement. Moreover, unlike Proposition 8, none of the provisions contradicted the initiative's general purpose, and none was unrelated to the common goal.

Finally, the general subject of the initiative, the corruptive influence of money in politics, was specifically addressed by a constitutional provision which reserves to the people the right to act by initiative to protect themselves against such corruption. Article IV, section 5 of the Constitution provides in pertinent part, "The Legislature shall enact laws to prohibit members of the Legislature from engaging in activities or having interests which conflict with the proper discharge of their duties and responsibilities; provided that the people reserve to themselves the power to implement this requirement pursuant to Section 22 of this article [now art. II, § 8, defining the initiative power]."

Each of these factors distinguishes the Fair Political Practices initiative from Proposition 8, and highlights the drafting deficiencies which render Proposition 8 constitutionally invalid.

Not only does Proposition 8 violate the terms of the single-subject rule as set forth in the case law, it also flouts the policy concerns underlying the voters' enactment of the rule in the first place.

separate enactment scuttled the Mentally Disordered Sex Offenders program. (See Stats. 1981, ch. 928, § 2, No. 6 Deering's Adv. Legis. Service, p. 586.) Clearly, these were not deemed to be interdependent or part of a single subject.

By lumping so many fundamental changes into one measure, the initiative effectively deprived the voters of their opportunity to consider and pass on the merits of the individual proposals. Each of these provisions created a *different* and *distinct* alteration of our constitutional or statutory framework. As a whole they did not present a coherent, interlocking program. Yet the electorate was forced to vote either "yes" or "no" on a single initiative containing this wide a variety of controversial and complex proposals.

The disparate votes on Proposition 8 and Proposition 4, a bail reform initiative on the same ballot, provide a vivid illustration of the dilemma Proposition 8 created for the voters of the state. Proposition 4 passed with over 82 percent of the electorate voting in its favor. Proposition 8 received only 56 percent of the votes cast. These figures seem to indicate that over 25 percent of the voters favored bail reform but nevertheless voted against Proposition 8 because they opposed other provisions included in the measure. Here is yet another graphic example that the voters of California were deprived of their constitutionally protected right to be able to evaluate independently each proposal of an initiative.

In essence, the draftsmen confronted the voters with a Hobson's choice, an electoral contract of adhesion. Had the separate provisions of the initiative been interdependent, it might have been reasonable to ask the electorate to vote on the entire initiative as a package. Since they were *independent*, encompassing a wide variety of disparate and conflicting concepts, the voters were deprived of their constitutional right to consider the proposals individually and to evaluate each in a more discriminating fashion.

The "multifarious" nature of this initiative created an additional problem. When the voters of California went to the polls on June 8, 1982, it is unlikely they were fully aware of all of the provisions of Proposition 8.

Can anyone seriously argue that the voters knew that Proposition 8 would (1) abolish the protection previously afforded to victims of sex crimes regarding the "exclu[sion] from evidence [of their] current address and telephone number" (Evid. Code, § 352.1); (2) permit testimony from those children and mentally incompetent persons who are "incapable of understanding the duty ... to tell the truth" (*id.*, § 701, subd. (b)); (3) authorize witnesses to testify to matters about which they have no personal knowledge (*id.*, § 702); (4) repeal the rule that

"[e]vidence of his religious belief or lack thereof is inadmissible to attack or support the credibility of a witness" (*id.*, § 789); (5) permit opinion testimony by non-expert witnesses (*id.*, § 800); and (6) authorize the trial court to exclude certain relevant evidence (*id.*, § 352)?

Those voters who relied on section 1 of the initiative may well have assumed that they were voting for a "Victims' Bill of Rights" without realizing that they were also adopting a new provision guaranteeing "safe, secure and peaceful" schools (for which they might have to pay a steep price) and substantially revising pretrial detention practices, rules of criminal evidence, criminal procedure, sentencing, and juvenile law. Similarly, those who relied on the accuracy of the title, "Criminal Justice" initiative, may well have been unaware of the provision affecting schools.

The risk that the electorate was unaware of many of Proposition 8's provisions was aggravated by the numerous inconsistencies among the initiative's various sections. The most glaring example is the contrast between the proposition's self-proclaimed title, the "Victims' Bill of Rights," and *the fact that many provisions of the initiative may actually be harmful to victims of crime.*

Additional examples abound. For instance, while one section states that generally, "relevant evidence shall not be excluded in any criminal proceeding," another section specifically requires the exclusion of evidence of lack of capacity to form a specified mental intent. (Compare Prop. 8, § 3, new art. I, § 28, subd. (d) with Prop. 8, § 4, new Pen. Code, § 25, subd. (a).) Yet another section appears to require the admission of certain *irrelevant* evidence—all prior felony convictions, whether or not relevant to credibility. (Prop. 8, § 3, new art. I, § 28, subd. (f).)

The initiative presented the additional danger of "logrolling"—aggregating the votes of those who favored parts of it into a majority for the whole, even though it was possible that some or all of its provisions were not supported by a majority of voters. Thus, those who favored better protection for victims of crime may not have favored a wholesale repeal of the state's Evidence Code, which may allow victims of crime to be subjected to searing cross-examination concerning their private lives. In like manner, those who wanted to ban plea bargaining may not have wanted to pay the high price in taxes necessary to ensure that schools are safe and secure from acts of nature or of man.

By placing these separate and quite disparate provisions in one initiative, the draftsmen of Proposition 8 deprived the voters of this state of an opportunity to analyze and vote on these provisions selectively. The people of California enacted the single-subject rule to prevent initiative draftsmen from unfairly foisting upon them just such misleading groupings of unrelated provisions.

In a final, overarching attack on petitioners' claim that the single-subject rule has been violated, the Attorney General claims that a "strict" interpretation of the rule violates precedent. However, he overlooks the fact that the standard applied here is the same as that applied in *Amador Valley*. In turn, *Amador Valley* described that standard as the "primary lesson" of another case which involved an initiative measure and was decided 30 years earlier. (22 Cal.3d at p. 230, referring to *Perry* v. *Jordan, supra*, 34 Cal.2d 87.) Even prior to *Perry*, it had long been established that the provisions of a single act should be "so related and interdependent as to constitute a single scheme." (*Evans* v. *Superior Court, supra*, 215 Cal. at p. 62.)

The single-subject rule does not prevent the submission to the voters of comprehensive programs of reform. Rather, it merely limits the form in which such programs may be presented. If proposed constitutional or statutory changes embrace more than one subject, they must be presented to the voters in more than one initiative. The proposed provisions of an initiative must be "'reasonably germane' to each other," creating a coherent, interdependent scheme. (*Amador Valley, supra*, 22 Cal.3d at p. 230.)

The single-subject requirement thus operates not as a limit on the people's reserved power to legislate by initiative, but as a *limit* on the *draftsmen* of *initiative measures*. The rule demands that initiative proposals be presented to the voters in a format that ensures the *integrity* of the cherished initiative process.

The Constitution permits the drafters of initiative measures to draw up their proposals without any input—direct or indirect—from the people. Thus, it is logical that the draftsmen are constitutionally required to submit initiatives to the electorate in coherent, single-subject packages, so that voters are able to make rational decisions that accurately and completely reflect their wishes. Just as consumers demand the right to buy what they want, the voters of this state have demanded that initiative sponsors give them the right to vote for the proposals they favor.

They have refused to be forced to accept unrelated provisions wrapped in deceptive packaging.

Initiatives which embrace more than one subject *weaken* rather than strengthen a citizen's right to vote. They threaten to undermine the *integrity* and *strength* of the whole initiative process. If the voters are confused or misled, or if they vote for or against a proposal because they favor or oppose one or two of its provisions, the initiative process has not served to implement the will of the people. Rather, it has sanctioned a warped expression of the wishes of some of those people, while *thwarting* the will of the majority. Only through careful adherence to the objective constitutional regulations governing the initiative process can the true purposes of the right to the initiative be realized. Bending those rules weakens the process, thereby diminishing the people's control over their government.[12]

[12]It is said that one picture is worth more than ten thousand words. The following is ample proof of that adage.

[Sept. 1982]

II.

In addition to the constitutional challenge based on the single-subject rule of article II, section 8, subdivision (d), there are other challenges to the presentation and enactment of Proposition 8. These include (1) whether the draftsmen failed to disclose on the face of this initiative the full purpose and effect of its provisions, in violation of article IV, section 9 and (2) whether they revised the Constitution, rather than *amended* it, thus running afoul of article XVIII, which limits the use of the initiative process to constitutional amendments. These issues are treated in order.

Failure to Disclose Full Purpose and Effect

Petitioners contend that the draftsmen of Proposition 8 failed to "disclose on [the] face [of the initiative] the full purpose and effect of its provisions," as required by article IV, section 9.

Their arguments are founded upon the last two sentences of that section. These sentences set forth a pair of rules: (1) "A statute may not be amended by reference to its title"; and (2) "A section of a statute may not be amended unless the section is re-enacted as amended."[13] Petitioners allege that the first rule was violated by that portion of Proposition 8 which repealed the law relating to mentally disordered sex offenders (M.D.S.O.). (Prop. 8, § 9.) They further contend that the "Truth-in-Evidence" provision amended by implication nearly all of the Evidence Code. Since none of the Evidence Code was "re-enacted as amended," they contend a violation of the second rule resulted.

[13]Although certain constitutional amendments were adopted in 1966 "for purposes of clarity," in fact they introduced a degree of ambiguity into section 9. (Cal. Const. Revision Com., Proposed Revision of Cal. Const. (1966) p. 34.)

Section 9 consists of four sentences, each purportedly concerning "statute[s]." However, as is immediately apparent from both context and history, the word "statute" as used in the first two sentences means something quite different from the word as employed in the final sentences. The opening sentences use "statute" to signify a *proposed* law or bill; in the last sentences, the word refers to an *already enacted* law.

Divided for clarity into separate sentences, section 9 provides in full as follows:

(1) "A statute shall embrace but one subject, which shall be expressed in its title."

(2) "If a statute embraces a subject not expressed in its title, only the part not expressed is void."

(3) "A statute may not be amended by reference to its title."

(4) "A section of a statute may not be amended unless the section is re-enacted as amended."

A law, once enacted, is not required to have a title. Even a cursory glance through

The first of these arguments lacks merit. The attempt by the draftsmen of Proposition 8 to repeal the M.D.S.O. laws was mooted by legislative enactment in 1981. The voters were twice informed of this fact in the ballot pamphlet. (Ballot Pamp., Primary Elec. (June 8, 1982), analysis by Legislative Analyst, p. 55, and rebuttal to argument in favor of Prop. 8, p. 34.) Indeed, the voters were explicitly advised that the initiative measure's attempt to repeal the M.D.S.O. laws "has no effect." (*Id.*, at p. 55.) It would be too severe a rule to hold that the entire proposition should be invalidated for such a technical violation of the prohibition against repeal by reference to a law's title. In all probability, no voter confusion was caused by this violation.

Petitioners' second contention—that numerous statutes relating to the admissibility of evidence were implicitly amended without being "re-enacted as amended"—poses a more difficult question. The purpose of such a constitutional provision is clear. "It is to compel [a proposed law] to disclose on its face something of its purpose and effect . . . ." (*Myers* v. *Stringham* (1925) 195 Cal. 672, 675 [235 P. 448]; see also *Brosnahan* v. *Eu, supra*, 31 Cal.3d at p. 12 (conc. and dis. opn. of Mosk, J.).)

There is no case which directly decides whether amendments proposed by statewide initiative are subject to the constitutional requirement of article IV, section 9, regarding reenactment of amended

our codes indicates that our codified laws only occasionally have titles. However, a legislative bill must have a title, since "[n]o bill may be passed [by the Legislature] unless it is read *by title* on 3 days in each house . . ." (Art. IV, § 8, subd. (b), italics added.) Clearly then, the first two sentences of section 9 apply to proposed legislation, not to enacted laws.

On the other hand, it would be meaningless to say that a legislative bill "may not be amended by reference to its title" and "may not be amended unless [a] section [of the bill] is re-enacted as amended." These provisions manifestly were intended to apply to laws already on the books.

That this interpretation is the correct one is confirmed by the history of section 9. Prior to the 1966 amendment, its provisions were found in article IV, section 24. That section did not contain the word "statute" at all. In its first two sentences, it used the word "act," obviously referring to a legislative act or bill. (Legislative bills were formerly titled "an act appropriating the sum of . . ." or "an act to amend an act entitled . . . .") In the predecessors to what are now the last two sentences of section 9, former section 24 employed the words "law" and "act . . . or section," clearly referring to already enacted provisions.

The 1966 constitutional amendment replaced both "act" and "law" with "statute." The change was not intended to be substantive, but merely "for purposes of clarity." Unfortunately, by using one word to cover two different concepts, the 1966 amendment may have created more confusion than clarity.

statutes.[14] However, in *Myers* v. *Stringham, supra*, 195 Cal. 672, a substantially similar requirement in a city charter was held to apply to an attempt to amend a city ordinance by the initiative process.

No reason has been suggested why a statewide initiative should be treated differently from a local initiative or a legislatively enacted statutory amendment in this regard. The purpose of the requirement is equally applicable to statewide initiatives. An amendment by initiative should "disclose on its face something of its purpose and effect . . . ." (See *Myers, supra*, 195 Cal. at p. 675.) Indeed, that purpose would seem to be even more important in the context of initiatives since they are frequently drafted by "a small group of people" (*Wallace, supra*, 200 Cal. at p. 592), without the opportunity for inquiry, explanation, and critical analysis that is available for amendments considered by the Legislature.

It is true that the requirement for reenactment of amended statutes is found in article IV, which deals with "Legislative" matters. However, this fact does not justify the conclusion that the application of the requirement is limited to amendments passed by the Legislature, since the initiative power reserved to the people is itself a reserved legislative power. (See art. IV, § 1.) As this court has noted on several occasions, "'By the enactment of initiative and referendum laws the people have simply . . . reserved to themselves the right to exercise a part of their inherent *legislative* power.'" (*Hays* v. *Wood, supra*, 25 Cal.3d at p. 786,

[14]In *Wallace* v. *Zinman, supra*, 200 Cal. 585, this court held that some provisions of article IV, section 24 (the predecessor to current § 9) do apply to initiative measures. At issue in *Wallace* was the requirement that the initiative's subject "shall be expressed in its title." (See sentence (1) of current § 9, *ante*, fn. 13.)

Subsequently, this court held to the contrary in *Prince* v. *City & County of S.F.* (1957) 48 Cal.2d 472, 475 [311 P.2d 544]. However, *Prince* failed even to mention *Wallace* and, in support of its conclusion, cited two prior cases which had nothing whatsoever to do with initiative measures. The United States Supreme Court granted certiorari in *Prince* and reversed the judgment of this court on grounds which reduced to dictum *Prince*'s discussion of article IV, section 24. (See *Speiser* v. *Randall* (1958) 357 U.S. 513 [2 L.Ed.2d 1460, 78 S.Ct. 1332].)

Wallace and *Prince* have each been cited once on this point since they were handed down. (See *Hays* v. *Wood* (1979) 25 Cal.3d 772, 786, fn. 3 [160 Cal.Rptr. 102, 603 P.2d 19] [citing *Wallace*]; *Morris* v. *Priest* (1971) 14 Cal.App.3d 621, 624 [92 Cal.Rptr. 476] [citing *Prince*].)

It is not necessary in the present case to resolve the conflict between *Wallace* and *Prince*. As previously noted, the requirement of reenactment of amended "statutes" imposes restrictions on amending laws *already enacted*. (*Ante*, fn. 13.) Both *Wallace* and *Prince* dealt with the provisions of article IV, section 24 relating to the titles of proposed laws, a subject not involved in the case at bench.

fn. 3, quoting *Dwyer* v. *City Council* (1927) 200 Cal. 505, 513 [253 P. 932], italics added in *Hays*.)

That the effect of Proposition 8 was to alter a substantial number of statutes is undeniable. Petitioners list more than two dozen statutes the provisions of which have, by necessary implication, been amended by the "Truth-in-Evidence" provision alone. (Prop. 8, § 3; see also *ante*, at pp. 278-279.) None of these statutes was set forth or reenacted in the initiative measure. Nor were they detailed in the analysis or the arguments in favor of the proposition. Thus, the voters could not have had a realistic idea as to the scope of the statutory changes which would result from the enactment of the measure.

Further, the voters could not possibly have known what existing evidentiary provisions were being preserved. As presented to the electorate, the initiative mandated that "relevant evidence shall not be excluded in any criminal proceeding." However, it also provided exceptions to this rule for "any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103."

Nowhere were the people even given a hint as to what these exceptions to the relevant evidence rule entailed. Such information was not contained within the four corners of the proposition. Sections 352, 782, and 1103 of the Evidence Code were neither set forth in the initiative, nor were their contents alluded to in the ballot pamphlet. The same is true for the "existing statutory rule[s] of evidence relating to privilege or hearsay" and for the rules governing the press.

Thus, not only was the electorate unable to determine what statutes *were* being altered, it also could not determine what statutes *were not* being changed. In short, the voters had no way of knowing what the law relating to admissibility of evidence would be following the enactment of Proposition 8.

Respondents cite cases which hold that article IV, section 9 does not apply to "independent" enactments which amend existing statutes "by implication," rather than by explicit terms. (See *Evans* v. *Superior Court, supra*, 215 Cal. at pp. 65-66; *Hellman* v. *Shoulters* (1896) 114 Cal. 136, 150-153 [44 P. 915, 45 P. 1057].) One such case, *Hellman*, involved a purported amendment to the "Vrooman Act of 1885," which set forth certain procedures for the enactment of local ordinances for street improvements. In 1891, the Legislature adopted an act which

professed to "amend" the Vrooman Act by "adding thereto an additional part," providing for an alternative street ordinance procedure. This court held that since the 1891 act added "new sections which *leave in full operation* all the language of the [existing law] which it purports to amend," there was no "amendment" of that law within the meaning of former article IV, section 24 (now § 9). (114 Cal. at p. 151, italics added.)

Further, even if the 1891 act were viewed as amending the Vrooman Act, it would amend "only by implication." (*Id.*, at p. 152.) Former article IV, section 24 "does not apply to amendments by implication," the court concluded. (*Id.*, at p. 153.) "To say that every statute which [by implication] affects the operation of another is therefore an amendment of it would introduce into the law an element of uncertainty which no one can estimate. It is impossible for the wisest legislator to know in advance how every statute proposed would affect the operation of existing laws.... 'The mischief designed to be remedied was the enactment of statutes in terms so blind that . . . *the public, from the difficulty of making the necessary examination and comparison, failed to become appraised of the changes made in the laws.... But an act complete in itself is not within the mischief designed to be remedied by this provision*, and cannot be held to be prohibited by it without violating its plain intent.'" (*Id.*, at pp. 152-153, italics added.)

The *Hellman* discussion of amendments by implication was picked up in *Evans, supra*, 215 Cal. 58. Under attack in *Evans* was the initial codification by the Legislature of the Probate Code. This court noted that some provisions of the new Code were inconsistent with existing statutes, but held nevertheless that compliance with the requirement that amended statutes be reenacted was not necessary. The Constitution, it was reasoned, "'does not apply to an independent act' [nor] '... to amendments by implication.'" (*Id.*, at pp. 65-66, quoting *Pennie* v. *Reis* (1889) 80 Cal. 266, 269 [22 P. 176], and *Hellman, supra*, 114 Cal. at p. 153.)

The holdings of both *Hellman* and *Evans* involved amendatory laws enacted by the Legislature. They did *not* involve amendments adopted through the initiative process. Sound reasons exist for treating initiative amendments with even more care.

It is the very essence of the legislative process to deal with and become immersed in laws, existing and proposed. A legislator's

professional life is one of passing and amending laws. This daily involvement with the law, combined with ready access to extensive professional research staffs and legal libraries, creates an expertise in the Legislature that is impossible to duplicate, or even approximate, among the electorate at large.

As the late Justice Wiley Manuel noted, "Voters have neither the time nor the resources to mount an in depth investigation of a proposed initiative." (*Schmitz* v. *Younger, supra*, 21 Cal.3d at p. 99 (dis. opn.); see also *Wallace, supra*, 200 Cal. at pp. 592-593.) This is not true of legislators. Thus, it makes eminently good sense to attribute to legislators knowledge of the primary purpose and effects of a proposed statutory amendment, even if not explicitly set forth. However, the same cannot be said for the voting public.

Further, the problems posed by Proposition 8 far exceed those addressed in *Hellman* or *Evans*. Unlike the amendatory enactments in *Hellman* and *Evans*, the initiative measure now before this court is not "complete in itself." It is not a wholly "independent act." This is immediately apparent from the fact that the voters could not have determined—either from the initiative measure itself or from the official ballot pamphlet—"what the effect of its adoption would be . . ." (See *Myers, supra*, 195 Cal. at p. 675.)

All that the voters would have been able to ascertain, without spending tedious hours in a law library, was that the initiative measure would create both a *rule* admitting relevant evidence and several *exceptions of undisclosed magnitude*. In the language of *Hellman*, Proposition 8 fails to inform the voter "of the changes made in the laws."

In this regard, the present case is similar to *Myers* v. *Stringham, supra*, 195 Cal. 672. (See *Brosnahan* v. *Eu, supra*, 31 Cal.3d at pp. 12-13 (conc. and dis. opn. of Mosk, J.).) In *Myers*, a proposed local initiative measure sought to amend a city's general zoning ordinance by (1) adding a new subsection, describing the boundaries of a plot of land and (2) repealing another subsection, identified only by number. The city charter contained a provision regarding reenactment of amended laws which closely resembled the corresponding portion of former article IV, section 24.

This court found that the initiative measure violated the charter requirement. "The purpose of the charter provision is plain. It is to

compel an ordinance to disclose on its face something of its purpose and effect as a legislative enactment. The wisdom of the requirement is at once apparent from an inspection of the proposed ordinance. The new subsection sought to be added to the section by amendment is no more than a description of certain real property. It does not purport to disclose what the effect of its adoption would be either on the status of the particular property described or on its relation to the general zoning classifications in the city. Considered in and by itself it is unintelligible and meaningless. It cannot be determined from its inspection what is sought to be accomplished." (195 Cal. at p. 675.)

Like the initiative in *Myers*, the "Truth-in-Evidence" provision of Proposition 8 does not "disclose on its face something of its purpose and effect." It gives the voters little inkling as to what changes are being made in the current law. The provision purports to impose new rules of evidence throughout the criminal justice system of this state. The voters, when called upon to approve or reject the initiative, could not determine the meaning of those new rules no matter how extensive their inspection of the measure or the ballot pamphlet. They were informed only as to the section numbers, not the content of the statutes being incorporated into the Constitution.

In short, the draftsmen of Proposition 8 failed to disclose to the people the purpose and effect of its provisions. As a result, they violated the constitutional standard set forth in article IV, section 9.

There is an additional defect of the measure which has apparently escaped the notice of the draftsmen of the initiative as well as those who challenged the measure's validity. The draftsmen of Proposition 8 sought to use this one initiative measure to make changes in *both* our Constitution and our codified laws. Such a combination of statutory and constitutional alterations is unusual.

To our knowledge, only once in this state's long history has an attempt been made to join both statutory and constitutional changes in a single initiative. Although this court upheld that initiative against a one-subject attack in *Perry* v. *Jordan, supra*, 34 Cal.2d 87, the court did not consider the propriety of combining statutory and constitutional changes in a single initiative. Indeed, the court did not appear to recognize that the initiative before it contained proposals for statutory change.

Perry preceded by nearly two decades the most recent comprehensive revision of our Constitution in 1966. That revision clearly sought to perpetuate the distinction between the use of the initiative process to effect constitutional change and its use to bring about statutory changes. (See, e.g., Cal. Const. Revision Com., Proposed Revision of Cal. Const. (1966) pp. 43-44; see also *Wallace* v. *Zinman, supra*, 200 Cal. at p. 593 ["Throughout section 1 of article IV of the constitution [predecessor to current art. II, §§ 8-11, and art. IV, § 1] a distinct line of demarcation is kept between a law or an act and a constitutional amendment."].) Subdivision (b) of section 8 of article II states that "[a]n initiative measure may be proposed by presenting to the Secretary of State a petition that sets forth the text of the proposed statute *or* amendment to the Constitution . . . ." (Italics added.) The use of the disjunctive is indicative of this differentiation.

Unfortunately, the majority ignores the issue of combining statutory and constitutional changes in a single initiative, giving no guidance to drafters of future initiatives other than a green light to go and violate the Constitution with impunity.

Revision or Amendment

The subject of "Amending and Revising the Constitution" is covered by article XVIII of our Constitution. Pursuant to its terms, the Legislature may propose "an amendment or revision of the Constitution," while an initiative may be used to "amend the Constitution." (Art. XVIII, §§ 1, 3; see also art. II, § 8, subd. (a) ["The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them"].)[15]

The courts have long been aware of the "fundamental distinction" between a constitutional revision and a constitutional amendment. (See *Amador Valley, supra*, 22 Cal.3d at p. 222; see also *Livermore* v. *Waite* (1894) 102 Cal. 113, 117-119 [36 P. 424].) Thus, it is firmly established that the initiative process may be used to amend our Constitution, but not to revise it. (*Amador Valley, supra*, 22 Cal.3d at p. 221; *McFadden* v. *Jordan, supra*, 32 Cal.2d at pp. 331-334.)

[15]Section 2 of article XVIII also permits a revision to be proposed to the electorate by a constitutional convention. Such a convention is called only after the Legislature, by a two-thirds vote, "submit[s] at a general election the question whether to call a convention to revise the Constitution" and a majority of voters approve. (Art. XVIII, § 2.)

Although a precise line of demarcation between amendment and revision may be difficult to draw, this court outlined the distinction in general terms nearly 90 years ago. "The very term 'constitution' implies an instrument of a permanent and abiding nature, and the provisions contained therein for its revision indicate the will of the people that the underlying principles upon which it rests, as well as the substantial entirety of the instrument, shall be of a like permanent and abiding nature. On the other hand, the significance of the term 'amendment' implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed." (*Livermore, supra*, 102 Cal. at pp. 118-119.)

In 1948, this court struck down as a "revision" an initiative proposal that would have effected "extensive alterations in the basic plan and substance of our present Constitution . . . ." (*McFadden, supra*, 32 Cal.2d at p. 347.) The initiative challenged in *McFadden* would have added 21,000 words to the Constitution and would have repealed or substantially altered 15 of its 25 articles.

Included within the "vast sweep" of the measure were matters "from gamblers to ministers; from mines to civic centers; from fish to oleomargarine; from state courts to city budgets; from liquor control to senate reapportionment . . . ." (*Id.*, at p. 349.) This court seemed most troubled by the initiative's creation of a new commission, whose virtually unfettered exercise of far-reaching powers would have placed it "substantially beyond the system of checks and balances which heretofore has characterized our governmental plan." (*Id.*, at p. 348.)

Recently, this court spoke to the issue as it applied to the enactment by initiative of article XIII A. (*Amador Valley, supra*, 22 Cal.3d 208.) A dual test, "quantitative and qualitative in nature," was applied. "[A]n enactment which is so extensive in its provisions as to change directly the 'substantial entirety' of the Constitution by the deletion or alteration of numerous existing provisions may well constitute a revision thereof. However, even a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision also. In illustration, the parties herein appear to agree that an enactment which purported to vest all judicial power in the Legislature would amount to a revision without regard either to the length or complexity of the measure or the number of existing articles or sections affected by such change." (*Id.*, at p. 223.)

Petitioners in *Amador Valley* challenged the initiative tax relief measure on the ground, inter alia, that it had the qualitative effect of impairing the established principle of "home rule." (22 Cal.3d at p. 224.) This loss of home rule was claimed to be a consequence of (1) restrictions which article XIII A placed on local government's power to tax and (2) the resulting need to look to the state Legislature for a substantial portion of funds for local purposes. In rejecting this argument, the court found that the "probable effects [of the initiative measure] are not as fundamentally disruptive as petitioners suggest" and that the initiative would not "*necessarily and inevitably*" result in the loss of home rule. (*Id.*, at pp. 224, 226.)

Under the particular theories advanced by the petitioners, it would appear that the "Victims' Bill of Rights" does not amount to a constitutional revision. Considering the measure's quantitative effect, it bears noting that less than half of the measure purports to change the content of the Constitution. The remainder of the proposition alters statutes, and by its very terms, the prohibition of revision by initiative applies to *constitutional*, not statutory, changes.

Only sections 2 and 3 of the initiative purport to directly alter the Constitution itself. They repeal one section of article I and add another. The net effect is the addition of about 660 words to our Constitution. This may be more words than were added by Proposition 13 (400 words), but in purely quantitative terms, it cannot be said to be so substantial as to amount to a revision of a document that already contains 21 articles, 277 sections, and approximately 35,000 words.

Petitioners' primary contention is that Proposition 8 fails the qualitative test of *Amador Valley* and *McFadden*. They argue that the measure accomplishes "far reaching changes in the nature of our basic governmental plan," by altering our court system and our system of public education. (See *Amador Valley, supra*, 22 Cal.3d at p. 223.)

Sections of Proposition 8 do make significant substantive changes across an extensive range of subjects, but these changes relate primarily to matters which previously had been covered by statute and were not a part of the Constitution. For example, the so-called "Truth-in-Evidence" provision would appear to alter by implication many of this state's evidentiary rules. (See Prop. 8, § 3, subd. (d).) However, most of these rules are statutory or have been developed over the years in the common law. Since petitioners have not argued that Proposition 8's

changes with respect to constitutionally based rules of evidence are a revision of the Constitution, that issue is not considered here.

Petitioners contend that Proposition 8 will prevent the judiciary from processing civil cases, in violation of article VI, section 1. That section vests the "judicial power of this State ... in the Supreme Court, courts of appeal, superior courts, municipal courts, and justice courts." The argument is advanced that Proposition 8 will create such an enormous backlog of *criminal* cases that "for all practical purposes, ... the judiciary [will be precluded] from performing their [*sic*] constitutional obligation to decide ... civil matters."

This backlog of criminal cases will be caused, it is said, by the enactment of the Penal Code provisions which (1) limit plea bargaining (Pen. Code, § 1192.7; Prop. 8, § 7), (2) require that victims have the opportunity to attend sentencing proceedings in misdemeanor cases (Pen. Code, § 1191.1; Prop. 8, § 6, subd. (a)), and (3) enable prosecutors to obtain longer sentences for defendants by bringing and trying charges separately (Pen. Code, § 667; Prop. 8, § 5).

Petitioners also foresee serious consequences for our system of public education as a result of the provisions in Proposition 8 regarding the right to "safe, secure and peaceful" schools. (Art. I, § 28, subds. (a), (c); Prop. 8, § 3.) They argue that with budgets already trimmed, "the schools will have little choice but to curtail instruction" in order to comply with the newly imposed duty to provide "safe, secure and peaceful" campuses. This contraction of educational services would amount to a substantial impairment of the fundamental constitutional right to education, they contend. (See art. IX, § 1; *Serrano* v. *Priest* (1971) 5 Cal.3d 584, 608-609 [96 Cal.Rptr. 601, 487 P.2d 1241].)

These predictions may well be accurate, but they do not justify the legal conclusion that Proposition 8 amounts to a constitutional revision, rather than an amendment, under the present state of the case law. (See *Amador Valley, supra*, 22 Cal.3d at pp. 223-224.)

Moreover, each argument is premised on assumptions concerning matters that are outside the four corners of the initiative measure itself, i.e., that there will be insufficient resources to cope with the changes mandated therein. No hard facts have been produced. This court has been and should continue to be reluctant to declare an initiative measure to be a revision based solely on speculation as to its fiscal effect.

Initiative measures frequently have an impact on the public fisc, and hence on matters of constitutional concern. (Cf. *Birkenfeld* v. *City of Berkeley* (1976) 17 Cal.3d 129, 144 [130 Cal.Rptr. 465, 550 P.2d 1001].) If that reason alone were sufficient to deem a measure to be a revision—and forbidden by article XVIII—then the power to improve our laws through the initiative process would be stringently curtailed.

There is, however, a serious problem presented by the manner in which the draftsmen of Proposition 8 attempted to alter the Constitution. Article XVIII sets forth the *exclusive* means by which the California Constitution may be amended or revised. The *sine qua non* of these provisions is that the voice of the citizens must be heard. Regardless of how the process is initiated, *every* constitutional amendment or revision must be submitted to a vote of the people.

Proposition 8 created a new section of the Constitution which contains direct reference to a specific statutory provision of the Penal Code. Subdivision (e) of section 28 of article I forbids release on his or her own recognizance of any person charged with the commission of any "serious felony," as defined in subdivision (g). In turn, subdivision (g) defines that term solely by reference to the list of "serious felonies" found in Penal Code section 1192.7, subdivision (c). In this manner the contents of this statute are imported into the Constitution.

Statutes, of course, may generally be amended by the Legislature without the necessity of referral to, and approval by, the people. However, the Constitution has established special rules for amending statutes (like § 1192.7) that are created by the initiative process. (See art. II, § 10, subd. (c).) When amending this type of statute, the Legislature must seek the people's approval unless the measure initially passed by the voters specifically authorized amendment without the need for such approval.

That is precisely the situation in the present case. The draftsmen of Proposition 8 explicitly provided a mechanism by which the Legislature, by a two-thirds vote and without the people's participation, can amend section 1192.7 and its list of enumerated "serious felonies" (Pen. Code, § 1192.7, subd. (d)). Such an arrangement ostensibly may be in keeping with the requirements of subdivision (c) of section 10 of article II. However, due to the unusual manner in which the draftsmen have linked statute to Constitution, legislative amendments to section 1192.7 would affect far more than the statutory law of this state. They would

alter the Constitution itself by changing the scope of the constitutional provisions into which they had previously been incorporated.

The flaw in this scheme is evident. It deprives the people of this state of their paramount role in approving or rejecting changes in their Constitution. In effect, it revises the Constitution by creating a method by which that document may be altered *without the participation of the electors*. As such, it represents an attempt by the draftsmen to fundamentally reorder the distribution of power between the Legislature and the citizens of this state.

It could be argued that if rules of statutory construction were applied to the context of the Constitution, the constitutionality of incorporating the specified Penal Code provision into section 28 might be upheld. It has been held that "where a *statute* adopts by specific reference the provisions of another statute, regulation, or ordinance, such provisions are incorporated in the form in which they exist at the time of the reference and not as subsequently modified .... [Citations omitted.]" (*Palermo* v. *Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 58-59 [195 P.2d 1], italics added.) It might be argued that this statutory rule should apply to a constitutional amendment. (Cf. *State School Bldg. Fin. Com.* v. *Betts* (1963) 216 Cal.App.2d 685, 692 [31 Cal.Rptr. 258].)

Subdivisions (e) and (g) of section 28 thus would be read as having incorporated the specified code provisions "in the form in which they exist[ed]" at the time of the passage of Proposition 8. Subsequent legislative modifications of these provisions would be ignored. As such, it would be contended that section 28 would not amount to a revision of the Constitution because future legislative amendment of Penal Code section 1192.7 would have no effect on subdivisions (e) and (g) of that provision.

This interpretation, however, ignores the fact that the draftsmen of Proposition 8 created a scheme expressly authorizing the Legislature, acting *alone*, to alter the provisions of Penal Code section 1192.7.

By incorporating the provisions of Penal Code section 1192.7, subdivision (c) into the Constitution and by providing in subdivision (d) of that section a mechanism for *legislative* amendment of the provisions of subdivision (c), the draftsmen clearly intended to empower the Legisla-

ture to modify the Constitution without ever referring such action to the electorate for approval.

In the face of such explicit evidence of the draftsmen's intent, the rule enunciated in *Palermo* is not applicable. Statutory construction is an effective means by which courts may resolve ambiguities created by the wording or grammatical construction of statutes. Here, however, there is no ambiguity. The rules of construction will not save a measure which is clearly and unambiguously unconstitutional, one which impermissibly reallocates power from the people of this state to the Legislature.

The draftsmen of Proposition 8 created a mechanism by which the Legislature can transmute a statutory modification into a constitutional amendment.

With one wave of the wand, this act of electoral alchemy revised the Constitution by devising a means of altering that document without the citizens' participation. Such a change, which strikes at the very essence of our form of government and the power of the people, violates article XVIII's prohibition against constitutional revision by initiative.

III.

CONCLUSION

The wisdom of the policies which the draftsmen of Proposition 8 sought to implement is not at issue in this case. I take no position on those policies for that is for the people to decide.

I have great respect for the will of the people. The sovereign power is theirs, and they have chosen to express that power through the Constitution which they, in their wisdom, saw fit to establish. *Respect for the Constitution is the truest measure of a justice's respect for the people. The Constitution speaks for the people, and as long as its voice remains strong, the voice of the people will not be muffled.*

I would give voice to the provisions the people have placed in their Constitution to ensure that initiative measures truly express their will. The Constitution sets forth the basic requirements for drafting a proper initiative measure. These requirements are simple and straightforward. They are there to protect the people, not from themselves but from un-

skilled, careless, or guileful draftsmen. When those rules are violated, this court must not look the other way, however easy and popular such a course of conduct might be at a given moment.

The majority opinion implies that the passage of a proposition somehow creates a conclusive presumption in favor of its constitutionality. Such a view sadly mistakes the role of this court. It is *not* our duty to certify the results of elections; that is the role of the Secretary of State. It *is* our duty to let the Constitution speak for the people so that their will may be given its fullest and truest expression.

What is essentially at issue here is the improper manner in which the *draftsmen* of Proposition 8 used the initiative process to achieve their goals.

The people of this state have no voice—either directly through the exercise of their franchise or indirectly through their elected representatives—in the formulation or drafting of proposals presented to them by initiative. Thus, the people have seen fit to establish specific constitutional safeguards to ensure that when initiatives are submitted to them, the outcome will be "the expression of the *true will* of the people." (See *Canon* v. *Justice Court* (1964) 61 Cal.2d 446, 453 [39 Cal.Rptr. 228, 393 P.2d 428], italics added.)

The people have entrusted to the courts the responsibility for preserving the integrity of the initiative process. In exercising that responsibility, this court must ensure that no initiative is enacted by means of the creation of false majorities, the presentation of deceptive or misleading proposals, or the imposition of forced electoral compromises.

Proposition 8, as drafted and presented to the voters of this state in June of 1982, violated virtually every one of these fundamental rules with its "multifarious" provisions.

The draftsmen presented the voters with a false bill of goods. They called the initiative the "Victims' Bill of Rights" when in truth the victims of crime *lost* many rights. Rape victims are just one graphic example of the draftsmen's deceptive packaging of this initiative. In fact, the draftsmen of Proposition 8 have allowed victims of crime themselves to be placed on trial. Under Proposition 8, basic protections that previously limited the scope of cross-examination of crime victims were repealed.

The single-subject rule is the constitutional equivalent of a truth-in-advertising requirement for the draftsmen of initiatives. When the contents of the package are disguised by its wrapping, the people are denied the Constitution's protection. That is exactly what happened here.

By presenting the voters with an all-or-nothing choice involving a large number of disparate and complex matters, the draftsmen of this initiative violated the single-subject rule of article II, section 8, subdivision (d).

Moreover, by failing to inform the voters either about the changes they were making in the current law of this state or about the scope of the law they sought to impose in the future, the draftsmen violated the constitutional requirement of full disclosure found in article IV, section 9.

Finally, by depriving the people of this state of their paramount role in approving or rejecting changes in their Constitution and by impermissibly transferring power from the people to the Legislature, the draftsmen of Proposition 8 have attempted to alter the fundamental distribution of power between the people and their elected representatives. They have thereby violated the prohibition against constitutional revision by initiative.

Our constitutional duty as the highest court in this state is to reassert the people's quintessential role in the initiative process and to reaffirm the vitality of the constitutional safeguards designed to protect the integrity of that process. Sadly, a majority of this court has today turned its back on fulfilling that difficult but essential obligation.

The late commentator Elmer Davis once remarked that "the republic was not established by cowards, and cowards will not preserve us." His words apply equally well to the Constitution.

MOSK, J.—I dissent.

A bare majority of this court have rejected fundamentals of constitutional law that have consistently guided this state in the conduct of its affairs. In lieu of those basic principles, four justices now declare that initiative promoters may obtain signatures for any proposal, however radical in concept and effect, and if they can persuade 51 percent of

those who vote at an ensuing election to say "aye," the measure becomes law regardless of how patently it may offend constitutional limitations.

The new rule is that the fleeting whims of public opinion and prejudice are controlling over specific constitutional provisions. This seriously denigrates the Constitution as the foundation upon which our governmental structure is based.

James Madison, in the Federalist Papers (No. LXXVIII), wrote, inter alia, "The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It, therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body [or the people acting in a legislative capacity]."

Crime is indeed a serious problem of society. But it must be approached with determination and intelligence, not by destruction of the values that have made this the greatest nation on earth. A thoughtful political observer (Tom Wicker in the New York Times) has written: "It is a good thing that neither the Bill of Rights nor the Magna Carta is the pending business of [legislative bodies] these days.... [I]n the present mood of political panic and myopia, it would undoubtedly be voted down as a needless restraint in the war on crime." In the same vein, Chief Justice Warren spoke about "straws in the wind" that worried him, and "which cause some thoughtful people to ask whether ratification of the Bill of Rights could be obtained today if we were faced squarely with the issue." (Katcher, Earl Warren (1967) p. 332.)

It is not unduly dramatic to suggest that proponents of this initiative have yielded to "panic and myopia" in what they describe as a "war on crime." In submitting to the same fears, four justices by a stroke of their pen have obliterated a section of the California Constitution in deference to what they charitably describe as "the extremely broad sweep of this legislation."

Article II, section 8, subdivision (d), is now virtually a dead letter. If an initiative that adds seven separate subdivisions to the Constitution, repeals one section of the Constitution, adds five new sections to the Penal Code and three more sections to the Welfare and Institutions Code, can be held to contain "one subject," then any combination of topics un-

der the rubric of "general welfare" or "pursuit of happiness" can be deemed one subject. If the 12 separate subjects enumerated by the Attorney General in his ballot title of the measure can be determined to be merely one subject, then Orwellian logic has become the current mode of constitutional interpretation.

In sum, I adhere to the views on the one-subject rule expressed in my dissent in *Brosnahan* v. *Eu* (1982) 31 Cal.3d 1, 5-14 [181 Cal.Rptr. 100, 641 P.2d 200]. I conclude that Proposition 8 fails to meet the provisions of article II, section 8, subdivision (d), of the Constitution under either the "reasonably germane" test of *Evans* v. *Superior Court* (1932) 215 Cal. 58 [8 P.2d 46], or the "functionally related" test proposed by the late Justice Manuel in *Schmitz* v. *Younger* (1978) 21 Cal.3d 90 [145 Cal.Rptr. 517, 577 P.2d 652] and endorsed by this court in *Amador Valley Joint Union High School Dist.* v. *State Bd. of Equalization* (1978) 22 Cal.3d 208 [149 Cal.Rptr. 239, 583 P.2d 1281].

Constitutional principles, wrote Chief Justice Warren, "are the rules of government." (*Trop* v. *Dulles* (1957) 356 U.S. 86, 103 [2 L.Ed.2d 630, 644, 78 S.Ct. 590].) And, added Justice Jackson, "the great purposes of the Constitution do not depend on the approval or convenience of those they restrain." (*Everson* v. *Bd. of Education* (1947) 330 U.S. 1, 28 [91 L.Ed. 711, 729-730, 67 S.Ct. 504, 168 A.L.R. 1392].) Chief Justice Wright also said it well: "A democratic government must do more than serve the immediate needs of a majority of its constituency —it must respect the 'enduring general values' of the society. Somehow, a democracy must tenaciously cling to its long-term concepts of justice regardless of the vacillating feelings experienced by a majority of the electorate." (Wright, *The Role of Judiciary* (1972) 60 Cal.L.Rev. 1262, 1267.)

The Goddess of Justice is wearing a black arm-band today, as she weeps for the Constitution of California.

Broussard, J., concurred.

The application of petitioners Brosnahan and Raven for a rehearing was denied October 13, 1982. Bird, C. J., and Broussard, J., were of the opinion that the application should be granted.

APPENDIX

CRIMINAL JUSTICE—INITIATIVE STATUTES AND CONSTITUTIONAL AMENDMENT

Text of Proposed Law

This initiative measure is submitted to the people in accordance with the provisions of Article II, Section 8 of the Constitution.

This initiative measure expressly repeals and adds existing provisions of the Constitution, and adds provisions to the Penal Code and the Welfare and Institutions Code; therefore, provisions proposed to be deleted are printed in ~~strikeout~~ type and new provisions proposed to be added are printed in *italic type* to indicate that they are new.

PROPOSED LAW

SEC. 1. This amendment shall be known as "The Victims' Bill of Rights".

SEC. 2. Section 12 of Article I of the Constitution is repealed.

~~SEC. 12. A person shall be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great. Excessive bail may not be required.~~

~~A person may be released on his or her own recognizance in the court's discretion.~~

SEC. 3. Section 28 is added to Article I of the Constitution, to read:

SEC. 28. (a) The People of the State of California find and declare that the enactment of comprehensive provisions and laws ensuring a bill of rights for victims of crime, including safeguards in the criminal justice system to fully protect those rights, is a matter of grave statewide concern.

The rights of victims pervade the criminal justice system, encompassing not only the right to restitution from the wrongdoers for financial losses suffered as a result of criminal acts, but also the more basic expectation that persons who commit felonious acts causing injury to innocent victims will be appropriately detained in custody, tried by the courts, and sufficiently punished so that the public safety is protected and encouraged as a goal of highest importance.

Such public safety extends to public primary, elementary, junior high, and senior high school campuses, where students and staff have the right to be safe and secure in their persons.

To accomplish these goals, broad reforms to the procedural treatment of accused persons and the disposition and sentencing of convicted persons are necessary and proper as deterrents to criminal behavior and to serious disruption of people's lives.

(b) Restitution. It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to restitution from the persons convicted of the crimes for losses they suffer.

Restitution shall be ordered from the convicted persons in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss, unless compelling and extraordinary reasons exist to the contrary. The Legislature shall adopt provisions to implement this section during the calendar year following adoption of this section.

(c) Right to Safe Schools. All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful.

(d) Right to Truth-in-Evidence. Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privileges or hearsay, or Evidence Code, Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press.

(e) Public Safety Bail. A person may be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great. Excessive bail may not be required. In setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. Public safety shall be the primary consideration.

A person may be released on his or her own recognizance in the court's discretion, subject to the same factors considered in setting bail. However, no person charged with the commission of any serious felony shall be released on his or her own recognizance.

Before any person arrested for a serious felony may be released on bail, a hearing may be held before the magistrate or judge, and the prosecuting attorney shall be given notice and reasonable opportunity to be heard on the matter.

When a judge or magistrate grants or denies bail or release on a person's own recognizance, the reasons for that decision shall be stated in the record and included in the court's minutes.

(f) Use of Prior Convictions. Any prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding. When a prior felony conviction is an element of any felony offense, it shall be proven to the trier of fact in open court.

(g) As used in this article, the term "serious felony" is any crime defined in Penal Code, Section 1192.7(c).

SEC. 4. *Diminished Capacity; Insanity.* Section 25 is added to the Penal Code, to read:

25. (a) The defense of diminished capacity is hereby abolished. In a criminal action, or any juvenile court proceeding, evidence concerning an accused person's intoxication, trauma, mental illness, disease, or defect shall not be admissible to show or negate capacity to form the particular purpose, intent, motive, malice aforethought, knowledge, or other mental state required for the commission of the crime charged.

(b) In any criminal proceeding, including any juvenile court proceeding, in which a plea of not guilty by reason of insanity is entered, this defense shall be found by the trier of fact only when the accused person proves by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense.

(c) Notwithstanding the foregoing, evidence of diminished capacity or of a mental disorder may be considered by the court only at the time of sentencing or other disposition or commitment.

(d) The provisions of this section shall not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.

SEC. 5. *Habitual Criminals.* Section 667 is added to the Penal Code, to read:

667. (a) Any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively.

(b) This section shall not be applied when the punishment imposed under other provisions of law would result in a longer term of imprisonment. There is no requirement of prior incarceration or commitment for this section to apply.

(c) The Legislature may increase the length of the enhancement of sentence provided in this section by a statute passed by majority vote of each house thereof.

(d) As used in this section "serious felony" means a serious felony listed in subdivision (c) of Section 1192.7.

(e) The provisions of this section shall not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.

SEC. 6. *Victim's Statements; Public Safety Determination.*

(a) Section 1191.1 is added to the Penal Code, to read:

1191.1 The victim of any crime, or the next of kin of the victim if the victim has died, has the right to attend all sentencing proceedings under this chapter and shall be given adequate notice by the probation officer of all sentencing proceedings concerning the person who committed the crime.

The victim or next of kin has the right to appear, personally or by counsel, at the sentencing proceeding and to reasonably express his or her views concerning the crime, the person responsible, and the need for restitution. The court in imposing sentence shall consid

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Proposition 8—Text—*Continued*

the statements of victims and next of kin made pursuant to this section and shall state on the record its conclusion concerning whether the person would pose a threat to public safety if granted probation.

The provisions of this section shall not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.

(b) Section 3043 is added to the Penal Code, to read:

3043. Upon request, notice of any hearing to review or consider the parole eligibility or the setting of a parole date for any prisoner in a state prison shall be sent by the Board of Prison Terms at least 30 days before the hearing to any victim of a crime committed by the prisoner, or to the next of kin of the victim if the victim has died. The requesting party shall keep the board apprised of his or her current mailing address.

The victim or next of kin has the right to appear, personally or by counsel, at the hearing and to adequately and reasonably express his or her views concerning the crime and the person responsible. The board, in deciding whether to release the person on parole, shall consider the statements of victims and next of kin made pursuant to this section and shall include in its report a statement of whether the person would pose a threat to public safety if released on parole.

The provisions of this section shall not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.

(c) Section 1767 is added to the Welfare and Institutions Code, to read:

1767. Upon request, written notice of any hearing to consider the release on parole of any person under the control of the Youth Authority for the commission of a crime or committed to the authority as a person described in Section 602 shall be sent by the Youthful Offender Parole Board at least 30 days before the hearing to any victim of a crime committed by the person, or to the next of kin of the victim if the victim has died. The requesting party shall keep the board apprised of his or her current mailing address.

The victim or next of kin has the right to appear, personally or by counsel, at the hearing and to adequately and reasonably express his or her views concerning the crime and the person responsible. The board, in deciding whether to release the person on parole, shall consider the statements of victims and next of kin made pursuant to this section and shall include in its report a statement of whether the person would pose a threat to public safety if released on parole. The provisions of this section shall not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.

SEC. 7. *Limitation of Plea Bargaining.* Section 1192.7 is added to the Penal Code, to read:

1192.7 (a) Plea bargaining in any case in which the indictment or information charges any serious felony or any offense of driving while under the influence of alcohol, drugs, narcotics, or any other intoxicating substance, or any combination thereof, is prohibited, unless there is insufficient evidence to prove the people's case, or testimony of a material witness cannot be obtained, or a reduction or dismissal would not result in a substantial change in sentence.

(b) As used in this section "plea bargaining" means any bargaining, negotiation, or discussion between a criminal defendant, or his or her counsel, and a prosecuting attorney or judge, whereby the defendant agrees to plead guilty or nolo contendere, in exchange for any promises, commitments, concessions, assurances, or consideration by the prosecuting attorney or judge relating to any charge against the defendant or to the sentencing of the defendant.

(c) As used in this section "serious felony" means any of the following:

(1) Murder or voluntary manslaughter; (2) mayhem; (3) rape; (4) sodomy by force, violence, duress, menace, or threat of great bodily harm; (5) oral copulation by force, violence, duress, menace, or threat of great bodily harm; (6) lewd acts on a child under the age of 14 years; (7) any felony punishable by death or imprisonment in the state prison for life; (8) any other felony in which the defendant inflicts great bodily injury on any person, other than an accomplice, or any felony in which the defendant uses a firearm; (9) attempted murder; (10) assault with intent to commit rape or robbery; (11) assault with a deadly weapon or instrument on a peace officer; (12) assault by a life prisoner on a noninmate; (13) assault with a deadly weapon by an inmate; (14) arson; (15) exploding a destructive device or any explosive with intent to injure; (16) exploding a destructive device or any explosive causing great bodily injury; (17) exploding a destructive device or any explosive with intent to murder; (18) burglary of a residence; (19) robbery; (20) kidnapping; (21) taking of a hostage by an inmate of a state prison; (22) attempt to commit a felony punishable by death or imprisonment in the state prison for life; (23) any felony in which the defendant personally used a dangerous or deadly weapon; (24) selling, furnishing, administering or providing heroin, cocaine, or phencyclidine (PCP) to a minor; (25) any attempt to commit a crime listed in this subdivision other than an assault.

(d) The provisions of this section shall not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.

SEC. 8. *Sentencing.* Section 1732.5 is added to the Welfare and Institutions Code, to read:

1732.5. Notwithstanding any other provision of law, no person convicted of murder, rape, or any other serious felony, as defined in Section 1192.7 of the Penal Code, committed when he or she was 16 years of age or older shall be committed to Youth Authority.

The provisions of this section shall not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.

SEC. 9. *Mentally Disordered Sex Offenders.* Section 6331 is added to the Welfare and Institutions Code, to read:

6331. This article shall become inoperative the day after the election at which the electors adopt this section, except that this article shall continue to apply to all respects to those already committed under its provisions.

The provisions of this section shall not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.

SEC. 10. If any section, party, clause, or phrase of this measure or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the measure which can be given effect without the invalid provision or application, and to this end the provisions of this measure are severable.

8 Criminal Justice—Initiative Statutes and Constitutional Amendment

Official Title and Summary Prepared by the Attorney General

CRIMINAL JUSTICE. INITIATIVE STATUTES AND CONSTITUTIONAL AMENDMENT. Amends Constitution and enacts several statutes concerning procedural treatment, sentencing, release, and other matters for accused and convicted persons. Includes provisions regarding restitution to victims from persons convicted of crimes, right to safe schools, exclusion of relevant evidence, bail, use of prior felony convictions for impeachment purposes or sentence enhancement, abolishing defense of diminished capacity, use of evidence regarding mental disorder, proof of insanity, notification and appearance of victims at sentencing and parole hearings, restricting plea bargaining, Youth Authority commitments, and other matters. Summary of Legislative Analyst's estimate of net state and local government fiscal impact: As the fiscal effect would depend on many factors that cannot be predicted, the net fiscal effect of this measure cannot be determined with any degree of certainty. However, approval of the measure would result in major state and local costs. The measure could: increase local administration costs; increase state administrative costs; increase claims against the state and local governments relating to enforcement of the right to safe schools; increase school security costs to provide safe schools; increase the cost of operating county jails by increasing the jail populations; increase court costs; and increase the cost of operating the state's prison system by increasing the prison population (estimated to be about $47 million increased annual prison operating costs and $280 million prison construction costs based on various assumptions)

Analysis by the Legislative Analyst

Background:

The California criminal justice system is governed by the State Constitution, by statutes enacted by the Legislature and the people, and by court rulings.

Under the criminal justice system, persons convicted of *misdemeanors* may be fined or sentenced to a county jail term, or both. Those convicted of *felonies* may be fined in some cases, sentenced to state prison, or (if they were under 21 years of age at the time they were apprehended) committed to the Youth Authority, or both fined and imprisoned. For some crimes, a person may receive "probation" in lieu of a prison sentence or a fine.

Proposal:

This initiative proposes many changes in the State Constitution and statutory law that would alter criminal justice procedures and punishments and constitutional rights. The major changes are summarized below.

Restitution. Under existing law, victims of crime are not automatically entitled to receive "restitution" from the person convicted of the crime. (Restitution would involve, for example, replacement of stolen or damaged property, or reimbursement for costs that the victim incurred as a result of the crime.) In some cases, however, the courts release a convicted person on probation, on the condition that restitution be provided to the victim or victims.

This measure would grant crime victims who suffer losses a constitutional right to receive restitution. Except in unusual cases, convicted persons would be required to make restitution to all of their victims who suffer losses. The extent to which restitution would be made would depend on how many convicted persons have or acquire sufficient assets to make restitution.

The Legislature would be responsible for adopting laws to implement this section of the measure.

Safe Schools. The Constitution currently provides that all people have the inalienable right of "pursuing and obtaining safety, happiness, and privacy." In addition, statutory law prohibits various acts upon school grounds which disturb the peace of students or staff, or which disrupt the peaceful conduct of school activities. This measure would add a section to the State Constitution declaring that students and staff of public elementary and secondary schools have the "inalienable right to attend campuses which are safe, secure, and peaceful."

Evidence. Under current law, certain evidence is not permitted to be presented in a criminal trial or hearing. For example, evidence obtained through unlawful eavesdropping or wiretapping, or through unlawful searches of persons or property, cannot be used in court. This measure generally would allow most relevant evidence to be presented in criminal cases, subject to such exceptions as the Legislature may in the future enact by a two-thirds vote. The measure could not affect *federal* restrictions on the use of evidence.

Bail. Under the State Constitution and statutory law, the courts generally must release on bail all persons accused of committing a crime, while they await trial. The courts may deny bail *only* for those who are accused of felonies punishable by death if the court determines that the proof of guilt is evident or the presumption of guilt is great.

In fixing the amount of bail, courts are required by statute to consider the seriousness of the offense with which the person is charged, the defendant's previous criminal record and the probability that the defendant will appear at the trial or hearings of the case. The State Constitution prohibits courts from setting "excessive" bail.

The courts also may allow those accused of commit-

Proposition 8—Analysis—*Continued*

ting a crime to be released without bail upon their written promise to appear in court when required. The failure to appear in court as promised can result in additional criminal charges being filed against the accused.

Court decisions have held that the purpose of bail is to assure that the defendant will appear in court to stand trial, rather than to protect the public's safety.

This measure would amend the State Constitution to give the courts discretion in deciding whether to grant bail. It would, however, continue the prohibition on bail in felony cases punishable by death when the proof of guilt is evident or the presumption of guilt is great.

In addition, the measure would add to the State Constitution a provision requiring the courts—in fixing, reducing, or denying bail or permitting release without bail—to consider the same factors that they now are required by statute to consider in fixing the amount of bail. It would also make protection of the public's safety the primary consideration in bail determinations. Moreover, the measure would prohibit the courts from releasing without bail persons charged with certain felonies.

Finally, the measure would require the court to state for the record its reasons for deciding to (a) grant or deny bail or (b) release an accused person without bail.

Prior Convictions. This measure would amend the State Constitution to require that information about prior felony convictions be used without limitation to discredit the testimony of a witness, including that of a defendant. Under current law, such information may be used only under limited circumstances.

Longer Prison Terms. Under existing law, a prison sentence can be increased from what it otherwise would be by from one to ten years, depending on the crime, if the convicted person has served prior *prison terms*, and a life sentence can be given to certain repeat offenders. Convictions resulting in probation or commitment to the Youth Authority generally are not considered for the purpose of increasing sentences, and there are certain limitations on the overall length of sentences.

This measure includes two provisions that would increase prison sentences for persons convicted of specified felonies. First, upon a second or subsequent conviction for one of these felonies, the defendant could receive, on top of his or her sentence, an *additional* five-year prison term for each such prior conviction, regardless of the sentence imposed for the prior conviction. This provision would not apply in cases where other provisions of law would result in even longer prison terms. Second, any prior felony conviction could be used without limitation in calculating longer prison terms.

Defenses of Diminished Capacity and Insanity. The measure would prohibit the use of evidence concerning a defendant's intoxication, trauma, mental illness, disease, or defect for the purpose of proving or contesting whether a defendant had a certain state of mind in connection with the commission of a crime. Legislation enacted in 1981 significantly limited use of this type of evidence.

This measure would provide that in order to be found not guilty by reason of insanity a defendant must prove that he or she (1) was incapable of knowing or understanding the nature and quality of his or her actions and (2) was incapable of distinguishing right from wrong at the time of the crime. These provisions could increase the difficulty of proving that a person is not guilty by reason of insanity.

If this measure is approved, evidence of diminished mental capacity or a mental disorder could be considered at the time of sentencing.

Victim Statements. Under existing law, statements of victims or next of kin are requested for various reports which are submitted to the court. In many cases, parole boards are not required to notify victims or next of kin about hearings.

This measure would require that the victims of any crimes, or the next of kin of the victims if the victims have died, be notified of (1) the sentencing hearing and (2) any parole hearing (if they so request) involving persons sentenced to state prison or the Youth Authority. During the hearings, the victim, next of kin, or his or her attorney would have the right to make statements to the court or hearing board. In addition, this measure would require the court or hearing board to state whether the convicted person would pose a threat to public safety if he or she were released on probation or parole.

Plea Bargaining. The measure would place restrictions on plea bargaining in cases involving specified felonies and offenses of driving while under the influence of an intoxicating substance. "Plea bargaining" is a term used to describe situations in which the defendant agrees to plead guilty in exchange for a reduced charge or sentence.

Exclusion of Certain Persons from Sentencing to the Youth Authority. Under current law, persons who commit certain sex crimes at the age of 18 years or older and some other youthful offenders are not sent to the Youth Authority. This measure would prohibit sending to the Youth Authority persons who were 18 years of

age or older at the time they committed murder, rape, or other specified felonies. As a result, they would be sentenced to state prison or local jails, or receive probation.

Mentally Disordered Sex Offenders. This measure contains a provision which would have changed the law concerning the treatment of certain sex offenders. However, legislation enacted in 1981 achieved the same purpose. Consequently, this provision has no effect.

Fiscal Effect:

The net fiscal effect of this measure cannot be determined with any degree of certainty. This is because the fiscal effect would depend on many factors that cannot be predicted. Specifically, it would depend on:

- how various provisions are implemented by the Legislature, local governments, and school districts,
- how the rights established by the measure are enforced by the courts,
- how many persons are incarcerated in state prison or detained in county jails for longer periods of time,
- how the various provisions affect criminal behavior (that is, to what extent the measure has a deterrent effect), and
- how the criminal justice system reacts to the measure.

We conclude, however, that approval of the measure would result in major state and local costs. This is because the measure, taken as a whole, could:

- increase local administration costs (for example, there would be a cost to implement the restitution procedures and to notify victims of sentencing hearings),
- increase state administrative costs (for example, there would be a cost to notify victims of parole hearings),
- increase claims against the state and local governments relating to enforcement of the right to safe schools,
- increase school security costs to provide safe schools,
- increase the cost of operating county jails by increasing the jail populations (for example, more persons accused of crimes could be denied bail in order to assure public safety and more persons could be detained in jail while awaiting trial due to the elimination of plea bargaining),
- increase court costs (for example, costs could increase due to more extensive bail hearings and the elimination of plea bargaining), and
- increase the cost of operating the state's prison system by increasing the prison population (for example, by increasing terms for certain repeat offenders). Based on various assumptions, the Department of Corrections estimates that the provisions that would result in longer prison terms for repeat offenders would lengthen the terms of at least 1,200 persons each year. The department states that this estimate may be low for several reasons. In addition, the measure's impact on conviction and sentencing trends and patterns cannot be predicted. As a result of these uncertainties, we cannot estimate how many persons would serve longer prison terms if this measure is approved. If, however, 1,200 persons per year were to receive the new sentences instead of the sentences provided under current law, annual state prison operating costs would increase by about $47 million (in 1982–83 prices) by the mid-1990s. This cost estimate assumes that the state's prison population would be about 3,800 higher than under existing law. In addition, the state might need to spend up to $220 million (in 1982 prices) to construct facilities to house these additional prisoners. The construction cost estimate assumes that existing standards for prisons would be followed when the new facilities were constructed, and that the custody levels (for example, maximum security) required for the additional inmates would match current housing patterns. To the extent that some of the additional prisoners could be housed by crowding existing facilities, both the estimated operating and construction costs could be reduced.

[Sept. 1982]

8 Criminal Justice—Initiative Statutes and Constitutional Amendment

Arguments in Favor of Proposition 8

It is time for the people to take decisive action against violent crime. For too long our courts and the professional politicians in Sacramento have demonstrated more concern with the rights of criminals than with the rights of innocent victims. This trend must be reversed. By voting "yes" on the Victims' Bill of Rights you will restore balance to the rules governing the use of evidence against criminals, you will limit the ability of violent criminals to hide behind the insanity defense, and you will give us a tool to stop extremely dangerous offenders from being released on bail to commit more violent crimes. Your action is as vital and necessary today as it was in 1978 when I urged Californians to take property taxes into their own hands and pass Proposition 13. If you believe as I do that the first responsibility of our criminal justice system is to protect the innocent, then I urge you to vote "yes" on Proposition 8.

MIKE CURB
Lieutenant Governor

Crime has increased to an absolutely intolerable level.

While criminals murder, rape, rob and steal, victims must install new locks, bolts, bars and alarm systems in their homes and businesses. Many buy tear gas and guns for self-protection. FREE PEOPLE SHOULD NOT HAVE TO LIVE IN FEAR.

Yet, higher courts of this state have created additional rights for the criminally accused and placed more restrictions on law enforcement officers. This proposition will overcome some of the adverse decisions by our higher courts.

THIS MEASURE CREATES RIGHTS FOR THE VICTIMS OF VIOLENT CRIMES. It enacts new laws that those of us in law enforcement have sought from the Legislature without success.

While there are more people going to state prison than there were three years ago, only 5.5 percent of those persons *arrested* for felonies are sent to state prison. Of those *convicted* of felonies, one-third go to state prison and the remaining two-thirds are back in the community in a relatively short period of time.

THERE IS ABSOLUTELY NO QUESTION THAT THE PASSAGE OF THIS PROPOSITION WILL RESULT IN MORE CRIMINAL CONVICTIONS, MORE CRIMINALS BEING SENTENCED TO STATE PRISON, AND MORE PROTECTION FOR THE LAW-ABIDING CITIZENRY.

IF YOU FAVOR INCREASED PUBLIC SAFETY, VOTE YES ON PROPOSITION 8.

GEORGE DEUKMEJIAN
Attorney General

Why is it that the Legislature doesn't start getting serious about a problem until we, the people, go out and qualify an initiative?

Four years ago it was Proposition 13, which I coauthored, to cut skyrocketing property taxes.

A year later we had to go to the initiative process to place a lid on government spending. That effort, the Gann Spending Limitation Initiative, was carried with a landslide 75 percent of the vote.

Today it is the forgotten victims of violent crime that the Legislature has so callously ignored. Again, it is up to the people to bring about reasonable and meaningful reform.

Your "YES" vote on Proposition 8 will restore victims' rights and help bring violent crime under control.

PAUL GANN
Proponent, Victims' Bill of Rights

Rebuttal to Argument in Favor of Proposition 8

WHY DON'T THE POLITICIANS SUPPORTING PROPOSITION 8 TELL YOU WHAT IT REALLY DOES? Look closely at their arguments. They are simply political slogans and antiCrime propaganda.

Every responsible citizen opposes crime, but we should also be very HESITANT to make *RADICAL* changes in our Constitution.

Yet Proposition 8 does just that . . . it needlessly reduces your personal liberties . . . and clearly harms true efforts to fight crime.

CONSIDER THESE EFFECTS OF PROPOSITION 8:

Takes away everyone's right to bail. (Compare Proposition 4, which targets only violent felons.)

Allows strip searches of minor traffic offenders.

Condones the use of wiretapping and seizure of your telephone and credit records without a warrant.

Permits spying on you in a public restroom.

Either Proposition 8 takes away your rights, or it is unconstitutional . . . in which case *valid criminal convictions will be thrown out.*

The other reason they say nothing specific is that MUCH OF PROPOSITION 8 IS ALREADY LAW. These laws:

Send mentally disordered sex offenders to prison.
Eliminate the diminished capacity defense.
Provide life sentences for habitual criminals.
Guarantee victim input.
Place controls on plea bargaining.
Restrict bail for violent felons (Proposition 4).

Proposition 8 will *undermine these new laws* by imposing its confusing language on top of clear, well-thought-out reforms.

Proposition 8 is the kind of abuse of the initiative process by political candidates which should be condemned. If you care about your privacy . . . and especially if you care about effective, responsible law enforcement . . . VOTE NO ON PROPOSITION 8.

RICHARD L. GILBERT
District Attorney, Yolo County

STANLEY M. BODEN
District Attorney, Santa Barbara County

TERRY GOGGIN
Member of the Assembly, 65th District
Chairman, Committee on Criminal Justice

Arguments printed on this page are the opinions of the authors and have not been checked for accuracy by any official agency

Criminal Justice—Initiative Statutes and Constitutional Amendment 8

Argument Against Proposition 8

You're afraid of crime—and you have the right to be.

If Proposition 8 would end crime, we would be the first to urge you to vote for it.

But Proposition 8 is a hoax . . . there is no other way to describe it.

Some ambitious politicians may think this ill-conceived measure helps them. It will certainly help keep an army of appellate lawyers fully employed . . .

But it will not reduce crime, help victims, or get dangerous criminals off the streets.

As professionals, charged with the responsibility of controlling crime and prosecuting criminals . . . we ask YOU to PLEASE VOTE NO on PROPOSITION 8.

Proposition 8 is so badly written *it mangles* nearly every aspect of the criminal justice system it touches.

READ the PROBLEMS it will cause:

UNCONSTITUTIONAL INITIATIVE TAKES CONVICTED KILLERS OFF DEATH ROW

Even some of Proposition 8's supporters agree it may be unconstitutional. But unconstitutional laws cause sentences to be overturned. Thirty convicted killers were recently taken off death row because of one unconstitutional line in the 1978 Death Penalty Initiative.

CONVICTING PEOPLE LIKE THE "FREEWAY KILLER" NEARLY IMPOSSIBLE

Proposition 8 seeks to stop plea bargaining. Its wording, however, would take away law enforcement's ability to negotiate with criminals to get them to testify against each other . . . This is how the "Freeway Killer" was convicted. It is how law enforcement fights organized crime and gang violence.

FREES DEFENSE LAWYERS TO SMEAR POLICE WHO TESTIFY IN COURT

Under current law, a defense lawyer cannot attack the character of a police witness. If Proposition 8 passes he could.

REQUIRES MILLIONS OF DOLLARS IN NEW COURT PROCEDURES—BUT NO MONEY TO PAY FOR THEM

Look at the cost of Proposition 8 at the top of this measure. Why is it so expensive?

A major share is for extra court hearings and elaborate new red tape in every criminal case—most of which are misdemeanors. This will require more courts, judges, clerks, and probation officers.

Proposition 8 does not provide one cent to pay for these things.

COURTS IN CHARGE OF PUBLIC SCHOOLS

Nobody knows what the so-called "safe schools" section means. The likely result of this provision is constant court battles over compliance. This will no doubt lead to judges running some of our schools. It also could give children the constitutional right to refuse to attend school.

VICTIM RESTITUTION—A MEANINGLESS PROMISE

What good is a right to restitution when so many victims are harmed by criminals who can't pay? (Ever been hit by an uninsured motorist?) Besides, victims already have the right to collect from criminals who can pay.

PROPOSITION 8—A POLITICAL PLOY

As professionals, we know our criminal justice system needs carefully written, tough, constitutional laws and procedures.

Proposition 8 is none of these. It makes it harder to convict criminals, will lead to endless appeals, and will create chaos in the legal system.

It may be good politics, but it is bad law.

PLEASE, VOTE NO ON PROPOSITION 8.

RICHARD L. GILBERT
District Attorney, Yolo County

STANLEY M. RODEN
District Attorney, Santa Barbara County

TERRY GOGGIN
Member of the Assembly, 68th District
Chairman, Committee on Criminal Justice

Rebuttal to Argument Against Proposition 8

LAW ENFORCEMENT SUPPORTS PROPOSITION 8

Proposition 8 has been endorsed by more than 250 police chiefs, sheriffs and district attorneys. It has the support of more than 30,000 rank-and-file police officers.

Senior Assistant Attorney General George Nicholson, a chief architect of the Victims' Bill of Rights and a former murder prosecutor, has called Proposition 8 "the most effective anticrime program ever proposed to help the forgotten victims of crime."

ANTICRIME LEGISLATIVE LEADERS SUPPORT PROPOSITION 8

Proposition 8 coauthor Assemblywoman Carol Hallett says, "A generation of victims have been ignored by our Legislature, thanks to the Assembly Criminal Justice Committee. Proposition 8 takes the handcuffs off the police and puts them on the criminals, where they belong."

THE PEOPLE SUPPORT PROPOSITION 8

Throughout California, hundreds of thousands of your fellow citizens carried and signed petitions to place this vital initiative on the ballot. Many of these people have lost family members or are themselves victims of crime.

But they are not only victims of crime, they are victims of our criminal justice system—the liberal reformers, lenient judges and behavior modification do-gooders who release hardened criminals again and again to victimize the innocent.

It's time to restore justice to the system.

VOTE YES FOR VICTIMS' RIGHTS.

VOTE YES ON PROPOSITION 8

PAUL GANN
Proponent, Victims' Bill of Rights

Arguments printed on this page are the opinions of the authors and have not been checked for accuracy by any official agency

[Sept. 1982]

ATTACHMENT "3"

Unger v. Superior Court (Marin County Democratic Central Com.) (1980)

102 Cal.App.3d 681; 162 Cal.Rptr. 611

[Civ. No. 47927. First Dist., Div. Two. Feb. 27, 1980.]

SAMUEL UNGER, Petitioner, v.
THE SUPERIOR COURT OF MARIN COUNTY, Respondent;
MARIN COUNTY DEMOCRATIC CENTRAL COMMITTEE, Real Party in Interest.

SUMMARY

A candidate for election as a member of the governing board of a community college district sought review by extraordinary writ of the dismissal of his mandamus petition seeking to enjoin a county central committee of a political party from indorsing or supporting candidates for the nonpartisan office on the ground the committee's activities violated Cal. Const., art. II, § 6, providing that judicial, school, county and city offices shall be nonpartisan.

The Court of Appeal denied relief on the ground the election had already taken place, but held that the explicit and unqualified language of Cal. Const., art. II, § 6, prohibits a political party and, in particular, a county central committee of a political party, from indorsing, supporting, or opposing a candidate for the office of governing member of the board of a community college district, a nonpartisan school office within the meaning of the constitutional provision, in any election. The court held the prohibition did not infringe on freedom of speech or association, or the right of suffrage. (Opinion by Miller, J., with Taylor, P. J., and Rouse, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) **Constitutional Law § 7—Operation and Effect—Mandatory, Directory, and Self-executing Provisions.**—Cal. Const., art. I, § 26, providing that constitutional provisions are "mandatory and pro-

hibitory, unless by express words they are declared to be otherwise," applies to all sections of the Constitution alike and is binding on all branches of the state government, including courts, in their construction of the provisions of Cal. Const., art. II, § 6, which provide that judicial, school, county and city offices shall be nonpartisan.

(2) **Elections § 1—Nonpartisan Offices—Constitutional Prohibition.**—The explicit and unqualified language of Cal. Const., art. II, § 6, providing that judicial, school, county and city offices shall be nonpartisan, prohibits a political party and, in particular, a county central committee of a political party, from indorsing, supporting, or opposing a candidate for the office of member of the governing board of a community college district, a nonpartisan school office within the meaning of the constitutional provision, in any election. Such prohibition does not infringe on freedom of speech or association, or restrict the right of suffrage. The provisions of Cal. Const., art. II, § 6, are self-executing, and will be given effect without implementing legislation. Legislative inaction cannot qualify constitutional provisions capable of self-execution whose language adequately sets forth the rule through which the duty imposed may be enforced. Moreover, the constitutional grant constitutes a restraint on the law-making powers of the state, and legislative enactments contrary to its provisions are void.

[See **Cal.Jur.3d**, Elections, § 118; **Am.Jur.2d**, Election, 117.]

(3) **State of California § 10—Attorney General—Opinions.**—Although opinions of the Attorney General, who is charged with the duty to enforce the law, are entitled to great weight, they are not controlling as to the meaning of a constitutional provision or statute.

COUNSEL

Lynn S. Carman for Petitioner.

No appearance for Respondent.

Herbert G. Hawkins and Hawkins & Petersen for Real Party in Interest.

[Feb. 1980]

OPINION

MILLER, J.—In this extraordinary writ proceeding, we consider whether article II, section 6 of the California Constitution prohibits a county central committee of a political party from indorsing, supporting or opposing a candidate for a school office.

Article II, section 6 of the California Constitution provides: "Judicial, school, county, and city offices shall be nonpartisan."

The salient facts are undisputed. Petitioner Samuel Unger is a resident and registered voter of the County of Marin and was a duly qualified candidate on the ballot for election as a member of the governing board of the Marin Community College District at the November 6, 1979, election. On or about September 1, 1979, real party in interest Marin County Democratic Central Committee, a county central committee created pursuant to Elections Code section 8820 et seq., invited all registered Democrats who were candidates for the governing board of the district to attend a September 6, 1979, meeting of the county central committee to seek the indorsement of the county central committee for the office and to apply for financial assistance.[1] Petitioner neither attended the meeting nor sought the endorsement or assistance of the county central committee. On September 6, 1979, the county central committee did in fact indorse four registered Democrats (out of six registered Democrats, four registered Republicans and three registered Independents) for the vacancies on the governing board to be filled at the November 6, 1979, election. The county central committee subsequently sent letters to unsuccessful applicants, publicly announced the indorsement of the four candidates, and planned to make "small" financial contributions to the candidates it had indorsed.

On September 12, 1979, petitioner filed a verified petition in respondent court seeking relief by mandate or by injunction to enjoin the county central committee from indorsing or supporting candidates for the nonpartisan office of member of the governing board of the district in the forthcoming November election and in all future elections for such nonpartisan office on the ground that the county central commit-

[1]Section 8500 et seq. of the Elections Code contains provisions governing the organization, operation, and functions of that political party known as the Democratic Party of California. Similar provisions exist for the Republican Party of California (§ 9000 et seq.), the American Independent Party of California (§ 9600 et seq.), and the Peace and Freedom Party of California (§ 9750 et seq.).

tee's activities violated article II, section 6 of the California Constitution and section 37 of the Elections Code.[2] Petitioner alleged that the conduct of the county central committee was causing great and irreparable injury to him in his capacity as resident, registered voter and candidate for the governing board of the district, an injury which was continuing and for which he had no plain, adequate or speedy remedy other than in the proceeding instituted by him.

On September 27, 1979, respondent court sustained a demurrer to the action without leave to amend and ordered that the action be dismissed.[3] Although the order of dismissal is a final judgment (Code Civ. Proc., § 581d) which is appealable (Code Civ. Proc., § 904.1), petitioner sought review by extraordinary writ, contending that appeal was not an adequate remedy in that he needed relief prior to the November 6, 1979, election. The issue of the absence of an adequate remedy in the ordinary course of law has been determined by the Supreme Court in its order directing the issuance of an alternative writ of mandate to be heard before this court. (*Brown* v. *Superior Court* (1971) 5 Cal.3d 509, 515 [96 Cal.Rptr. 584, 487 P.2d 1224].)

In its return to the alternative writ, real party does not deny that it had engaged in the conduct objected to by petitioner; real party contends that its conduct was in conformance with accepted practice which it believed to be proper. Real party has submitted declarations attesting to the fact that the county central committees have been openly indorsing and supporting candidates for nonpartisan office for many years. The declarations show that the practice is widespread in the San Francisco Bay Area.[4]

[2]Section 37 of the Elections Code provides: "'Nonpartisan office' means an office for which no party may nominate a candidate. Judicial, school, county and municipal offices are nonpartisan offices."

[3]The demurrer was based on two grounds: (1) that the complaint did not state a cause of action, and (2) that the complaint was uncertain.

[4]The declaration of Agar Jaicks, chairman of the Democratic Central Committee for the City and County of San Francisco, avers that the San Francisco central committee has been indorsing and actively supporting candidates for the nonpartisan offices of mayor, board of supervisor, board of education, community college board and judge since 1967. The declaration of Sal Bianco, chairman of the Santa Clara County Democratic Central Committee, avers that the Santa Clara County central committee has been indorsing candidates for nonpartisan offices since 1972. The declaration of Mary Warren, chairperson of the Alameda County Democratic Central Committee, avers that over the past 5 years the Alameda County central committee has indorsed at least

Before examining the provisions of article II, section 6 of the Constitution (added to the Const. as § 5 in 1972 and renumbered § 6 in 1976), we note that the Constitution furnishes a rule for its own construction. (1) That rule, unchanged since its enactment in 1879, is that constitutional provisions are "mandatory and prohibitory, unless by express words they are declared to be otherwise." (Art. I, § 26, Cal. Const.)[5] The rule applies to all sections of the Constitution alike and is binding upon all branches of the state government, including this court, in its construction of the provisions of article II, section 6. (*State Board of Education* v. *Levit* (1959) 52 Cal.2d 441, 460-461 [343 P.2d 8].)

Section 26 of article I "'not only commands that its provisions shall be obeyed, but that disobedience of them is prohibited. Under the stress of this rule, it is the duty of this court to give effect to every clause and word of the constitution, and to take care that it shall not be frittered away by subtle or refined or ingenious speculation. The people use plain language in their organic law to express their intent in language which cannot be misunderstood, and *we must hold that they meant what they said*.'...[Citation.]" (*State Board of Education* v. *Levit, supra,* at p. 460, italics added.)

Applying the foregoing rule of construction, the language of the constitutional provision is plain, explicit and free from ambiguity. "There is no necessity or opportunity to resort to judicial construction to ascertain its meaning. When the facts in any particular case come within its provisions it is the duty of the court to apply and enforce it." (*French* v. *Jordan* (1946) 28 Cal.2d 765, 767 [172 P.2d 46].)

It cannot be denied that the office for which petitioner was a candidate was a "school" office within the meaning of the constitutional provision. "Nonpartisan" is defined as "not affiliated with or committed to the support of a particular political party: politically independent... viewing matters or policies without party bias...held or organized with all party designations or emblems absent from the ballot...composed, appointed, or elected without regard to the political party affiliations of members..." (Webster's New Internat. Dict. (3d ed. 1965).)

100 candidates for the nonpartisan offices of supervisor, city council member, school board member and judge.

[5]Present section 26 of article I appeared as section 22 thereof in the Constitution of 1879. It was repealed and readopted, as section 28 but otherwise unchanged, by vote of the people on November 5, 1974; on June 8, 1976, it was renumbered as section 26.

(2) In light of the foregoing, we hold that the explicit and unqualified language of article II, section 6 prohibits a political party and, in particular, a county central committee of a political party, from indorsing, supporting, or opposing a candidate for the office of governing member of the board of a community college district, a nonpartisan school office within the meaning of the constitutional provision, in any election.[6]

Real party acknowledges that it is prohibited by the "Truth in Endorsements Law" (Elec. Code, § 11700 et seq.) from indorsing, supporting, or opposing any candidate for nomination for partisan office in the direct primary election, but suggests that if the doctrine of *expressio unius est exclusio alterius* is applied, section 11702 constitutes the sole limitation upon its activities, and that it may participate in nonpartisan elections.[7]

We do not agree. Former article II, section 2-1/2, in which the "Truth in Endorsements Law" finds its genesis, expressly empowered the Legislature to regulate the manner in which political parties could participate in the direct primary election. (*Cal. Democratic Council* v. *Arnebergh* (1965) 233 Cal.App.2d 425 [43 Cal.Rptr. 531].)[8] Reasonable regulation pursuant to such a constitutional grant in order to prevent evils which formerly had been prevalent does not infringe on freedom of speech or association guaranteed by the federal and state Constitutions (*Cal. Democratic Council* v. *Arnebergh, supra*, at p. 429; petn. for hg. den.; app. dism. for want of a substantial federal question, 382 U.S. 202 [15 L.Ed.2d 269, 86 S.Ct. 395]), nor does such regulation, even to the extent that it excludes parties and individuals from

[6]Section 19 of the Elections Code provides that "'Election' means any election, including a primary which is provided for under the provisions of this code."

[7]Section 11702 of the Elections Code provides: "The state convention, state central committee, and the county central committee in each county are the official governing bodies of a party qualified to participate in the direct primary election. The state convention, state central committee, and the county central committee in each county shall not endorse, support, or oppose, any candidate for nomination by that party for partisan office in the direct primary election." Any registered voter may apply to the superior court for a restraining order or injunction in the event of a violation of this chapter. (Elec. Code, § 11706.)

[8]In 1963, at the time the "Truth in Endorsements Law" was enacted, former article II, section 2-1/2 provided that "[t]he legislature shall have the power . . . to determine the tests and conditions upon which electors, political parties, or organizations of electors may participate in any . . . primary election." Former article II, section 2-1/2 was repealed November 7, 1972, and superseded by article II, section 5 which provides in relevant part, "[t]he Legislature shall provide for primary elections for partisan offices. . . ."

participating in primary elections under certain conditions, restrict the constitutional right of suffrage. (*Communist Party* v. *Peek* (1942) 20 Cal.2d 536, 544-545 [127 P.2d 889].)[9]

In a nonpartisan election, "the party system is not an integral part of the elective machinery and the individual's right of suffrage is in no way impaired by the fact that he cannot exercise his right through a party organization." (*Communist Party* v. *Peek, supra*, at p. 544.) The evils of partisanship in certain offices are well illustrated in *Moon* v. *Halverson* (1939) 206 Minn. 331 [288 N.W. 579, 581-582, 125 A.L.R. 1041] (conc. opn. of Loring, J.). No constitutional provision was at issue in *Moon*; here, by constitutional command, the People have directed that certain offices *shall* be nonpartisan. The provisions of article II, section 6, unlike the provisions of former article II, section 2-1/2, are self-executing; these provisions will be given effect without implementing legislation. (*Chesney* v. *Byram* (1940) 15 Cal.2d 460, 463 [101 P.2d 1106]; *Taylor* v. *Madigan* (1975) 53 Cal.App.3d 943, 950-952 [126 Cal.Rptr. 376].)[10] Although the Legislature may enact legislation to implement a self-executing provision of the Constitution (*Chesney* v. *Byram, supra*, at p. 463), "'"[i]t is not and will not be questioned but that . . . it is not within the legislative power, either by its silence or by direct enactment, to modify, curtail or abridge this constitutional grant." [Citations.]'" (*Flood* v. *Riggs* (1978) 80 Cal.App.3d 138, 154 [145 Cal.Rptr. 573].)

Legislative inaction can in no manner qualify constitutional provisions capable of self-execution whose language adequately sets forth the rule through which the duty imposed may be enforced. (*Flood* v. *Riggs, supra*, at p. 155.) Moreover, the constitutional grant constitutes a restraint upon the law-making powers of the state, and legislative enactments contrary to its provisions are void. (*Sail'er Inn., Inc.* v. *Kirby* (1971) 5 Cal.3d 1, 8 [95 Cal.Rptr. 329, 485 P.2d 529, 46 A.L.R.3d 351].)

[9]Real party has acknowledged that it is bound by section 11702 of the Elections Code (*ante*, at p. 686, and fn. 7), which is not here under attack (see *People* v. *Crutcher* (1968) 262 Cal.App.2d 750, 752-753 [68 Cal.Rptr. 904], but see *Abrams* v. *Reno* (S.D.Fla. 1978) 452 F.Supp. 1166, a decision of a lower federal court by which this court is not bound (*People* v. *Bradley* (1969) 1 Cal.3d 80, 86 [81 Cal.Rptr. 457, 460 P.2d 129])).

[10]A constitutional provision may be said to be self-executing "if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced." (*Chesney* v. *Byram, supra*, at p. 462; *Taylor* v. *Madigan, supra*, at p. 950, fn. 3.)

We also disapprove the opinion of the Attorney General relied upon by real party (59 Ops.Cal.Atty.Gen. 60 (1976)) to the extent that it is inconsistent with the constitutional mandate herein expressed. (3) Although opinions of the Attorney General, who is charged with the duty to enforce the law, are entitled to great weight, the opinions of the Attorney General are not controlling as to the meaning of a constitutional provision or statute. (*Smith* v. *Municipal Court* (1959) 167 Cal.App.2d 534, 539 [334 P.2d 931].)

Because this case poses a question which is of broad public interest, is likely to recur, and should receive uniform resolution throughout the state, we have undertaken to resolve the issue raised by petitioner even though an event occurring during its pendency would normally render the matter moot. (*Zellenga* v. *Nelson* (1971) 4 Cal.3d 716, 719-720 [94 Cal.Rptr. 602, 484 P.2d 578].) Although we have concluded that petitioner's complaint stated a proper cause against the demurrer, it is obvious that by reason of the election of November 6, 1979, having taken place, this court cannot grant the relief sought by petitioner (*Kagan* v. *Kearney* (1978) 85 Cal.App.3d 1010, 1014 [149 Cal.Rptr. 867]; *Gold* v. *Los Angeles Democratic League* (1975) 49 Cal.App.3d 365, 372 [122 Cal.Rptr. 732]), and we deem it unlikely that real party, having been apprised of this decision, will repeat the conduct which precipitated this proceeding.

The alternative writ, having served its purpose, is discharged, and the peremptory writ is denied. All other relief sought by petitioner is denied.

Taylor, P. J., and Rouse, J., concurred.

A petition for a rehearing was denied March 28, 1980, and the opinion was modified to read as printed above. Petitioner's application for a hearing by the Supreme Court was denied May 22, 1980. Mosk, J., and Newman, J., were of the opinion that the application should be granted.

ATTACHMENT "4"

Porten v. University of San Francisco (1976)

64 Cal.App.3d 825; 134 Cal.Rptr. 839

[Civ. No. 38930. First Dist., Div. Four. Dec. 14, 1976.]

MARVIN L. PORTEN, Plaintiff and Appellant, v.
UNIVERSITY OF SAN FRANCISCO, Defendant and Respondent.

SUMMARY

The trial court dismissed a cause of action after a demurrer to the complaint was sustained without leave to amend. The complaint sought damages against an in-state university arising out of the university's claimed misconduct in disclosing to the State Scholarship and Loan Commission the grades plaintiff had earned at an out-of-state university before transferring to the local university. (Superior Court of the City and County of San Francisco, No. 689956, Charles S. Peery, Judge.)

The Court of Appeal reversed with directions to overrule the general demurrer. The court held that, while the complaint did not state a cause of action for the public disclosure of private facts about plaintiff, the communication not being to the public in general, the complaint did state a cause of action under Cal. Const., art. I, § 1, as amended in 1972 to protect the right to privacy. The court declared that elevation of the right to be free from invasions of privacy to constitutional stature was apparently intended to expand the right and to give a cause of action for the improper use of information, properly obtained for a specific purpose, for another purpose, or the disclosure of the information to a third party. (Opinion by Christian, J., with Caldecott, P. J., and Rattigan, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) **Privacy § 8—Actions—Pleading—Public Disclosure of Private Facts.**—The tort of public disclosure of private facts about plaintiff requires communication to the public in general or to a large number of persons, as distinguished from communication to one individual or to a few. The interest to be protected is individual freedom from the wrongful publicizing of private affairs and activities that are outside the relm of legitimate public concern. Hence, a complaint seeking damages against a university in this state arising out of the university's claimed misconduct in disclosing to the State Scholarship and Loan Commission the grades plaintiff had earned at an out-of-state university before transferring to the university does not state a cause of action for the public disclosure of private facts.

[See **Cal.Jur.3d,** Assault and Other Wilful Torts, § 119; **Am. Jur.2d,** Privacy, §§ 26, 42.]

(2) **Privacy § 3—Nature and Extent of Right—Constitutional Provision.**—Elevation of the right to be free from invasions of privacy to constitutional stature, by amendment of Cal. Const., art. I, § 1, apparently was intended to expand the right of privacy.

(3) **Privacy § 3—Nature and Extent of Right—Constitutional Provision as Self-executing.**—The constitutional right to privacy contained in Cal. Const., art. I, § 1, is self-executing and confers a right of action on all Californians for invasions of privacy, not merely by the state, but by anyone.

(4) **Privacy § 8—Actions—Pleading—Improper Use of Information Obtained for Specific Purpose.**—A complaint seeking damages against a local university arising out of the university's claimed misconduct in disclosing to the State Scholarship and Loan Commission the grades plaintiff had earned at an out-of-state university before transferring to the local university adequately stated a cause of action for invasion of privacy under Cal. Const., art. I, § 1.

(5) **Pleading § 15—Construction—On Appeal—As Abandoning Theory of Complaint.**—The policy of the law is to construe pleadings liberally to the end that cases will be tried on their merits, rather than be disposed of on technicalities of pleadings. Thus, plaintiff's complaint was not defective because the legal theory was first labeled by him "breach of confidential relationship," where it stated a cause of action for an asserted "invasion of privacy" by a local university, in disclosing to a scholarship commission the grades plaintiff had earned at an out-of-state university.

COUNSEL

Marvin L. Porten, in pro. per., for Plaintiff and Appellant.

Low, Ball & Lynch and David R. Vogl for Defendant and Respondent.

OPINION

CHRISTIAN, J.—Marvin L. Porten appeals from a judgment of dismissal rendered after a demurrer to his complaint was sustained without leave to amend. Appellant's complaint prayed damages against respondent University of San Francisco arising out of the university's claimed misconduct in disclosing to the State Scholarship and Loan Commission the grades appellant had earned at Columbia University before transferring to the University of San Francisco. Appellant alleged that he had sought and received assurances from the university that his Columbia grades would be used only for the purpose of evaluating his application for admission, that they would be kept confidential and that they would not be disclosed to third parties without appellant's authorization. It is also alleged that the State Scholarship and Loan Commission did not ask the university to send appellant's Columbia University transcript and that the commission did not have a need for that transcript.

Respondent's demurrer is to be treated as admitting the truthfulness of all properly pleaded factual allegations of the complaint, but not contentions, deductions or conclusions of fact or law. (See *White* v. *Davis*

(1975) 13 Cal.3d 757, 765 [120 Cal.Rptr. 94, 533 P.2d 222]; *Serrano* v. *Priest* (1971) 5 Cal.3d 584, 591 [96 Cal.Rptr. 601, 487 P.2d 1241]; *Daar* v. *Yellow Cab Co.* (1967) 67 Cal.2d 695, 713 [63 Cal.Rptr. 724, 433 P.2d 732].) The legal effect of the facts alleged in the complaint is a question of law. (*Hendrickson* v. *California Newspapers, Inc.* (1975) 48 Cal.App.3d 59, 61 [121 Cal.Rptr. 429]; Code Civ. Proc., § 589.)

According to Prosser, the courts have recognized four distinct forms of tortious invasion of privacy: (1) the commercial appropriation of the plaintiff's name or likeness (codified in California in 1971 in Civ. Code, § 3344, subd. (a)); (2) intrusion upon the plaintiff's physical solitude or seclusion; (3) publicity which places the plaintiff in a false light in the public eye; and (4) public disclosure of true, embarrassing private facts about the plaintiff. (Prosser, Torts (4th ed.) § 117, pp. 804-814; see also *Johnson* v. *Harcourt, Brace, Jovanovich, Inc.* (1974) 43 Cal.App.3d 880, 887 [118 Cal.Rptr. 370].)

In discussing the right of privacy as it relates to the public disclosure of private facts, Prosser states: "Some limits of this branch of the right of privacy appear to be fairly well marked out. The disclosure of the private facts must be a public disclosure, and not a private one; there must be, in other words, publicity." (Prosser, Torts, *supra*, § 117, p. 810.) (1) Except in cases of physical intrusion, the tort must be accompanied by publicity in the sense of communication to the public in general or to a large number of persons as distinguished from one individual or a few. (*Schwartz* v. *Thiele* (1966) 242 Cal.App.2d 799, 805 [51 Cal.Rptr. 767].) The gravamen of the tort is unwarranted publication of intimate details of plaintiff's private life. (*Coverstone* v. *Davies* (1952) 38 Cal.2d 315, 322, 323 [239 P.2d 876]; *Schwartz* v. *Thiele, supra*, 242 Cal.App.2d at p. 805.) The interest to be protected is individual freedom from the wrongful publicizing of private affairs and activities which are outside the realm of legitimate public concern. (See *Coverstone* v. *Davies, supra*, 38 Cal.2d at p. 323; *Stryker* v. *Republic Pictures Corp.* (1951) 108 Cal.App.2d 191, 194 [238 P.2d 670].)

In this case, the university's disclosure of the Columbia transcript to the Scholarship and Loan Commission was not a communication to the public in general or to a large number of persons as distinguished from a communication to an individual or a few persons. Therefore, the university is correct in its contention that appellant's complaint fails to

state a cause of action based on the so-called "public disclosure of private facts" branch of the tort of invasion of privacy.

Appellant argues however that his complaint states a cause of action under the privacy provision added to the state Constitution in 1972. Section 1 of article I of the California Constitution provides:

"[*Inalienable Rights*]

SECTION 1. All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, *and privacy.*" (Italics added.)

The new language was first construed by the California Supreme Court in *White* v. *Davis, supra,* 13 Cal.3d 757: "the full contours of the new constitutional provision have as yet not even tentatively been sketched, . . ." (*White* v. *Davis, supra,* at p. 773; see also *Valley Bank of Nevada* v. *Superior Court* (1975) 15 Cal.3d 652, 656 [125 Cal.Rptr. 553, 542 P.2d 977].)

(2) The elevation of the right to be free from invasions of privacy to constitutional stature was apparently intended to be an expansion of the privacy right. The election brochure argument states: "The right to privacy is much more than 'unnecessary wordage.' It is fundamental to any free society. Privacy is not now guaranteed by our State Constitution. This simple amendment *will extend various court decisions* on privacy to insure protection of our basic rights." (Cal. Ballot Pamp. (1972) p. 28.)[1] (Italics added.)

(3) The constitutional provision is self-executing; hence, it confers a judicial right of action on all Californians. (*White* v. *Davis, supra,* 13 Cal.3d at p. 775.) Privacy is protected not merely against state action; it is considered an inalienable right which may not be violated by anyone.[2]

[1]In *White* v. *Davis,* the California Supreme Court pointed to the election brochure argument as the only legislative history available in construing the constitutional amendment. In footnote 11 at page 775, the court stated: "California decisions have long recognized the propriety of resorting to such election brochure arguments as an aid in construing legislative measures and constitutional amendments adopted pursuant to a vote of the people. (See, e.g., *Carter* v. *Com. on Qualifications, etc.* (1939) 14 Cal.2d 179, 185 [93 P.2d 140]; *Beneficial Loan Society, Ltd.* v. *Haight* (1932) 215 Cal. 506, 515 [11 P.2d 857]; *Story* v. *Richardson* (1921) 186 Cal. 162, 165-166 [198 P. 1057, 18 A.L.R. 750]; *In re Quinn* (1973) 35 Cal.App.3d 473, 483-486 [110 Cal.Rptr. 881].)"

[2]The language of the election brochure argument refers to "*effective restraints on the information activities of government and business.*" (Cal. Ballot Pamp. (1972) p. 26.)

(See *Annenberg* v. *Southern Cal. Dist. Council of Laborers* (1974) 38 Cal.App.3d 637 [113 Cal.Rptr. 519]; 26 Hastings L.J. 481, 504, fn. 138 (1974).)

The California Supreme Court has stated that the privacy provision is directed at four principal "mischiefs": "(1) 'government snooping' and the secret gathering of personal information; (2) the overbroad collection and retention of unnecessary personal information by government and business interests; (3) the improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party; and (4) the lack of a reasonable check on the accuracy of existing records." (*White* v. *Davis, supra,* 13 Cal.3d at p. 775.) The *White* case concerned the use of police undercover agents to monitor class discussions at a state university. In ruling on the sufficiency of a complaint challenging the legality of such a practice, the Supreme Court found that a cause of action had been stated on the basis that the practice threatened freedom of speech and association and abridged the students' and teachers' constitutional right of privacy. The *White* court noted that the police surveillance operation challenged there epitomized the kind of governmental conduct which the new constitutional amendment condemns. (See *White* v. *Davis, supra,* 13 Cal.3d at p. 775.)

Appellant's complaint obviously involves a far different factual situation from that before the court in *White*; appellant contends that the allegedly unauthorized transmittal of his Columbia University transcript to the State Scholarship and Loan Commission falls within the proscribed third "mischief"—"the improper use of information properly obtained for a specific purpose, *for example, the use of it for another purpose or the disclosure of it to some third party.*" (*White* v. *Davis, supra,* 13 Cal.3d 757, 775.) (Italics added.)

It should be noted that former section 22504.5[3] of the Education Code (in effect during the events in issue here) provided:

"§ 22504.5.

"No teacher, official, employee, or governing board member of any public or private community college, college, or university shall permit access to any written records concerning any particular pupil enrolled in

[3](Repealed by Stats. 1975, ch. 816, § 5.)

the school in any class to any person except under judicial process unless the person is one of the following:

"(a) Either parent or a guardian of such pupil.

"(b) A person designated, in writing, by such pupil if he is an adult, or by either parent or a guardian of such pupil if he is a minor.

"(c) An officer or employee of a public, private, or parochial school where the pupil attends, has attended, or intends to enroll.

"(d) An officer or employee of the United States, the State of California, or a city, city and county, or county seeking information in the course of his duties.

"(e) An officer or employee of a public or private guidance or welfare agency of which the pupil is a client.

"Restrictions imposed by this section are not intended to interfere with the preparation and distribution of community college, college and university student directories or with the furnishing of lists of names, addresses, and telephone numbers of community college, college and university students to proprietors of off-campus housing. Such restrictions are not intended to interfere with the giving of information by school personnel concerning participation in athletics and other school activities, the winning of scholastic or other honors and awards, and other like information.

"Notwithstanding the restriction imposed by this section, a governing board may, in its discretion, provide information to the staff of a college, university, or educational research and development organization or laboratory if such information is necessary to a research project or study conducted, sponsored, or approved by the college, university, or educational research and development organization or laboratory and if no pupil will be identified by name in the information submitted for research. Notwithstanding the restrictions imposed by this section an employer or potential employer of the pupil may be furnished the age and scholastic record of the pupil and employment recommendations

prepared by members of the school staff."[4] Moreover, recently enacted federal and state statutes recognize a right of privacy in student records. (See 20 U.S.C.A. § 1232g (Family Educational Rights and Privacy Act of 1974); see also Ed. Code, §§ 25430-25430.18.)[5]

(4) In view of the foregoing considerations and the broad language of the California Supreme Court in *White* to the effect that the new constitutional provision protecting privacy is aimed at curbing "the improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party," the allegations of appellant's complaint, which for present purposes must be deemed true,[6] state a prima facie violation of the state constitutional right of privacy. At trial, of course, the university may contest any of the allegations of the complaint as well as show some compelling public interest justifying the transmittal of the Columbia transcript to the commission. (See *White* v. *Davis*, *supra*, 13 Cal.3d at p. 775; see also *Loder* v. *Municipal Court* (1976) 17 Cal.3d 859 [132 Cal.Rptr. 464, 553 P.2d 624]; 64 Cal.L.Rev. 347, 352 (1976).)[7]

[4]Subdivision (d) of former section 22504.5 of the Education Code provides that colleges shall permit access to student records to officers or employees of the State of California seeking information in the course of their duties. It cannot be determined from the record on appeal whether an officer or employee of the State Scholarship and Loan Commission, in the proper course of his duties, sought Porten's complete undergraduate transcript. If this were shown to be the case, as seems possible, appellant's invasion of privacy action might well be disposed of upon a motion for summary judgment.

[5]This new legislation permits access to student records without student consent when given to agencies or organizations in connection with a student's application for, or receipt of, financial aid. (See 20 U.S.C.A. § 1232g, subd. (b)(1)(D); see also Ed. Code, § 25430.15, subd. (b)(3).)

[6]It should be noted that former section 31243 of the Education Code (which was in effect during the events leading to this action but was repealed by Stats. 1975, ch. 1270, § 5) provided that the State Scholarship and Loan Commission "*may* take into account such factors as the following:

". . . . . .

"(b) Grades in the total undergraduate program." (Italics added.) However, appellant's complaint, here accepted as true, alleges that: "27. The California State Scholarship and Loan Commission did not request that defendant send to it plaintiff's Columbia University transcript, nor did said Commission have a need for plaintiff's Columbia University transcript."

[7]The election brochure argument states: "This right should be abridged only when there is compelling public need. Some information may remain as designated public records but only when the availability of such information is clearly in the public interest.

". . . . . .

"The right to privacy will not destroy welfare nor undermine any important government program. It is limited by 'compelling public necessity' and the public's need to know." (Cal. Ballot Pamp. (1972) p. 28.)

(5) The university contends that the appeal is defective because appellant has abandoned the theory of his complaint. Appellant's legal theory was first labeled by him "breach of confidential relationship." Although the complaint may not be a model pleading, the policy of the law is to construe pleadings liberally to the end that cases will be tried on their merits rather than disposed of on technicalities of pleadings. (*Taylor* v. *S & M Lamp Co.* (1961) 190 Cal.App.2d 700, 703 [12 Cal.Rptr. 323]; Code Civ. Proc., § 452.) Mistaken labels and confusion of legal theory are not fatal; if appellant's complaint states a cause of action on any theory, he is entitled to introduce evidence thereon. (See *Barquis* v. *Merchants Collection Assn.* (1972) 7 Cal.3d 94, 103 [101 Cal.Rptr. 745, 496 P.2d 817]; *Lacy* v. *Laurentide Finance Corp.* (1972) 28 Cal.App.3d 251, 256-257 [104 Cal.Rptr. 547]; *Taylor* v. *S & M Lamp Co., supra,* at pp. 704, 712.) An action cannot be defeated merely because it is not properly named. (*Taylor* v. *S & M Lamp Co., supra,* at p. 712.)

The judgment is reversed with directions to overrule the general demurrer.

Caldecott, P. J., and Rattigan, J., concurred.

ATTACHMENT "5"

Laguna Publishing Co. v. Golden Rain Foundation (1982)

131 Cal.App.3d 816; 182 Cal.Rptr. 813

[Civ. No. 20650. Fourth Dist., Div. Two. May 18, 1982.]

LAGUNA PUBLISHING COMPANY, Plaintiff and Appellant, v. GOLDEN RAIN FOUNDATION OF LAGUNA HILLS, Defendant and Respondent.

SUMMARY

A newspaper publisher that had been prevented from making unsolicited distributions by private carrier of its giveaway newspaper in a private residential community filed a complaint against the corporation that owned the sidewalks, streets, and other common areas in the community and the publisher of another similar giveaway newspaper, in which it sought damages and an injunction against excluding its newspaper from the community. Plaintiff alleged it had been deprived by such exclusion of its constitutionally protected rights of freedom of speech and press and that it was entitled to damages by reason of the violation of Cal. Const., art. I, § 2, and under the federal Civil Rights Act (42 U.S.C. § 1983). It also alleged a cause of action under the Cartwright Act (Bus. & Prof. Code, § 16720) against defendants for their alleged conspiracy in restraint of trade in excluding plaintiff's newspaper from the community. After a trial by jury, judgment was entered against plaintiff. The jury also awarded defendant publisher compensatory and exemplary damages on its cross-complaint against plaintiff. (Superior Court of Orange County, No. 207112, Walter W. Charamza, Judge.)

The Court of Appeal reversed the judgment insofar as it denied plaintiff's application for an injunction with directions to enter judgment granting the application on terms and conditions set forth in the opinion. The court further directed the trial court, on due application of plaintiff, to try, with a jury if requested, the issue whether plaintiff suf-

fered any damages caused by its exclusion from the community in violation of its free speech and free press rights, and issues as to whether plaintiff was entitled to any damages under the Cartwright Act. The court struck, as unsupported by the evidence, a determination of the trial court to the effect that only owners or occupants of real property in the community or their invitees had been authorized to enter since the community's inception. The judgment on the cross-complaint was affirmed. The court held that the discriminatory action of defendant owner of the common areas in denying plaintiff distribution rights it had afforded for many years to defendant rival publisher was an unconstitutional deprivation of plaintiff's free speech and free press rights under Cal. Const., art. I, § 2. It further held that the trial court properly ruled that plaintiff had neither pleaded nor proved a right to damages under the federal Civil Rights Act. However, the court held that a direct right to sue for damages accruing from plaintiff's exclusion arose under Cal. Const., art. I, § 2, and that a predicate for recovery of such damages was provided by Civ. Code, §§ 1708, 3333, relating to noncontractual injuries and the measure of damages therefor. In conclusion, the court held plaintiff was entitled to consideration of its claims of conspiracy to unreasonably restrain trade or commerce in violation of Bus. & Prof. Code, § 16720, and damages arising therefrom. (Opinion by McDaniel, J., with Gardner, J.,* concurring. Separate concurring and dissenting opinion by Kaufman, Acting P. J.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) **Constitutional Law § 57—First Amendment and Other Fundamental Rights of Citizens—Scope and Nature—Freedom of the Press—Distribution of Newspapers in Private Residential Community.**—In an action by the publisher of a giveaway commercial newspaper against a corporation that owned all the streets, sidewalks, and other common areas of a private residential community and the publisher of another similar giveaway newspaper, in which plaintiff alleged that the conduct of defendant owner in preventing unsolicited carrier distribution of plaintiff's paper in the community infringed on its rights to free speech and freedom of the press,

*Retired Presiding Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

the trial court erred in denying plaintiff an injunction against such conduct, where the record showed that for many years defendant owner had permitted defendant publisher to make unsolicited deliveries of its paper to residents of the community. Defendant owner, in the exercise of its private property rights, could choose to exclude all giveaway, unsolicited newspapers from the community. However, in view of the preferred status of the rights of free speech and free press existing under Cal. Const., art. I, § 2, it impermissibly discriminated against plaintiff, when, acting with the implicit sanction of the state's police power behind it, and without authority from the residents of the community, it excluded plaintiff from the community, after having chosen to permit defendant publisher to make unsolicited deliveries therein.

[See **Cal.Jur.3d**, Constitutional Law, § 247; **Am.Jur.2d**, Constitutional Law, § 520.]

(2) **Civil Rights § 8—Actions—Restrictions on Freedom of Press—Federal Civil Rights Act—Exclusion of Giveaway Newspaper From Private Residential Community.**—In an action by the publisher of a giveaway commercial newspaper against a corporation that owned all the streets, sidewalks, and other common areas of a private residential community and the publisher of another similar giveaway newspaper, in which plaintiff alleged that the conduct of defendant owner in preventing unsolicited carrier distribution of plaintiff's paper in the community infringed on its rights to free speech and freedom of the press, the trial court properly ruled that plaintiff neither pleaded nor proved a right to damages under 42 U.S.C. § 1983, which provides for recovery of damages against any person "who, under color of any statute, ordinance, regulation, custom or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws of the United States." There was no deprivation of any right, privilege, or immunity secured by the Constitution and laws of the United States. Though "state action" was present in plaintiff's exclusion, plaintiff established impermissible discrimination solely with reference to its free-speech, free-press rights secured under the California Constitution.

(3) **Constitutional Law § 55—First Amendment and Other Fundamental Rights of Citizens—Scope and Nature—Freedom of Speech and**

Expression—Abridgement—Right to Damages.—In an action by the publisher of a giveaway commercial newspaper against a corporation that owned all the streets, sidewalks, and other common areas of a private residential community and the publisher of another similar giveaway newspaper, in which plaintiff alleged that the conduct of defendant owner in preventing unsolicited carrier distribution of plaintiff's paper in the community infringed on its rights to free speech and freedom of the press, the trial court erred in foreclosing plaintiff's right to present evidence of damages it sustained as allegedly arising from the unconstitutional exclusion of its newspaper from the community. A direct right to sue for damages accruing from plaintiff's exclusion arose under Cal. Const., art. I, § 2. Furthermore, since the constitutional violation arose from plaintiff's discriminatory exclusion with the implicit sanction of state action behind such exclusion, a predicate for recovery of money damages was provided by Civ. Code, § 1708, which provides that "every person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his rights," and the provision of Civ. Code, § 3333, that the measure of damages for a breach of an obligation not arising from contract is the amount which will compensate for all detriment proximately caused thereby.

(4) **Monopolies and Restraints of Trade § 10—Under Cartwright Act—Remedies of Individuals—Damages—Conspiracy to Discriminate Against Newspaper Publisher.**—In an action for damages by a newspaper publisher, prevented from unsolicited distribution by private carrier of its commercial, giveaway newspaper in a private residential community, against a rival newspaper and a corporation that owned all the streets, sidewalks, and other common areas in the community, in which the record established constitutionally impermissible discrimination in favor of the rival newspaper and against plaintiff, the trial court erred in ordering plaintiff not to advert in the jury's presence to any deprivation of its constitutional right to freedom of the press due to exclusion of its newspaper from the community. Moreover, the matter of the exclusion of the newspaper should have been considered by the jury under such instructions as would have enabled it to decide whether the exclusion was the result of conduct by defendants that constituted a combination of acts by two or more persons to unreasonably restrain trade or commerce in violation of the Cartwright Act (Bus. & Prof. Code, § 16720), and whether as the result of any such vio-

lation plaintiff received injuries to its business so as to be entitled to compensation in accordance with Bus. & Prof. Code, § 16750.

COUNSEL

W. Mike McCray for Plaintiff and Appellant.

Pacht, Ross, Warne, Bernhard & Sears, Michael D. Koomer, Scott Z. Zimmermann and Carol A. Schneiderman for Defendant and Respondent.

OPINION

McDANIEL, J.—In this case we decide that it violated the plaintiff's free-speech, free-press rights secured under article I, section 2 of the California Constitution when unsolicited, live-carrier delivery of plaintiff's giveaway newspaper was made the object of discriminatory exclusion from Rossmoor Leisure World by defendant Golden Rain Foundation of Laguna Hills. The extent to which plaintiff is entitled to damages, if any, beyond injunctive relief lifting such exclusion, must be resolved at a new trial of issues as later defined.

The action in the trial court was brought by Laguna Publishing Company (plaintiff) against assorted defendants after plaintiff's give-away newspaper, the Laguna News Post, was excluded by way of a denial of entry into Rossmoor Leisure World for unsolicited, free delivery to the residents of Leisure World, a private, residential, walled community where only resident-approved access is permitted through guarded security gates. The defendants named included Golden Rain Foundation of Laguna Hills (Golden Rain), the entity which finally decided to exclude plaintiff's newspaper from Leisure World, and which owns the streets, sidewalks, and other common areas within its boundaries for the benefit of its residents. Also named as a defendant was Golden West Publishing Corp. (Golden West), publisher of the Leisure World News, a give-away type newspaper which *is* and for years has been accorded the exclusive privilege of entry into Leisure World for free, unsolicited delivery to its residents.

The fourth amended complaint upon which the case went to trial, undertook to plead several theories of entitlement to relief. Plaintiff alleged that Golden Rain and Golden West had engaged in a conspiracy in restraint of trade, violative of the Cartwright Act, and that Golden West had also engaged in certain conduct against plaintiff violative of the Unfair Trade Practices Act.

For its part, Golden West cross-complained against plaintiff and its principal, Vernon R. Spitaleri, alleging the latter's violations of the Cartwright Act, the Unfair Trade Practices Act, in addition to other conduct allegedly amounting to unfair competition under the common law.

The respective claims noted were all tried to a jury which resolved the issues raised by the complaint against the plaintiff and resolved those raised by the cross-complaint in favor of Golden West. The latter was awarded $5,000 compensatory and $50,000 exemplary damages.

Otherwise, and of central importance here, the plaintiff asserted that the exclusion of its newspaper from Leisure World constituted a deprivation of its free speech and free press rights secured to it under either the federal or state Constitutions. Based on such assertion, plaintiff prayed for an injunction to lift such exclusion and for money damages either under the federal civil rights statute, 42 United States Code section 1983, or on the basis of a claimed "self-executing" modality under article I, section 2, of the California Constitution.

Procedurally, the manner in which the constitutional issues were presented and resolved was somewhat complex. Nine months before trial, the court granted a defense motion that certain issues of fact be deemed without substantial controversy. They are:

"1. Leisure World of Laguna Hills is a private residential housing project, consisting of dwelling units, streets, maintenance and, other facilities.

"2. All of the real property within Leisure World is privately owned and is used only for private purposes.

"3. Leisure World is not open to the general public.

"4. Entry into Leisure World is restricted to authorized persons who must pass through gates guarded by private security guards.

"5. Since the inception of Leisure World in 1964, only the owners or occupants of real property within Leisure World, or their invitees, have been authorized to enter Leisure World.[1]

"6. There are no business districts or commercial facilities or areas such as stores, shopping centers, office buildings, or the like within Leisure World, nor have there ever been any such districts, areas, or facilities therein.

"7. Beginning in late 1967, and continuing to date, plaintiff has been denied permission to enter Leisure World for the purpose of delivering its newspapers by carrier boy on an unrequested basis."

Item 8, argued as a part of such motion to the effect that exclusion of the Laguna News-Post from Leisure World did *not* violate plaintiff's constitutional rights, was excepted from the order granting the motion. However, the court did grant a later defense motion for an order that plaintiff refrain, in the presence of the jury, from making any reference to its claim of free speech abridgement.

The net legal effect of the later order was the same as if the court had sustained a general demurrer to plaintiff's theory of relief based upon a claimed violation of its constitutional rights of free speech and free press; hence, the jury trial of those issues arising under the respective allegations characterized as violations of the Cartwright Act and the Unfair Trade Practices Act proceeded without recognition of the claimed deprivation of plaintiff's constitutional rights.

After the jury brought in its verdict, the court, sitting in equity, took further evidence on plaintiff's application for an injunction and then denied such application. In support of that denial, it made extensive findings of fact and conclusions of law. In this connection, it is appropriate to observe, in terms of extrinsic, observable events, that there was little if any conflict in the evidence. The dispute between the parties lay

[1]All the evidence in the record is to the contrary, and so No. 5 above will be ordered stricken. The actual fact is that the Leisure World News was and at all times has been admitted to Leisure World without any expression of assent or invitation by any resident of Leisure World whatsoever.

in their divergent views of the legal consequences of those events which all agree happened, and so the findings add nothing to aid our decisional task in terms of the customary office fulfilled by findings of fact as part of a record on appeal. In other words, the constitutional issue, as defined hereinafter, is solely one of law with reference to which the jury verdict and the court's findings have no significance whatsoever. That legal issue derives from the order *in limine* which emasculated plaintiff's deprivation of constitutional rights theory.

The plaintiff and the cross-defendants appealed from the judgment, and, in the opinion filed in our initial effort to dispose of the appeal, we held that plaintiff was entitled to an injunction by the terms of which it would be accorded access to Leisure World on the same terms and conditions as those enjoyed by the Leisure World News. We held further that plaintiff was entitled to a limited new trial on those issues of fact arising from its exclusion, solely in light of state statutes proscribing conspiracies in restraint of trade, the same considered in light of plaintiff's unconstitutional exclusion from Leisure World. Otherwise, the judgment as it reflected the jury's verdict was affirmed.

Both defendants petitioned for rehearing. We granted those petitions; the matter was reargued and submitted for decision.

While the case was under submission, counsel for Golden West informed us that the appeal against it would soon be dismissed.[2] That has occurred, and so only Golden Rain continues to oppose the appeal.

In the opinion filed following the first rehearing, we reached the same result as the first time, i.e., reversing with directions: (1) to grant plaintiff's application for equitable relief; and (2) to conduct a further trial of the Cartwright Act issues in light of the unconstitutionality of plaintiff's exclusion from Leisure World. Both sides again petitioned for

[2]Our information supplied by counsel was that plaintiff had sold its newspaper to Media General, a publishing company which had previously purchased the assets of Golden West. In this connection, we were further informed by counsel for plaintiff that Laguna Publishing Company had nevertheless retained ownership of its causes of action against both Golden Rain and Golden West; however, we were further advised that Laguna Publishing Company, as a condition of the sale of its newspaper to Media General, was required to negotiate a settlement with Golden West.

Thereafter, we were informed that a settlement had been reached and that the superior court had confirmed it within the contemplations of sections 877 and 877.6 of the Code of Civil Procedure. Following those proceedings, the appeal as to Golden West was dismissed October 27, 1981.

rehearing, and both petitions were again granted. Thus, the matter is once more before us for disposition.

THE CONSTITUTIONAL ISSUE

I

The complexity of the procedures in the trial court by which the constitutional issue was presented and resolved has necessarily resulted in prolix assignments of error relative to that issue. The plaintiff contends that the trial court's ruling of December 5, 1977, which precluded it from arguing or in any way adverting in the presence of the jury to its claim of constitutional deprivation was improper because Golden Rain's exclusion of plaintiff's newspaper from Leisure World was tantamount to state action which operated to abridge plaintiff's rights of free speech and free press. This contention proceeds upon two theories under which the exclusion from Leisure World is characterized by plaintiff as impermissible state action: (1) Leisure World is the legal equivalent of a municipality under the "company town" cases; (2) Leisure World's development and construction were accomplished only as a consequence of federally guaranteed financing, with the result that its actions partake of a public quality.

In our view, it more simply frames the issue to ask, on the undisputed extrinsic facts presented by this record, if plaintiff's free speech and free press rights, secured under either the state or federal Constitutions, were abridged by the actions of Golden Rain in excluding plaintiff's employees from Leisure World and thereby preventing the unsolicited, live carrier distribution of plaintiff's newspaper, the Laguna News-Post, to the residences in Leisure World.

II

The trial court reserved its ruling on any right to an injunction until after the jury phase of the trial had been completed. That the trial court eventually denied plaintiff's application for an injunction, which would have forced Golden Rain to cease its exclusion of the Laguna News-Post from unsolicited, live carrier distribution within Leisure World, necessarily indicates that nothing which the trial court received in the way of evidence during the five-month, jury trial or during the additional period thereafter, during which it took evidence, operated in

its view to demonstrate any deprivation of plaintiff's constitutional rights.

This observation is confirmed by certain of the trial court's conclusions of law reached after promulgating 23 paragraphs of findings extending to over a dozen pages of the record. Such conclusions are: (a) "Plaintiff has no federal or state constitutional right to enter Leisure World of Laguna Hills to distribute its newspaper by carrier to occupants of dwelling units therein without any request or subscription therefor by such occupants"; (b) "Plaintiff has no federal or state constitutional right to enter Leisure World of Laguna Hills to distribute its newspapers by carrier to the occupants of dwelling units without any request or subscription therefor by such occupants when Golden Rain Foundation of Laguna Hills, acting within the scope of its authority, in behalf of its members, has denied Plaintiff permission to enter to make such distribution."

In our view, those conclusions are wrong insofar as the state Constitution is concerned. As a consequence, plaintiff is entitled to an injunction which will terminate its exclusion from Leisure World and thus enable it to distribute its newspaper there upon the same terms and conditions as the Leisure World News is now distributed therein,[3] subject nevertheless to such reasonable regulations as to time, place, and manner as Golden Rain may elect to adopt to regulate disposition of all newspapers within Leisure World.

III

What then are the facts which are material to the question of whether plaintiff's free speech and free press rights were abridged when it was excluded by Golden Rain from distributing its unsolicited, giveaway newspaper to the residences of Leisure World?

Before answering that question, we are constrained to observe again, despite the evidence presented to the court in the second, nonjury phase of the trial, following which extensive findings were made, that on the

[3]Following the filing of our initial opinion, it would not require much imagination to suppose that Golden Rain would undertake directly or would authorize others to solicit personally each residence in Leisure World for the purpose of obtaining something in writing from each, specifically requesting delivery of the Leisure World News to that residence. If this were done, the import of this decision would require that the same opportunity to solicit each residence in Leisure World be accorded to plaintiff.

constitutional issue *this is not an evidence case.* The material, extrinsic facts are not disputed. In effect, the trial court ruled as a matter of law, without the need to resolve any issues of fact, that no constitutional deprivation had occurred as a consequence of the exclusion of plaintiff's newspaper by Golden Rain from Leisure World.[4]

From this perspective, we shall recite the undisputed facts which provide the basis for our reversal. Our factual recitation of what we see to have been significant in reaching our decision, of course, starts with the several items settled nine months before trial as being without substantial controversy, with the exception of course of No. 5 which is wholly without any evidentiary support in the record.

Supplementing the six valid items noted, the record shows that the entire residential community of Leisure World, consisting of both condominiums and cooperative housing units, is comprised of roughly contiguous groups of residents sometimes referred to as "mutuals." These mutuals are also organized as nonprofit corporations and are responsible for the actual maintenance and preservation of the residential property within their respectively defined areas. As already noted, Golden Rain owns all the *common areas* within Leisure World, including the streets and sidewalks. As a consequence, Golden Rain is responsible for the maintenance and upkeep of these non-residential areas for the benefit of all the residents of Leisure World. *All residents of Leisure World are not members of Golden Rain.* Its members must apply for and be accepted for membership, such acceptance being subject to assuming certain financial obligations.

To accomplish their respective maintenance and upkeep objectives, both the mutuals and Golden Rain early on contracted with yet another legal entity to perform the actual work functions. From 1964 to the end of 1972 the entity with such contracts was the Leisure World Foundation (hereinafter LWF), and, since 1972, Professional Community Management, Inc.

[4]Because the determination of the constitutional issue is and always has been an issue of law, both in the trial court and before us, we have now reached a point of aggravated impatience with counsel for Golden Rain because of their dogged advocacy on this point as illustrated by a statement in the current petition for rehearing, namely, "The legal principles coined by the Court are constructed on the Court's own independent fact searching and drawing of inferences in derogation of established rules of appellate review. As a consequence, the Court has become an advocate for plaintiff." Such intemperate and wholly inaccurate assertions are of no aid to us in the task of trying to decide a difficult case.

Although not a prescribed part of its duties under its contract with Golden Rain, LWF, from the outset of its management of Leisure World, published and delivered, *unsolicited*, to each residence therein a community-type newspaper under the banner of the Leisure World News which Golden Rain has steadfastly described as a "house organ." LWF continued to do this until it sold the Leisure World News to defendant Golden West, initially incorporated as Birchall, Smith & Weiner, Inc., by the young men, who, as employees of LWF, had performed the functions necessary to get out the paper, including the sale of advertising.

During the beginning years of its publication by LWF, the Leisure World News was a losing effort financially. Some of the costs of printing and distributing the paper were defrayed by the sale of advertising, but in the earlier years of its publication the larger share of such costs was borne as a direct expense by LWF. As time passed, this direct expense was increasingly offset by advertising revenues, but even as late as 1967 the deficit for an operation which brought in $138,390 was still $6,055, reflecting expenses of $144,445.

In 1967, the two young men who had been hired by LWF to perform the task of putting out the Leisure World News discussed with Edward Olsen, president of LWF, the possibility, while continuing to work for LWF, of their being accorded permission by their employer to publish for their own account a so-called "shopper" for distribution to persons *outside* Leisure World.

Permission to launch the new venture was granted; thereupon Carlton Smith and Richard Birchall commenced publication of the News Advertiser for circulation outside Leisure World. Smith and Birchall were allowed to maintain an office for the News Advertiser in the same space provided them by LWF to enable them to perform their duties in putting out the Leisure World News. Advertising in the News Advertiser was sold to many of the same businesses as those who bought space in the Leisure World News. This advertising was sold at the same time by the same salesmen who represented the Leisure World News.

The consequence of this was that the Leisure World News defrayed and/or absorbed many of the expenses of Birchall, Smith & Weiner, Inc., the firm eventually organized to publish the "outside" publication which Smith and Birchall had been given permission by LWF to pub-

lish while they continued to work for LWF in space provided for them. Despite this increased overhead, the steadily increasing advertising revenue of the Leisure World News brought in a net for it in 1971 of $44,630 based on a gross of $318,616.

During this interval of time, i.e., from 1967 through 1971, the Leisure World News was delivered unsolicited to all residences within Leisure World by LWF with the full knowledge of and without any objection from Golden Rain. In addition, such deliveries were carried out with a tacit understanding with Golden Rain that no competing unsolicited, give-away newspaper could be distributed within Leisure World except by mail.[5]

As a consequence of the exclusive access accorded the Leisure World News by LWF, a meeting was arranged between publishers of three of the area's competing newspapers, including plaintiff, on the one side, and Edward Olsen of LWF on the other. The basic complaint voiced to Mr. Olsen was that Leisure World's management was subsidizing the News Advertiser, published by employees of LWF, while at the same time refusing to allow its competitors inside Leisure World except by mail. Olsen responded to such complaint by asserting that this policy of LWF had been adopted and was being followed to allow LWF to recoup the losses it had suffered during the earlier years in publishing the Leisure World News.[6]

[5]In the earlier petitions of both defendants for rehearing this statement of fact in our original opinion was challenged as unsupported by the record. Golden West argued that the jury's verdict and the court's findings are to the contrary, explicitly pointing out that the trial court found there was no conspiracy. That argument begs the question, for such finding is based on the previous legal determination of the court that no constitutional deprivation was involved in the exclusion of plaintiff's newspaper. In any case, the facts recited above do *not* necessarily describe a conspiracy.

[6]At the initial oral argument, Mr. Watson, appearing for Golden West, referred us to pages 31-35 of Golden West's petition for rehearing as demonstrating by citations to the record a refutation that Mr. Olsen had stated that the reason for the policy which excluded all give-away newspapers except the Leisure World News was to enable LWF to recoup the losses it had suffered in earlier years. We have with exacting particularity gone through the record cited by Mr. Watson, and otherwise, and can find nothing which *directly* contradicts the testimony of Mr. Moses at reporter's transcript volume XXIII, p. 5772, lines 9-14. Just because Mr. Olsen testified that he did not recall what was said 10 years earlier does not disprove the Moses testimony. Moreover, we must again point out that arguments about substantial evidence on this point are meaningless because the court had ruled *in limine* that no constitutional right had been abridged by excluding plaintiff's newspaper. Accordingly, the necessary starting point in any analysis of the constitutional issue is a hypothesis which must ignore any findings of fact as meaningless to this issue.

Beginning in 1972 there was a series of letters and other communications between Birchall, Smith & Weiner, Inc., on the one hand, and LWF on the other, the latter being represented by Edward Olsen, the president, and Otto Musch, an accountant. No good purpose would be served here to summarize all of the steps and the numerous communications utilized to develop a "record" in the corporate minutes of the two entities. It is enough to state that the end result was that Birchall, Smith & Weiner, Inc., purchased from LWF the Leisure World News for $48,000. This price was agreed to be paid at $1,000 per month for only so long as the buyer elected to continue with publication of the newspaper, or until the 48 monthly payments had been made.

Referring again to the net of $44,630 earned by the Leisure World News in calendar 1971, which accrued even though the Leisure World News was absorbing certain of the expenses of the newspaper published by Birchall, Smith & Weiner, Inc., the record reflects, out of the mouth of the president of LWF, that LWF realized and was well aware that *if* the Leisure World News could *not* be distributed inside Leisure World on an unsolicited basis it would cease to be profitable. More particularly, Edward Olsen testified concerning the agreement to sell the Leisure World News to Birchall, Smith & Weiner, Inc., "that if the Leisure World News could not be distributed inside Leisure World on a permissive basis, that Leisure World News would have no value . . . ."

Otherwise, by the end of 1972 during which the gross of Birchall, Smith & Weiner, Inc., had grown to $559,112, Olsen and Musch had organized another corporation and had entered into contracts with the various mutuals and with Golden Rain to take over all the management functions performed up to that time by LWF for the residents of Leisure World. This new corporation as earlier noted is known as the Professional Community Management Corporation.

During this same time the pressure continued to mount from other publishers, including the plaintiff, to gain access to Leisure World for unsolicited carrier delivery. It is a reasonable inference to be drawn from the extrinsic facts that in response to that pressure, under date of March 30, 1973, a written agreement was entered into between Golden Rain and Birchall, Smith & Weiner, Inc. (by then owned 51 percent by the same persons who owned an interest in the management company servicing Leisure World),[7] which provided that Golden West would de-

[7]As a consequence of other litigation, the stock in Birchall, Smith & Weiner, Inc., acquired by Olsen and Musch was later restored to Smith and Birchall.

liver the Leisure World News to all of the residents of Leisure World. This arrangement covered over 10,000 copies per week at an annual rate of $3,600. As a consequence, the unsolicited carrier delivery of the Leisure World News to all residences of Leisure World continued just as before. However, a representation was then made to the competition, including plaintiff, that the Leisure World News was being delivered in compliance with the rules and regulations of Golden Rain which required that newspapers could only be delivered by carrier within Leisure World to *subscribers*. Nevertheless, the record fails to disclose that any resident of Leisure World ever sought execution of the agreement or even knew of its existence.

More particularly, as stated in plaintiff's opening brief, "[t]he Defendants never asked permission of the residents to allow BIRCHALL, SMITH & WEINER, INC. to distribute and the record is completely void of any evidence which showed that [even] one resident of LEISURE WORLD OF LAGUNA HILLS ever requested that the LEISURE WORLD NEWS be delivered to them over the period of 1965 through the time of trial."

Otherwise, on the record, it is doubtful whether the board of directors of Golden Rain had authority to enter into the agreement providing for unsolicited delivery of the Leisure World News to *all* the residents of Leisure World.

We have already related that the board of directors of Golden Rain on March 30, 1973, entered into a written agreement with the predecessor of Golden West by means of which Golden Rain undertook on behalf of all the residents of Leisure World to "subscribe" to the Leisure World News for each of those residents.[8]

In our original opinion, we characterized this agreement as a "cosmetic subterfuge," and we remain persuaded that this is an accurate characterization of the agreement. To be more explicit in disclosing our reasons for this view of the matter, we note that the record includes copies of both the articles of incorporation and bylaws of Golden Rain.

[8]There appears to be a disparity of viewpoint between the two defendants as to the import of this agreement. Golden Rain in its earlier petition for rehearing states: "Nothing in the agreement designates the residents of Leisure World as 'subscribers.'" On the other hand, Golden West in its petition for rehearing quotes at length the testimony of George Bouchard of Golden Rain to the effect that it was the intent of the agreement to make the residents of Leisure World "subscribers" to the Leisure World News. Otherwise, in the body of Golden West's petition for rehearing references are made repeatedly to the "subscription agreement."

These items are significant not only in what they show but in what they do not show. Nowhere in either instrument is there delegated to the board of directors of Golden Rain any authority to decide what persons or publications shall be afforded *uninvited* entry into Leisure World for purpose of delivery to the individual residences of Leisure World. Actually the subject is not dealt with at all.

In addition, the bylaws of Golden Rain, exhibit "J," provide, in article II, for two classes of membership in the corporation as well as for qualification and admission to membership. *Membership is not automatic.* A resident must apply for membership in a mutual and at the same time for membership in Golden Rain. The pertinent provision states, "When a subscriber has been admitted to membership in a Mutual and has paid an initiation fee as fixed and determined by the board of directors, he shall be admitted to resident membership in the corporation, which membership shall be appurtenant to his membership in the Mutual."

In going through exhibit "I," the articles of incorporation, we noted that attached to the original draft were certain amendments. Of interest here is the fact that each amendment carried a recitation of the number of members entitled to cast votes for the amendment. The latest amendment constituting a part of this exhibit was dated February 8, 1971, at which time 7,379 members were entitled to vote and did consent to the amendment. According to the record otherwise there were at the time of the events here material to this litigation some 20,000 residents of Leisure World scattered through 12,000 residences. From this it appears that a substantial number of residents of Leisure World were *not* members of Golden Rain during the period here involved.

The consequence of all this, of course, is that Golden Rain purported to "subscribe" to the Leisure World News on behalf of a large number of residents who not only had *not* delegated any such authority to Golden Rain in its articles and bylaws, *but who in fact were not even members of Golden Rain.* In short, what Golden Rain undertook to do by means of the March 30, 1973, agreement was presumptuous, if not brazen, and therefore can fairly be described as a "cosmetic subterfuge."

In any event, in May of 1973, the plaintiff's general manager sent a letter to the presidents of each of the mutuals in Leisure World as follows: "Last November the News-Post submitted a request to the

management of Leisure World to be allowed permission to distribute the News-Post by carrier in Leisure World. We were promised that each mutual board would be consulted at their December meetings and we would have an answer within a month. [¶] After a luncheon with Robert Price and several telephone inquiries, we were told late in March that our request was denied. Further inquiries have indicated that directors of the various mutuals have never been made aware of our request. [¶] We feel the management of Leisure World would prefer not to have an independent local newspaper distributed in Leisure World. Therefore they have made it as difficult as possible for us to distribute our newspaper, and we must go to the considerable expense of mailing to our readers. [¶] The News-Post has published news stories that the management would prefer not to come to the attention of the residents. However, we do not feel the residents of Leisure World want someone else to determine what they might read. It is unfair and discriminatory to deny to one newspaper a privilege that is granted to another, even if the other newspaper can be controlled. [¶] We request that your mutual board take our request under consideration. I would be glad to appear before your board to answer any questions your directors might have. We believe their judgments are more representative of your residents and less influenced by the pressures of management. [¶] I will be anxious for your reply by mail or phone. All we want is a fair shake."

In reply thereto the then president of Golden Rain wrote some four months later, "[u]nder date of May 11, 1973, you sent a letter to the Presidents of all Mutual Corporations within the community of Leisure World, Laguna Hills. Since the subject matter of your letter relates to the community as a whole, all recipients of your letter are replying [by] this letter. [¶] Please be advised that existing regulations have been, since inception of Leisure World and remain so at the present time, that delivery of newspapers within the community can be made by your company, providing you abide by the community's rules, which presently include the privilege extended to your newspaper to have carriers deliver copies to each and all of your subscribers. [¶] You are therefore permitted to deliver newspapers within Leisure World so long as you abide by the above regulation."

The letter was also signed by the presidents of 11 of the mutuals. The position of Golden West and Golden Rain, maintained from the time of the agreement between Golden Rain and Birchall, Smith & Weiner, Inc., was that carrier delivery of the Leisure World News to every resi-

dence in Leisure World was permitted by Golden Rain because each such residence was regarded as a paid "subscriber" thereto by reason of the March 30, 1973, agreement noted earlier.[9] In this connection, we point out again that Golden Rain had neither legal nor ostensible authority to act for any resident who was not a member, and it is clear from the record that not every resident of Leisure World was a member of Golden Rain.

Otherwise, we are constrained to observe that there was a period of at least six years, i.e., from 1967 to 1973, during which there was no "subscription" agreement and during which the Leisure World News enjoyed a live carrier, exclusive access for give-away type newspapers within Leisure World to the exclusion of the Laguna News-Post and other similar publications. This circumstance was instituted and enforced by LWF, the publisher of the Leisure World News, while LWF had a management contract with Golden Rain which apparently well knew what was going on and suffered it to continue. On this point, we note once more that defendants argue that the arrangement with LWF was only an innocuous policy of Golden Rain to provide for a "house organ." In light of such argument, we find it significant that it was Edward Olsen himself, president of LWF, and not someone from Golden Rain with whom a representative of plaintiff met in an effort to break the exclusion. Moreover, it was Olsen who stated that the exclusive access allowed the Leisure World News was a policy explicitly adopted by LWF to recoup its earlier losses sustained in publishing the Leisure World News. In this connection, while Golden Rain may have owned the streets and sidewalks within Leisure World, it was LWF which employed the security personnel which enforced the exclusion it had instituted with no exception thereto taken by Golden Rain.

Nevertheless, soon after the letter last quoted above was received, this litigation was begun.

Referring to Golden Rain's current petition for rehearing, we note that a vigorous argument is again made that the Leisure World News is a "house organ" quite different in its content and purpose from those give-away type newspapers, including plaintiff's, which have been excluded. While this may be true in a sense, it conveniently overlooks the compelling feature of the Leisure World News and of those excluded

[9]See footnote 8 where we referred to the testimony of George Bouchard to this effect.

which is the same, namely their advertising content. More exactly, we are not here concerned with why the Leisure World News was *admitted* to Leisure World, i.e., even if as a "house organ," but why plaintiff's newspaper was *excluded*.

Whether the Leisure World News is or is not a "house organ" has no significance as a fact for consideration in reaching our decision. On the contrary, it was the *similarities* of the Leisure World News and plaintiff's newspaper which were what spawned this litigation and necessarily provide the basis for its resolution. In other words, what is significant is that the Leisure World News carries advertising and that it is the only give-away type newspaper carrying advertising which reaches the huge audience comprised of the residents of Leisure World. It is a competitor for the advertising dollar which retailers spend in this area of Orange County, and the fact that it has a captive audience of 20,000 affluent people whom advertisers are trying to reach is an overriding factor which no amount of sophistry emphasizing that the Leisure World News is a "house organ" can evade. The consequences of this fact are both dramatic and decisive in guiding our approach to a decision in this case. To resort to the overworked cliche, "the bottom line," here it is $1,873,204, which represents the gross revenues of the publishers of the Leisure World News who started with an initial investment of $1,000 and in just 10 years built their business to one with the almost $2 million gross noted. No doubt good management played an important part in this success story, but *exclusive access* of the advertising in the Leisure World News to the residents of Leisure World must be regarded as having played a decisive part in this success, even by the most begrudging advocate. In a word, the plaintiff's newspaper and the Leisure World News are *identical* insofar as they play their roles in competing for the local advertising dollar. Moreover, it was plaintiff's exclusion from the opportunity to compete for these advertising revenues which raised this dispute, and, parenthetically, it was this theory which plaintiff was precluded from presenting to the jury in its constitutional proportions.

To summarize, then, it emerges clearly from the foregoing synopsis that in the first instance, i.e., from 1964 up to May 1, 1972, after which the management company, LWF, sold the Leisure World News to defendant Golden West (then Birchall, Smith & Weiner, Inc.), that LWF, with the tacit concurrence of Golden Rain, distributed the Leisure World News to all residences within Leisure World by live carrier on *an unsolicited basis*. Beginning in 1967, the same year in which Bir-

chall et al., started up their "shopper," LWF, with the tacit concurrence of Golden Rain, excluded from Leisure World all other give-away type newspapers, including plaintiff's, except those to which the residents of Leisure World had subscribed.

From May 1, 1972, to March 30, 1973, during a time when the president of the management company was also a shareholder in defendant Golden West, the same arrangement continued, and the Leisure World News was accorded exclusive live carrier circulation privileges within Leisure World to the exclusion of plaintiff's newspaper. On the latter date, an agreement was entered into which purported, at least in the view of George Bouchard, a member of the Board of Directors of Golden Rain, to make all the residents of Leisure World "subscribers" to the Leisure World News and thus to place it arguably within the same category as other newspapers delivered within Leisure World on a subscription basis. This position was taken notwithstanding that all residents of Leisure World were not then members of Golden Rain.

The facts are clear. Plaintiff was purposefully excluded from Leisure World, and this operated to foreclose plaintiff's opportunity to communicate its advertising to the residents of Leisure World, notwithstanding that the Leisure World News, a similar publication, in that it carried advertising, was afforded that opportunity. This alignment of competitive factors must be viewed in light of the fact that Golden West within 10 years after its predecessors became operative with a $1,000 investment was able to generate gross advertising revenue of $1,873,204. (1) Whether or not the curtailment of plaintiff's opportunity to communicate with the residents of Leisure World under these precisely defined circumstances and thereby to be denied an equal chance to compete for those revenues was an abridgement of its constitutional rights of free speech and free press is the threshold question which we must address.

IV

Before proceeding with efforts to answer this question, we hasten to note that such efforts have been undertaken with a full awareness that any *constitutional* issue necessarily arises in the arena of a contest between the citizen and his government. Thus, the basic issue in many cases involving a claimed deprivation of constitutional rights is whether or not so-called state action is present. So it is here, and historically, the free speech, private property cases have fallen generally into two

groups. The first group is comprised of the company town cases descending from *Marsh* v. *Alabama* (1946) 326 U.S. 501 [90 L.Ed. 265, 66 S.Ct. 276], which involved an individual who was arrested for attempting to sell religious publications on the streets of a privately owned company town, Chickasaw, Alabama. In the litigation which was finally resolved in the Supreme Court of the United States, it was determined that the action of the company in excluding private individuals from exercising their free speech rights on the streets of the company town was unconstitutional.

Without going into an extensive recitation of the rationale of the decision, it is enough for our purposes here to observe that the high court looked upon the company town as tantamount to a municipality. This imputation imported the concept of state action of a kind proscribed under the Fourteenth Amendment, for the exercise of free speech cannot be limited by a true municipality. On this latter proposition, reference is made to *Van Nuys Pub. Co.* v. *City of Thousand Oaks* (1971) 5 Cal.3d 817 [97 Cal.Rptr. 777, 489 P.2d 809], which struck down a city ordinance which prohibited unsolicited delivery to private residences of precisely the same kind of newspaper as published by plaintiff.

Plaintiff relies heavily on certain language in *Marsh* in arguing that its exclusion from Leisure World amounted to state action, entitling it not only to injunctive relief but affording it a further claim for damages arising under 42 United States Code section 1983. However, even though resourceful in its arguments by analogy, plaintiff has not persuaded us that Leisure World is a company town for purposes of resolving the free speech, discrimination issue. There are no retail businesses or commercial service establishments in Leisure World. It is solely a concentration of private residences, together with supporting recreational facilities, from which the public is rigidly barred. However, the peculiar attributes of Leisure World which in many ways approximate a municipality bring it conceptually close to characterization as a company town, and such attributes do weigh in our decision as will be later discussed.

The other line of free speech, private property cases is that involving regional shopping centers, which, for our purposes, starts with *Diamond* v. *Bland* [*I*] (1970) 3 Cal.3d 653 [91 Cal.Rptr. 501, 477 P.2d 733], followed by *Lloyd Corp.* v. *Tanner* (1972) 407 U.S. 551 [33 L.Ed.2d 131, 92 S.Ct. 2219], which led to *Diamond* v. *Bland* [*II*] (1974) 11 Cal.3d

331 [113 Cal.Rptr. 468, 521 P.2d 460]. In the *Diamond* cases, which were an outgrowth of an exclusion from a San Bernardino regional shopping center of solicitors of signatures for an antipollution initiative, the court ultimately held, because the plaintiffs had effective, alternative channels of communication with the public, and because the solicitation activities bore no relationship to the shopping center activities, that it was permissible to exclude the plaintiffs. The court said, "[u]nder these circumstances, we must conclude that defendants' private property interests outweigh plaintiffs' own interests in exercising First Amendment rights in the manner sought herein." (*Diamond v. Bland* [*II*], *supra*, 11 Cal.3d 331, 335.)

However, that is not the last word on the subject. More recently, the California Supreme Court, acting expressly under the California Constitution, reversed its position on the regional shopping center, doing so in *Robins* v. *Pruneyard Shopping Center* (1979) 23 Cal.3d 899 [153 Cal.Rptr. 854, 592 P.2d 341]. In *Pruneyard*, on facts strikingly similar to those in *Diamond*, the court ruled that the exercise of free speech rights unrelated to the customary commercial activities conducted within a privately owned, regional shopping center cannot be prohibited by the shopping center, provided the free speech activity does not interfere with or impinge in any way upon such customary commercial activity.

The *Pruneyard* case was appealed to the United States Supreme Court, which, recently, handed down its opinion. (*Pruneyard Shopping Center* v. *Robins* (1980) 447 U.S. 74 [64 L.Ed.2d 741, 100 S.Ct. 2035].) The United States Supreme Court decided that our state Constitution *could* provide more expansive rights of free speech than that provided by the federal Constitution, and that the state Constitution in affording these expanded free speech rights, as announced in *Pruneyard*, does *not* import a violation of the shopping center owner's or tenants' property rights under the Fifth or Fourteenth Amendments to the United States Constitution.

Because the public is not invited but excluded from Leisure World, and because we read *Diamond* [*I*] and *Pruneyard* to reach the results they do primarily because of this feature of unlimited public access, notwithstanding the stated basis for the decision of the United States Supreme Court in *Lloyd Corp.* v. *Tanner*, *supra*, 407 U.S. 551, we have concluded, while such cases are of no direct assistance, that they do define certain concepts for us to build on in reaching our decision here.

Pruneyard is an intriguing decision. Our Supreme Court decided that plaintiffs' free speech rights as guaranteed by the state Constitution had been abridged when they were excluded from a regional shopping center, and it did so without ever once discussing or even impliedly dealing with the phenomenon of *state action* except in its discussion of *Lloyd*.

Proceeding from this perception of *Pruneyard's* content, it could be argued that the decision, by implication, stands for the proposition, in California, that a *private individual* can be held to have violated the state constitutional rights of another, at least the latter's free speech rights. However, we do not choose to interpret *Pruneyard* that broadly, leaving it to the Supreme Court itself to do so if *Pruneyard* actually was intended to extend the notions of state constitutional law into such an unexplored salient.

It is enough to conclude here that *Pruneyard*, by reason of its emphasis on the unrestricted access to the shopping center accorded the public, held that the limitations upon plaintiff's free speech rights were impermissibly proscribed under a rationale closely approximating that developed in *Marsh*. In other words, because the public had been *invited* on to private property, they would be deemed as remaining clothed with their free speech rights secured under the state Constitution for so long as the exercise of those rights did not impinge on the property rights of the merchants doing business in the shopping center, all with the result that any attempted curtailment of those rights imported the implicit sanction of state action.

Otherwise, to emphasize the dignity of the right of free speech under the California Constitution, *Pruneyard* drew upon language from *Agricultural Labor Relations Bd. v. Superior Court* (*ALRB*) (1976) 16 Cal.3d 392 [128 Cal.Rptr. 183, 546 P.2d 687], that "all private property is held subject to the power of the government to regulate its use for the public welfare." (*Id.* at p. 403.)

This *ALRB* case was further invoked to announce, "'We do not minimize the importance of the constitutional guarantees attaching to private ownership of property; but as long as 50 years ago it was already "'thoroughly established in this country that the rights preserved to the individual by these constitutional provisions are held in subordination of the rights of society. Although one owns property, he may not do with it as he pleases any more than he may act in accordance with his personal desires. As the interest of society justifies restraints upon

individual conduct, so, also, does it justify restraints upon the use to which property may be devoted. It was not intended by these constitutional provisions to so far protect the individual in the use of his property as to enable him to use it to the detriment of society. By thus protecting individual rights, society did not part with the power to protect itself or to promote its general well-being. Where the interest of the individual conflicts with the interest of society, such individual interest is subordinated to the general welfare.'" (*Agricultural Labor Relations Bd.* v. *Superior Court, supra*, 16 Cal.3d at p. 403, . . .)" (*Robins* v. *Pruneyard Shopping Center, supra*, 23 Cal.3d 899, 906.)

Pruneyard, in further reliance on the *ALRB* case, observes "that the power to regulate property is not static; rather it is capable of expansion to meet new conditions of modern life. Property rights must be '"redefined in response to a swelling demand that ownership be responsible and responsive to the needs of the social whole. Property rights cannot be used as a shibboleth to cloak conduct which adversely affects the health, the safety, the morals, or the welfare of others."' (16 Cal.3d at p. 404, quoting Powell, *The Relationship Between Property Rights and Civil Rights, supra*, 15 Hastings L.J. at pp. 149-150.)" (*Id.* at pp. 906-907.)

To this we add that the gated and walled community is a new phenomenon on the social scene, and, in the spirit of the foregoing pronouncement, the ingenuity of the law will not be deterred in redressing grievances which arise, as here, from a needless and exaggerated insistence upon private property rights incident to such communities where such insistence is irrelevant in preventing any meaningful encroachment upon private property rights and results in a pointless discrimination which causes serious financial detriment to another.

This observation suggests that the facts of the case before us include two additional ingredients not found in the *Pruneyard* mix. While the public is not invited into Leisure World, Leisure World in many respects does display many of the attributes of a municipality. That is to say, although the public generally is not invited, there is substantial traffic into Leisure World of a variety of vendors and service persons whom the residents of Leisure World do invite in daily to accommodate the living needs of a community this large. By this we mean to refer to

plumbers, electricians, refrigeration repairmen, painters, United Parcel deliverymen, to name a few, plus the carriers of newspapers to which the residents have subscribed.

The other ingredient noted is the exclusion of plaintiff while the Leisure World News has been accorded unrestricted entry by Golden Rain even though no individual resident has invited in the Leisure World News. Suppose Golden Rain had undertaken to impose on the residents of Leisure World a rule that only one particular plumber would be allowed to enter Leisure World to perform this kind of service. If such an effort were made by Golden Rain, the discrimination would be apparent to anyone, not to mention its limitation on the residents' freedom of choice.

Thus, the question arises as to whether the factor of discrimination is significant. To answer this question, there is a line of constitutional cases involving *discrimination* which does open the door to decision here. Just as we have interpreted *Pruneyard*, these cases do find "state action" present in an analogous way as an element affecting decision where there is actual or even threatened enforcement by state law in aid of *discriminatory* conduct. That concept is central, for instance, to the decisions in the so-called lunch-counter cases. Equally important to our analysis here there is a suggestion in *Lloyd* itself that such concept would even apply in federal First Amendment cases. And why not? Surely the First Amendment shares equal dignity with the Fourteenth.

Turning then in this context to *Lloyd Corp.* v. *Tanner, supra*, 407 U.S. 551, that case was a so-called shopping center case in which the respondents undertook to distribute handbills in the interior mall area of petitioner's large, privately owned, regional shopping center. Just as in *Pruneyard*, private security guards invited the respondents to repair to the adjoining public streets to distribute their literature. Respondents did so and then sought an injunction against their exclusion, claiming a violation of their First Amendment rights. The Supreme Court of the United States reversed the judgment which granted respondents the injunction they sought and, in so doing, held that there had been no dedication of petitioner's privately owned and operated shopping center to public use so as to entitle respondents to exercise any First Amendment rights therein unrelated to the shopping center's operations. The case further held that petitioner's property did not lose its private character and its right to protection under the Fourteenth Amendment

merely because the public had generally been invited to come into the premises for the purpose of doing business with petitioner's tenants.

As already noted, this led to the California Supreme Court's decision in *Diamond* [*II*], which in turn was reversed on *state* constitutional grounds by *Pruneyard*.

However, of significance to the issue here is certain language in *Lloyd* which suggested that a different result might have been reached had there been a different scenario. In the latter portion of the decision, the United States Supreme Court said, "The basic issue in this case is whether respondents, in the exercise of asserted First Amendment rights, may distribute handbills on Lloyd's private property contrary to its wishes and contrary to a policy enforced against all handbilling. In addressing this issue, it must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner[s] of private property used *nondiscriminatorily* for private purposes only." (*Lloyd Corp.* v. *Tanner, supra*, 407 U.S. 551, 567 [33 L.Ed.2d 131, 142]; original italics deleted, our italics added.)

The key word is "nondiscriminatorily." As an indication that this notion was not suggested by an inadvertent choice of words, the opinion soon thereafter states, "The United States Constitution does not forbid a State to control the use of its own property for its own lawful *nondiscriminatory* purposes." (*Id.* at p. 568 [33 L.Ed.2d at p. 142]; italics added; quoting from *Adderley* v. *Florida* (1966) 385 U.S. 39, 48 [17 L.Ed.2d 149, 156, 87 S.Ct. 242].) From this language we deduce, if the court had been faced with a *discriminatory* limitation of free speech on private property, that it may well have reached a different result.

Returning to California cases, our analysis brings us to *Mulkey* v. *Reitman* (1966) 64 Cal.2d 529 [50 Cal.Rptr. 881, 413 P.2d 825]. That celebrated case struck down as unconstitutional Proposition 14 which appeared on the statewide ballot in 1964. That measure, adopted by popular vote, sought to restrict the power of the state to legislate against the right of any person, desiring to sell, lease or rent his real property, "to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses." (Former Cal. Const., art. I, § 26.)

This proposition was a direct reaction to the Hawkins Act and the subsequent Rumford Fair Housing Act which were aimed at eliminating racial discrimination in housing. The legal effect of Proposition 14 was to nullify these legislative efforts as they applied to discrimination in the housing market of California. The California Supreme Court in *Mulkey* exhaustively marshaled the authorities to demonstrate the presence of state action in the operation of Proposition 14 so as to bring it within the equal protection clause of the Fourteenth Amendment. Relying in the first instance on *Shelley* v. *Kraemer* (1948) 334 U.S. 1 [92 L.Ed. 1161, 68 S.Ct. 836, 3 A.L.R.2d 441], the court in *Mulkey* said, "*Shelley*, and the cases which follow it, stand for the proposition that when one who seeks to discriminate solicits and obtains the aid of the court in the accomplishment of that discrimination, significant state action, within the proscription of the equal protection clause, is involved." (*Mulkey* v. *Reitman, supra*, 64 Cal.2d 529, 538.)

Mulkey went on to observe, "It must be recognized that the application of *Shelley* is not limited to state involvement only through court proceedings. In the broader sense the prohibition extends to any racially discriminatory act accomplished through the significant aid of any state agency, even where the actor is a private citizen motivated by purely personal interests. [Citing *Burton* v. *Wilmington Pkg. Auth.* (1961) 365 U.S. 715, 722 (6 L.Ed.2d 45, 50-51, 81 S.Ct. 856).]" (*Id.* at p. 538.)

Other cases relied upon in *Mulkey* demonstrate the nature and extent of just what it meant by significant state involvement so as to bring essentially private conduct dependent on state implementation within the ambit of proscriptions on unconstitutional state action included: *Evans* v. *Newton* (1966) 382 U.S. 296 [15 L.Ed.2d 373, 86 S.Ct. 486]; *Terry* v. *Adams* (1953) 345 U.S. 461 [97 L.Ed. 1152, 73 S.Ct. 809]; *Robinson* v. *Florida* (1964) 378 U.S. 153 [12 L.Ed.2d 771, 84 S.Ct. 1693]; and *Anderson* v. *Martin* (1964) 375 U.S. 399 [11 L.Ed.2d 430, 84 S.Ct. 454].

The end result in *Mulkey* was to declare unconstitutional Proposition 14 because it operated to deny the plaintiffs equal protection of the laws in a case where the trial court had awarded a summary judgment against them in an action seeking relief under sections 51 and 52 of the Civil Code as those sections then read.

When *Mulkey* and the alternative scenario in *Lloyd* are viewed along with the "state action" implications of *Pruneyard*, the outline of a work-

able rule emerges for application to the facts of the case before us. Its rationale derives from the differential view of "state action" as characterized in the *discrimination* cases when compared to that in other constitutional cases. In this case, while Leisure World is not a "company town" so as to require that it yield to the results reached in *Marsh*, it is a hybrid in this sense.[10] The question then becomes, notwithstanding that the public is generally excluded except upon invitation of the residents, whether its town-like characteristics compel Golden Rain's yielding to certain constitutional guarantees as a consequence of its adding discrimination to the picture. When that element is added, the balance tips to the side of the scale which imports the presence of state action per *Mulkey* and the lunch counter cases. In other words, Golden Rain, in the proper exercise of its private property rights, may certainly choose to exclude *all* give-away, unsolicited newspapers from Leisure World, but once it chooses to admit one, where that decision is not made in concert with the residents, then the discriminatory exclusion of another such newspaper represents an abridgement of the free speech, free press rights of the excluded newspaper secured under our state Constitution.

In the current petition for rehearing Golden Rain devotes considerable ink in support of its contention that there could have been no discrimination practiced against plaintiff's newspaper because "Discrimination presupposes meaningful similarity." We are indebted to counsel for Golden Rain for supplying us the concise terms we have labored to locate. "Meaningful similarity," that's it! On the undisputed facts before us there could be no more meaningful similarity possible than emerges in the comparison of the Leisure World News and plaintiff's newspaper. That *meaningful similarity* lies in their common role as competitors for the advertising dollars to be spent in this marketing area, an area where the Leisure World News has exclusive access to the residents of Leisure World and from where plaintiff was barred from making the unsolicited deliveries available to the Leisure World News. Thus, the legal conclusion that there was unconstitutional discrimination practiced against plaintiff's newspaper is inescapable.

Based upon the foregoing, keeping in view the greater status of the rights of free speech and free press existing under the California Consti-

[10]Leisure World at the time material to this litigation had about 20,000 residents, its own system of roads and streets, its own security force, its own parks, its own recreation facilities, and a hybrid form of self-government which dealt with matters of internal maintenance, security, and operation of the 8 square miles of the project.

tution as delineated in *Pruneyard*; and keeping in mind also that discriminatory proscription of free speech on private property may even be questionable under the federal Constitution, as suggested by *Lloyd*, we hold that Golden Rain, acting with the implicit sanction of the state's police power behind it, impermissibly discriminated against the free speech and free press rights of plaintiff, guaranteed to it under the state Constitution, by excluding it from Leisure World after it, Golden Rain, without authority from the residents of Leisure World, had chosen to permit the unsolicited delivery of the Leisure World News to the residents of Leisure World. As a consequence, for so long as Golden Rain permits the unsolicited[11] delivery of the Leisure World News to the residents of Leisure World, then it cannot permissibly discriminate against plaintiff's opportunity to communicate with the residents of Leisure World by excluding unsolicited delivery of its newspaper to these same residents.

V

Defendant Golden Rain has argued that to subject the residents of Leisure World to unsolicited delivery of plaintiff's newspaper would frustrate their investment expectations of privacy and freedom from the intrusions of those who have not been invited, citing *Kaiser Aetna* v. *United States* (1979) 444 U.S. 164 [62 L.Ed.2d 332, 100 S.Ct. 383]. Without more we would agree with such contention; however, *it was the management of Leisure World itself which let down the bars, and Golden Rain which suffered the discrimination to continue.* It was thus the choice of Golden Rain which resulted in the threat of any claimed encroachment on the privacy of the residents of Leisure World. In this vein, it is pertinent to observe, if the residents of Leisure World do not want *unsolicited*, give-away newspapers delivered to their homes by live carrier, then Golden Rain should cease its discrimination and exclude them all, including the Leisure World News.

Actually, as a practical matter, in response to the turgid rhetoric about the imposition on privacy and property rights which admission of plaintiff's newspaper to Leisure World would supposedly represent, it is fair to say that there would be no imposition of substance. Parentheti-

[11]Again, we observe that a substantial number of the residents of Leisure World are not even members of Golden Rain, and so the steps taken by which Golden Rain purported to "subscribe" to the Leisure World News for all such residents were meaningless in terms of the issue here presented.

cally, what we see happening is plaintiff's delivery personnel being screened in the same way that the carriers of the Los Angeles Times are screened; we see plaintiff's delivery personnel being instructed that they are permitted to move about the streets of Leisure World during certain daylight hours on certain days; we see plaintiff's delivery personnel placing copies of the Laguna News-Post on the front steps or porch of each residence of Leisure World in much the same manner as would a United States Postal Service employee deliver the newspaper if it were mailed in. This hardly represents an assault upon the privacy of any resident of Leisure World beyond what is already occurring, *especially when no resident of Leisure World has actually requested delivery of the Leisure World News either.*

Nevertheless, if this activity represents an unacceptable intrusion upon the privacy of the residents of Leisure World, a privacy which it is argued they paid for when they bought homes there, then Golden Rain should cease its discrimination and exclude *all* newspapers to which individual residents have not *personally* subscribed.

The rule we announce as the basis for resolution of this phase of the case will not result in requiring unrestricted admittance to Leisure World of religious evangelists, political campaigners, assorted salespeople, signature solicitors, or any other uninvited persons of the like. It will compel admission only of those who wish to deliver a newspaper like the Leisure World News, "like" in the sense that it is a competitor of Leisure World News for the same advertising dollars to be spent by businesses in Southern Orange County. In short, for purposes of avoiding discrimination against the state constitutional guarantees of free speech and free press, the right of any and all to enter this private, gated community to exercise this state constitutional right must be exactly measured by the right accorded to one, both as to the nature of the activity of that one as well as to the conditions of his admission. Under such a rule, the owners of this private property still remain in *complete* control of who shall enter Leisure World, while Golden Rain is yet required only to act fairly and without discrimination toward others in the exercise of their state constitutional rights of free speech and free press which rights Golden Rain itself has chosen to accord exclusively to the Leisure World News while acting wholly beyond the knowledge and complicity of any resident of Leisure World.

[May 1982]

VI

In one of the earlier petitions a worried concern was voiced that the rule here announced would confer a kind of "equal time" entitlement on any who wished to enter should persons of opposite or different views have been "invited" into Leisure World to speak or to entertain. To note these objections to the rule is itself enough to demonstrate how wide they are of the mark. The rule we have announced has nothing to do with instances where persons are *invited* into Leisure World *by its residents*. The premise on which the rule here announced has derived is the discrimination by Golden Rain which has allowed an exclusive opportunity to Golden West to deliver its Leisure World News to the residents of Leisure World *where, as to those residents individually, such deliveries are wholly unsolicited*. To this extent, Golden Rain, with absolutely no advice from or consultation with the actual residents, by its own choice and not that of the residents, has rendered Leisure World an area where a singular member of the public is admitted for this limited purpose. Thus, the rule has absolutely no application to any person who or activity which the *residents* of Leisure World may choose to invite to come in.

The principal argument advanced by *Golden Rain* in its earlier petition for rehearing which challenged our initial decision was also that it contravened constitutionally guaranteed rights to privacy and freedom of association. No good purpose would be served here to respond specifically to each of the points contained in the 10 pages of learned constitutional discourse offered under point IV of Golden Rain's earlier petition for rehearing except to say that we can only agree with the propositions there recited. The problem with the petition is that it ignores the realities of this case.

We have already noted the letter directed to plaintiff by the president of Golden Rain which closed with the statement that "you are therefore permitted to deliver newspapers within Leisure World so long as you abide by the above regulation" which meant that plaintiff could enter Leisure World and deliver its newspaper to any of its "subscribers." Of course, we all know that in the nature of things there are no "subscribers" to give-away newspapers which subsist entirely by advertising. However, the point remains that Golden Rain specifically indicated that it had no objection to associating with plaintiff's carriers provided those carriers were inside the gates of Leisure World solely to deliver plaintiff's newspaper to its "subscribers." Just how these very same carriers

would ipso facto become a threat to the freedom of association and right of privacy within Leisure World just because they would be delivering plaintiff's newspaper on an unsolicited instead of a subscription basis escapes us.

Similarly, much is made of the fact that residents of Leisure World actually performed the distribution of the Leisure World News, the implication being that some infectious, undisciplined rabble would overrun Leisure World if plaintiff were allowed to distribute its newspaper there.[12]

If this is truly a concern, we see no legal problem in Golden Rain's imposing a regulation which would require employment of only Leisure World residents for delivery of *any* unsolicited publication. This would fall well within the ambit of Justice Traynor's time, place, and manner rule in *Hoffman*.[13] Otherwise, Golden Rain could prescribe that any resident who elected not to receive the unsolicited delivery would need only notify Golden Rain of such wishes and that would terminate delivery at that residence.

The significant point is that we see nothing in the record which indicates that the individual residents of Leisure World have expressed themselves on what give-away newspaper is to be allowed to enter and what ones are to be excluded. The discriminatory exclusion has been imposed solely by the owner of the common areas, i.e., the owner of the streets and sidewalks, not the owners of actual residences. Thus, we are forced to conclude that the real reason for the exclusion of the plaintiff's newspaper had and continues to have little if anything to do with an actual concern for the preferences of the residents as to whom they shall associate with. In short, at the time this litigation began and continuing to the present, the distribution to the residents of Leisure World of the Leisure World News was and is just as much *unsolicited* by them as was and is that of the Laguna News-Post.[14]

[12]Here it is again appropriate to refer to Golden Rain's letter to plaintiff advising that it was free to enter to deliver its newspaper to subscribers. With this the case, we fail to see the relevance of the strident pleas about rights to privacy and to freedom of association.

[13]*In re Hoffman* (1967) 67 Cal.2d 845, 852-853 [64 Cal.Rptr. 97, 434 P.2d 353].

[14]Here is the appropriate place to observe that we do not regard this case as one likely to generate a great constitutional upheaval despite the stentorian tones in which Golden Rain has portentously argued it. The reason this litigation was commenced and has been so vigorously defended is money, and it has nothing to do with protecting any private rights of association. It began because of a fight between two newspapers over

VII

Based upon the foregoing discussion of points IV, V and VI, the trial court's denial of plaintiff's application for an injunction to end its exclusion from Leisure World will be reversed.

Having determined that there is a legal basis for reversal as discussed above, there is no need to address plaintiff's other contention that state action was implicit from the fact that Leisure World was developed with federally insured financing.

DAMAGES FOR THE CONSTITUTIONAL DEPRIVATION

I

(2) Because we do not wish to extend this opinion beyond its already inordinate length, it is enough to observe here that we agree with the trial court and hold that plaintiff neither pleaded nor proved a right to damages under 42 United States Code section 1983. That section provides for recovery of damages against any person "who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. Under our decision we have ruled that there has been no deprivation of any right, privilege or immunity secured by the Constitution and laws of the United States.

In other words, it is an answer to plaintiff's claim of right to an opportunity to prove alleged damages under 42 United States Code section 1983 to observe that the discrimination which we hold was here practiced was solely with reference to the plaintiff's free-speech, free-press rights secured under the *California Constitution*. To this, plaintiff could conceivably respond that in our decision we have noted a suggestion in *Lloyd Corp.* v. *Tanner, supra*, 407 U.S. 551, that discriminatory conduct in a First Amendment context might well have led to a different result, and that therefore we must further decide explicitly, because we have held "state action" to have been present in plaintiff's exclusion

advertising revenues, and just why Golden Rain has taken sides in the dispute, even to the point of practicing free press discrimination, eludes us. This is purely and simply a discrimination case with substantial economic consequences, and not one truly involving the resolution of the rights of free speech in conflict with the vested rights of private property.

from Leisure World, whether a federal constitutional right was abridged in order to afford a full and complete disposition of plaintiff's claim to damages under the federal civil rights statute. To this we say again that no *federal* right is here involved and that *Lloyd* only suggested the thread by which the knot was unraveled. Moreover, it is enough to decide, which we do, that the "state action" necessary to import the sanction of constitutional restraint dictated by the Constitution of California is not coextensive with and is something less than that degree of conduct sufficient to entitle one to a right of action for damages under 42 United States Code section 1983 where a federal right allegedly has been violated.

Just what that quantum of difference is we need not define. Because of the special dignity accorded the rights of free speech arising under the California Constitution as announced in *Pruneyard*, it is enough to state that the difference is readily recognizable here, and it is the more recognizable because of the palpably serious economic consequences which were caused by Golden Rain's discriminatory exclusion of plaintiff's newspaper from Leisure World.

II

(3) Although plaintiff has no claim to damages under the federal civil rights statute, because we have decided that it was constitutionally impermissible under the California Constitution for Golden Rain to exclude plaintiff's newspaper from Leisure World after it had for years allowed exclusive access to Leisure World by the Leisure World News, it remains to be decided if there is any *other* theory upon which plaintiff could be entitled to damages.

Plaintiff contends that the court compounded the error of its December 5, 1971, ruling by means of amplifying remarks made at the time it granted the defense motion above noted in which remarks it stated that there was no right to money damages in any event because the state constitutional right, if there were one, is not "self-executing."

It is clear from the record that the trial court at the time of the ruling of December 5, 1977, was of the view, based solely on the pleadings, and in light of the six factual items earlier noted as deemed to be without substantial controversy, that plaintiff was not entitled to money damages even if the court were to rule that there had been an abridgement of plaintiff's constitutional free speech and free press rights;

hence, the prohibition of any references thereto in the presence of the jury.[15]

In other words, plaintiff contends that the trial court erred in denying it the opportunity to put on evidence of the damages which it incurred as a result of the abridgement of its right of free speech, and we assume, for the sake of analysis, that the plaintiff has suffered actual,

[15]The following is a full text of the court's remarks made at the time of the December 5, 1977, ruling:

"There remains the one question of the motion to exclude from the jury references to Plaintiff's claim of violation of or infringement of the rights, that is, the alleged constitutional rights of free press. And the motion is to exclude reference to that in voir dire, opening statements, evidence, argument or other proceedings before the jury....

"All right. The motion is granted.

"Now, let me elaborate on that. The motion to exclude from the jury references to the Plaintiff's claim of the violation of [its] constitutional rights is granted.

"If such a violation occurred, it does not give the right to damages in the Plaintiff. There are insufficient allegations in the Complaint to bring the Plaintiff's claim under the provisions of the Federal Civil Rights Act, the 1983 sections, and that is, the provision under Federal law that would have to be—with which we would have to be concerned if the Plaintiff were asserting a right to damages because of the claim of the violation of the right to a free press by virtue of the fact that they were precluded from delivery within the gates of Leisure World Laguna Hills.

"The Complaint does not allege facts that would show any conduct under color of State law or statute or ordinance or custom, as is required by that act. It would appear that the initial conduct that is alleged did occur beyond the date that the statute would permit an action for recovery, that is, sometime in 1967, and the Complaint was filed in 1973. The question of whether or not the Defendants should be restrained from excluding Plaintiff from the grounds of Leisure World Laguna Hills is before the court and is properly a question for the court to decide, that is, should an injunction issue? And I anticipate that when the matter is submitted to the jury on the Cartwright assertions, that is, the assertions under the Cartwright Act, and the assertions under the Unfair Trade Practices Act, if there is other evidence that any party wants to present to the court on the issue of whether or not the injunction should issue after the jury has the case, you may present any additional evidence that has to do with the item of the injunction.

"The question under the State Constitution, that is, assuming there is an assertion of a violation of constitutional rights, should there be a right to recover damages in a State court because the allegations are that it violates the State Constitution. When there is an assertion of an inverse condemnation by the State, clearly, there is a right to recover damages because that is compensation for the taking of property. But in those instances where there is an assertion of violation of free press or free speech, there is no State statute on that subject. There is a State statute that gives the right to damages on a violation of the civil rights, and that is the Unruh Act. The legislature saw fit to enact the Unruh Act and give the right to damages for a violation of civil rights, but I don't believe the California Constitution is self-executing in other circumstances.

"So, we will proceed to trial on the Plaintiff's claim for damages under the Unfair Trade Practices Act, and under the allegations of violations of the Cartwright Act, and on the Cross-Complaint where the Cross-Complainant is asserting, at least, some acts that they contend are also a violation of the Unfair Trade Practices Act and the Cartwright Act."

demonstrable, compensatory damages arising solely from its exclusion from Leisure World and could have proved such damages had it been permitted to put on such evidence.

The issue, as posed by the parties' briefs, therefore, is whether the free speech clause of the California Constitution (art. I, § 2) affords a right to money damages without the benefit of enabling legislation.[16]

Passing for the moment that both the plaintiff and the trial court have mistakenly equated the right to money damages for a constitutionally defined grievance with the "self-executing" nature or lack of it in the California Constitution, we note that great emphasis is placed by plaintiff on the right-to-privacy cases as supporting its position.

In *Porten* v. *University of San Francisco* (1976) 64 Cal.App.3d 825 [134 Cal.Rptr. 839], dealing with the new state constitutional provision assuring the individual right to privacy (art. I, § 1), the court said, "The constitutional provision is self-executing; hence it confers a judicial right of action on all Californians. (*White* v. *Davis*, *supra*, 13 Cal.3d at p. 775 [120 Cal.Rptr. 94, 533 P.2d 222].) Privacy is protected not merely against state action; it is considered an inalienable right which may not be violated by anyone. [Fn. omitted.] (See *Annenberg* v. *Southern Cal. Dist. Council of Laborers* (1974) 38 Cal.App.3d 637...." (*Id.* at pp. 829-830.)

In *Porten* the plaintiff sought damages against the University of San Francisco for its alleged infringement of his right to privacy when it disclosed to a state agency his grades earned at Columbia before transferring to San Francisco. In applying the rule above recited, the appellate court reversed the trial court's judgment of dismissal after sustaining of a general demurrer. From this we conclude that plaintiff was thereafter afforded an opportunity to put on evidence of any damages he had suffered by reason of the infringement upon his constitutional rights to privacy.

The self-executing nature of the constitutional provision above noted as recited in *Porten* was confirmed in passing by Justice Sims in

[16]Plaintiff's brief argues its right to money damages in terms of whether the state Constitution is "self-executing." This approach begs the question. We have already deemed it to be "self-executing" to the extent that injunctive relief is available without the need for enabling legislation.

Emerson v. *J. F. Shea Co.* (1978) 76 Cal.App.3d 579, 591 [143 Cal. Rptr. 170]. It is also recognized with approval by Witkin. He writes, "... it has been declared that a [state] constitutional provision will now be presumed to be self-executing, and will be given effect, without legislation, unless it clearly appears that this was not intended." (5 Witkin, Summary of Cal. Law (8th ed. 1974) Constitutional Law, § 38, p. 3278.)

Having moved through this exposition of cases dealing with the right-to-privacy amendment to the California Constitution, we must observe that the issue remains, without more, unresolved; after all, *White* v. *Davis, supra*, 13 Cal.3d 757, 775, the leading case which passed upon and construed the consequences of the new amendment, and upon which *Porten* relied, was an *injunction* case.

Here, we part company with our decision after the first rehearing. In that opinion we proceeded to discredit *Porten* as authority by way of analogy for allowing money damages for violation of other state constitutional rights because, as we stated, the right to privacy had previously existed as a *common law* right.

In its current petition for rehearing, the plaintiff has effectively demonstrated that we were wrong in such latter pronouncement, and we must therefore retract it. In such petition plaintiff has directed our attention to *Melvin* v. *Reid* (1931) 112 Cal.App. 285 [297 P. 91], which reversed a judgment of dismissal, after a demurrer had been sustained, in an action which included a count for damages brought over 50 years ago under section 1 of article I of the California Constitution and based on allegations that a right of privacy had been illegally encroached upon. This, of course, was long before the 1973 amendment construed by *White*, relied upon in *Porten*.

In the course of its decision, the *Melvin* court categorically rejected the suggestion, insofar as California is concerned that a right of privacy existed as common law. The court went on to say, "We find, however, that the fundamental law of our state contains provisions which, we believe, permit us to recognize the right to pursue and obtain safety and happiness without improper infringements thereon by others. [¶] Section 1 of article I of the Constitution of California provides as follows: 'All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property; and pursuing and

obtaining safety and happiness.' [¶] The right to pursue and obtain happiness is guaranteed to all by the fundamental law of our state. This right by its very nature includes the right to live free from the unwarranted attack of others upon one's liberty, property, and reputation. Any person living a life of rectitude has that right to happiness which includes a freedom from unnecessary attacks on his character, social standing or reputation. . . . We believe that the publication by respondents of the unsavory incidents in the past life of appellant after she had reformed, coupled with her true name, was not justified by any standard of morals or ethics known to us and was a direct invasion of her inalienable right guaranteed to her by our Constitution, to pursue and obtain happiness. Whether we call this a right of privacy or give it any other name is immaterial because it is a right guaranteed by our Constitution that must not be ruthlessly and needlessly invaded by others." (*Id.* at pp. 291-292.)

From the foregoing, it is too plain for argument that our state Constitution has been interpreted to support an action for damages for a violation of rights arising under old section 1, article I, and that such an action was possible without the need for enabling legislation. In reliance thereon and because of the *special dignity* accorded the rights of free speech and free press under the California Constitution, whether they be described as "inalienable" rights or not, it is not illogical in view of *Melvin* to hold, which we do, that a direct right to sue for damages also accrued here by reason of plaintiff's exclusion from Leisure World, and that it accrued under article I, section 2 of the California Constitution.

Counsel for plaintiff has persuasively pointed out further, accepting that plaintiff has suffered a violation of its state constitutional rights, that Civil Code sections 1708 and 3333 together also provide a predicate for recovery of money damages in instances of such violations.

Section 1708 provides that "[e]very person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his rights."

Section 3333 provides that "[F]or the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

The question then is whether the constitutionally protected right of plaintiff which we have held to have been violated comes within the ambit of section 1708. We can find no good reason why it does not, and so as pointed out by plaintiff, it follows "as night follows day," that a violation of that right imports by reason of section 3333 a correlative right to recover any damages proximately resulting from the violation of such right, keeping in perspective that we regard the constitutional violation here as having arisen from plaintiff's discriminatory exclusion from Leisure World with the implicit sanction of *state action* behind such exclusion.

Based upon the foregoing, it was error for the trial court to foreclose the plaintiff's right to present evidence of damages it sustained as allegedly arising from the unconstitutional exclusion of its newspaper from Leisure World.

III

(4) Having concluded that it was constitutionally impermissible for Golden Rain to discriminate against plaintiff's newspaper by excluding it from Leisure World, we next decide whether the trial court, upon a new trial, should entertain plaintiff's efforts to prove damages on the further theory that Golden Rain and Golden West allegedly acted in concert unconstitutionally to limit access to Leisure World only to the Leisure World News to the exclusion of plaintiff's newspaper and thereby brought about an unreasonable restraint of trade.

The plaintiff in its opening brief argues that the error of December 5, 1977, was also compounded because plaintiff was not allowed to introduce evidence in support of or to argue to the jury a theory of relief based upon a "conspiracy to deprive plaintiff of [its] constitutional rights [of free speech] as overt acts" such as to qualify as a violation of the Cartwright Act.

Referring to the trial already had, it logically followed, in view of the trial court's order *in limine*, that the jury did not consider the wrongful discriminatory exclusion from Leisure World of plaintiff's newspaper as an element in connection with its finding or not finding a conspiracy or combination resulting in an unreasonable restraint of trade as alleged by plaintiff in the fourth amended complaint. However, because we have concluded that such discriminatory exclusion was wrongful, it nec-

essarily follows that the court erred in applying its December 5, 1977, order so as to prevent the plaintiff from adverting in the presence of the jury to the constitutional deprivation as an element of its theory of grievance against both defendants. This limitation was necessarily reflected in a refusal to instruct the jury in keeping with what we have here held to be plaintiff's unconstitutional exclusion from Leisure World.

In arguing the Cartwright Act phase of the case to us, defendant has repeatedly asserted that an illegal restraint of trade does not require that the overt acts of the individuals themselves be illegal. While this may be true as a general proposition, it is an irrelevant if not diversionary argument here. As we understand plaintiff's position, it contends that the trial court erred in preventing it from arguing the *unconstitutional* nature of plaintiff's exclusion as only one element for the jury to weigh in deciding whether the restraint implicit in the exclusion was unreasonable. We agree. In other words, just because an unreasonable restraint *can arise* from *legal* overt acts does not mean that an unreasonable restraint *cannot* arise from *illegal* overt acts.

Thus, there can be no question that the discrimination against the Laguna News-Post in the form of its unconstitutional exclusion from Leisure World presented an additional circumstance which the jury should have considered under such instructions as would have enabled it to decide if there had been acts in concert by two or more persons to carry out an unreasonable restraint on trade or commerce. (Bus. & Prof. Code, § 16720.) If the jury were to find that there were such an unreasonable restraint, then the consequences thereof would be governed by Business and Professions Code section 16750 under which the jury would be entitled to decide further whether the plaintiff was injured in its business by reason of any such unreasonable restraint found to have occurred as defined by Business and Professions Code section 16720.

Because of the error of the trial court at the outset as represented by its order of December 5, 1977, all of the urgings of Golden West in its petition for rehearing about there being substantial evidence to support the jury's verdict which held against plaintiff on its theory of an illegal combination in restraint of trade are meaningless. The ground rules under which the jury decided the case were wrong, and plaintiff, should it seek a new trial, is entitled to try to prove that Golden West participat-

ed in influencing Golden Rain's *unconstitutional* exclusion of the plaintiff's newspaper from Leisure World and to try to prove additionally that this resulted in an unreasonable restraint of trade which proximately caused damages to the plaintiff for the applicable period not barred by the statute of limitations.

Unless there were such complicity which resulted in an unreasonable restraint of trade and commerce, no violation of section 16750 of the Business and Professions Code occurred. Otherwise, even though the appeal has been dismissed as to Golden West, plaintiff is still entitled to pursue the foregoing theory against Golden Rain as a possible participant in the alleged conspiracy.

THE REMAINING ISSUES

On the factual issues actually tried to the jury on the cross-complaint under the Cartwright Act and the Unfair Trade Practices Act, there was substantial evidence abounding to sustain the jury's verdicts on the cross-complaint, and we see no good purpose to be served in pursuing a detailed recitation of such evidence. The judgment in that respect is affirmed.

DISPOSITION

Item No. 5 deemed to be without substantial controversy is stricken, there being absolutely no evidence in the record to support such a determination. Insofar as the judgment denied plaintiff's application for an injunction to terminate its exclusion from Leisure World, the judgment is reversed with directions. The trial court is directed to enter a new and different judgment granting such application on terms and conditions substantially as follows: For so long as Golden Rain or any other entity, exercising a power of control over the right of entry into Leisure World, authorizes or suffers the unsolicited, live carrier delivery of any give-away type newspaper, including the Leisure World News, to any residence in Leisure World where any occupant thereof has not personally requested or subscribed to such delivery, the plaintiff shall be entitled to enter Leisure World for the purpose of delivering its newspaper, unsolicited, to any such residence in Leisure World, provided nevertheless that such delivery shall be under the same rules and regulations as to time, place, and manner as apply to the delivery of e.g., the Los Angeles Times and other newspapers offered for sale to subscribers, and provided further that if any resident of Leisure World shall expressly

state in writing to Golden Rain or to the management of Leisure World that he or she does not wish to receive unsolicited delivery of the Laguna News-Post to his or her residence, then plaintiff shall refrain thereafter from any delivery to that resident. In this latter instance, plaintiff shall be entitled to verify independently by telephone call or personal visit that any given resident does not wish to receive unsolicited delivery of the Laguna News-Post.

Because we have decided that plaintiff's exclusion from Leisure World was unconstitutional discrimination and therefore wrongful as a matter of law, the trial court is further directed, upon due application of plaintiff, to try, with a jury if requested, those issues of damages arising from the illegality of the exclusion of the Laguna News-Post from Leisure World, namely: (1) whether plaintiff suffered any damages caused by its illegal exclusion from Leisure World as measured by sections 1708 and 3333 of the Civil Code; (2) whether there was any concerted action or agreement between Golden Rain and Golden West, per section 16720, subdivision (a) of the Business and Professions Code, which caused the unconstitutional exclusion of the Laguna News-Post from Leisure World such as to constitute an unreasonable restraint of trade; and (3) whether there were any actual damages proximately resulting from any such unreasonable restraint of trade over the four years next preceding the filing of the action for assessment per section 16750.1 of the Business and Professions Code.

Except as reversed with directions above, the judgment is affirmed, and each party shall bear its own costs on appeal.

Gardner, J.,* concurred.

KAUFMAN, Acting P. J., Concurring and Dissenting.—Somewhat reluctantly,[1] I concur in the opinion and judgment except insofar as it holds that a discriminatory violation of a newspaper's constitutional right to freedom of the press gives rise to a direct cause of action for damages outside the parameters of recognized tort law and independent of the statutory law dealing with unlawful restraints of trade and unfair business practices. Not a single case or authority so holding is cited for that novel proposition, and the authorities that are cited in support of it are neither compelling nor persuasive.

*Retired Presiding Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

[1]My reluctance is based on my agreement with the majority (see majority opn., *ante*, pp. 847-848, fn. 14) that this case really involves nothing more than a commercial dispute between two entities engaged in the newspaper business and my regret that plain-

Even if the majority were correct that the provision in the California Constitution guaranteeing freedom of the press (art. I, § 2, subd. (a)) is self-executing, that would not automatically and necessarily result in the conclusion that a violation of that right gives rise to a cause of action for damages. Self-executing means no more than that the constitutional right will be enforced without enabling legislation. The fact that a constitutional provision is self-executing does not establish the remedies that are available for its enforcement. Injunctive or declaratory relief may be available to the exclusion of money damages.

Moreover, it is clear that the free press provision of the California Constitution is not self-executing, at least in the sense that its violation gives right to a direct cause of action for damages. Subdivision (a) of section 2 of article I provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. *A law may not restrain or abridge liberty of* speech or *press*." (Italics added.) A constitutional provision may be regarded as self-executing "if the nature and extent of the right conferred and the liability imposed are fixed by the Constitution itself, so that they can be determined by an examination and construction of its terms . . . ." (*Taylor* v. *Madigan* (1975) 53 Cal.App.3d 943, 951 [126 Cal. Rptr. 376]; accord; *Chesney* v. *Byram* (1940) 15 Cal.2d 460, 462 [101 P.2d 1106]; *Flood* v. *Riggs* (1978) 80 Cal.App.3d 138, 154 [145 Cal. Rptr. 573].) Obviously, the language "a law may not restrain or abridge liberty of . . . press" falls a bit short of fixing the "extent of the right conferred" and, a fortiori, "the liability imposed." Indeed, inasmuch as the prohibition is against abridgement of the right by "[a] law," it is problematical whether the constitutional provision has any application to the conduct of nongovernmental entities.

The last observation is pertinent also to the fundamental distinction between the case at bench and the right of privacy cases cited by the majority. The initiative constitutional amendment to section 1 of article I of the California Constitution, adding privacy to the enumerated inalienable rights,[2] had a unique "legislative" history that indicated the

plaintiff has been successful in importing into the dispute the revered constitutional right of freedom of the press. Although I find it difficult to argue with the logic of the discussion of constitutional issues in the majority opinion, I have the uneasy feeling that by right this case should not, and in fact does not, involve the grave constitutional concerns confronted in the majority opinion.

[2]The language of article I, section 1, of the California Constitution is: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

provision was meant to protect the right of privacy against unlawful intrusions by either governmental or private entities and was intended to be enforceable without more. (See *White* v. *Davis* (1975) 13 Cal.3d 757, 773-776 [120 Cal.Rptr. 94, 533.P.2d 222]; *Porten* v. *University of San Francisco* (1976) 64 Cal.App.3d 825, 829 [134 Cal.Rptr. 839].) The courts in both the *White* and *Porten* decisions relied entirely on that unique "legislative" history in determining that the provision establishing an inalienable right to privacy was self-executing and, apparently in *Porten*, that its violation gives rise to a direct cause of action for damages. Thus those decisions constitute no authority for a damage action based on article I, section 2, subdivision (a). Neither does the observation in *Emerson* v. *J. F. Shea Co.* (1978) 76 Cal.App.3d 579, 591 [143 Cal.Rptr. 170], that in *White* the court indicated that the constitutional amendment adding privacy to the list of inalienable rights was intended to be self-executing.

Civil Code section 3333 is not a substantive statute; it merely prescribes the general measure of damages in tort cases. Civil Code section 1708 which provides that every person is bound to abstain from injuring the person or property of another or infringing any of his rights, states a general principle of law, but it hardly provides support for the adoption of the novel legal proposition that a violation of subdivision (a) of section 2 of article I of the California Constitution gives rise to a direct cause of action for damages outside the parameters of recognized tort law and independent of the statutory law governing unlawful restraints on trade and unfair business practices.

A petition for a rehearing was denied June 16, 1982, and respondent's petition for a hearing by the Supreme Court was denied August 18, 1982.

ATTACHMENT "6"

Weiss v. State Board of Equalization (1953)
40 Cal.2d 772; 256 P.2d 1

[L. A. No. 22697. In Bank. Apr. 28, 1953.]

ALFRED K. WEISS et al., Appellants, v. STATE BOARD OF EQUALIZATION et al., Respondents.

[1] Intoxicating Liquors—Licenses—Discretion of Board.—In exercising power which State Board of Equalization has under Const., art. XX, § 22, to deny, in its discretion, "any specific liquor license if it shall determine for good cause that the granting . . . of such license would be contrary to public welfare or morals," the board performs a quasi judicial function similar to local administrative agencies.

[2] Licenses—Application.—Under appropriate circumstances, the same rules apply to determination of an application for a license as those for its revocation.

[3] Intoxicating Liquors — Licenses — Discretion of Board.—The discretion of the State Board of Equalization to deny or revoke a liquor license is not absolute but must be exercised in accordance with the law, and the provision that it may revoke or deny a license "for good cause" necessarily implies that its decision should be based on sufficient evidence and that it should not act arbitrarily in determining what is contrary to public welfare or morals.

[4] Id.—Licenses—Discretion of Board.—While the State Board of Equalization may refuse an on-sale liquor license if the premises are in the immediate vicinity of a school (Alcoholic Beverage Control Act, § 13), the absence of such a provision or regulation by the board as to off-sale licenses does not preclude it from making proximity of the premises to a school

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[1] See Cal.Jur.2d, Alcoholic Beverages, § 25 et seq.; Am.Jur., Intoxicating Liquors, § 121.

McK. Dig. References: [1, 3-7] Intoxicating Liquors, § 9.4; [2] Licenses, § 32.

an adequate basis for denying an off-sale license as being inimical to public morals and welfare.

[5] Id.—Licenses—Discretion of Board.—It is not unreasonable for the State Board of Equalization to decide that public welfare and morals would be jeopardized by the granting of an off-sale liquor license within 80 feet of some of the buildings on a school ground.

[6] Id.—Licenses—Discretion of Board.—Denial of an application for an off-sale license to sell beer and wine at a store conducting a grocery and delicatessen business across the street from high school grounds is not arbitrary because there are other liquor licensees operating in the vicinity of the school, where all of them, except a drugstore, are at such a distance from the school that it cannot be said the board acted arbitrarily, and where, in any event, the mere fact that the board may have erroneously granted licenses to be used near the school in the past does not make it mandatory for the board to continue its error and grant any subsequent application.

[7] Id.—Licenses—Discretion of Board.—Denial of an application for an off-sale license to sell beer and wine at a store across the street from high school grounds is not arbitrary because the neighborhood is predominantly Jewish and applicants intend to sell wine to customers of the Jewish faith for sacramental purposes, especially where there is no showing that wine for this purpose could not be conveniently obtained elsewhere.

APPEAL from a judgment of the Superior Court of Los Angeles County. Frank G. Swain, Judge. Affirmed.

Proceeding in mandamus to compel State Board of Equalization to issue an off-sale liquor license. Judgment denying writ affirmed.

Riedman & Silverberg and Milton H. Silverberg for Appellants.

Edmund G. Brown, Attorney General, and Howard S. Goldin, Deputy Attorney General, for Respondents.

CARTER, J.—Plaintiffs brought mandamus proceedings in the superior court to review the refusal of defendant, State Board of Equalization, to issue them an off-sale beer and wine license at their premises and to compel the issuance of such a license. The court gave judgment for the board and plaintiffs appeal.

Plaintiffs filed their application with the board for an off-sale beer and wine license (a license to sell those beverages to be consumed elsewhere than on the premises) at their premises where they conducted a grocery and delicatessen business. After a hearing the board denied the application on the grounds that the issuance of the license would be contrary to the "public welfare and morals" because of the proximity of the premises to a school.

According to the evidence before the board, the area concerned is in Los Angeles. The school is located in the block bordered on the south by Rosewood Avenue, on the west by Fairfax Avenue, and on the north by Melrose Avenue—an 80-foot street running east and west parallel to Rosewood and a block north therefrom. The school grounds are enclosed by a fence, the gates of which are kept locked most of the time. Plaintiffs' premises for which the license is sought are west across Fairfax, an 80-foot street, and on the corner of Fairfax and Rosewood. The area on the west side of Fairfax, both north and south from Rosewood, and on the east side of Fairfax south from Rosewood, is a business district. The balance of the area in the vicinity is residental. The school is a high school. The portion along Rosewood is an athletic field with the exception of buildings on the corner of Fairfax and Rosewood across Fairfax from plaintiffs' premises. Those buildings are used for R.O.T.C. The main buildings of the school are on Fairfax south of Melrose. There are gates along the Fairfax and Rosewood sides of the school but they are kept locked most of the time. There are other premises in the vicinity having liquor licenses. There are five on the west side of Fairfax in the block south of Rosewood and one on the east side of Fairfax about three-fourths of a block south of Rosewood. North across Melrose and at the corner of Melrose and Fairfax is a drugstore which has an off-sale license. That place is 80 feet from the northwest corner of the school property as Melrose is 80 feet wide and plaintiffs' premises are 80 feet from the southwest corner of the school property. It does not appear when any of the licenses were issued, with reference to the existence of the school or otherwise. Nor does it appear what the distance is between the licensed drugstore and any school buildings as distinguished from school grounds. The licenses on Fairfax Avenue are all farther away from the school than plaintiffs' premises.

Plaintiffs contend that the action of the board in denying them a license is arbitrary and unreasonable and they particu-

larly point to the other licenses now outstanding on premises as near as or not much farther from the school.

The board has the power "in its discretion, to deny . . . any specific liquor license if it shall determine for good cause that the granting . . . of such license would be contrary to public welfare or morals." (Cal. Const., art. XX, § 22.) [1] In exercising that power it performs a quasi judicial function similar to local administrative agencies. (*Covert* v. *State Board of Equalization*, 29 Cal.2d 125 [173 P.2d 545]; *Reynolds* v. *State Board of Equalization*, 29 Cal.2d 137 [173 P.2d 551, 174 P.2d 4]; *Stoumen* v. *Reilly*, 37 Cal.2d 713 [234 P.2d 969].) [2] Under appropriate circumstances, such as we have here, the same rules apply to the determination of an application for a license as those for the revocation of a license. (*Fascination, Inc.* v. *Hoover*, 39 Cal.2d 260 [246 P.2d 656]; Alcoholic Beverage Control Act, § 39; Stats. 1935, p. 1123, as amended.) [3] In making its decision "The board's discretion . . . however, is not absolute but must be exercised in accordance with the law, and the provision that it may revoke [or deny] a license 'for good cause' necessarily implies that its decisions should be based on sufficient evidence and that it should not act arbitrarily in determining what is contrary to public welfare or morals." (*Stoumen* v. *Reilly*, *supra*, 37 Cal.2d 713, 717.)

[4] Applying those rules to this case, it is pertinent to observe that while the board may refuse an on-sale license if the premises are in the immediate vicinity of a school (Alcoholic Beverage Control Act, *supra*, § 13) there is no such provision or regulation by the board as to off-sale licenses. Nevertheless, proximity of the licensed premises to a school may supply an adequate basis for denial of a license as being inimical to public morals and welfare. (See *Altadena Community Church* v. *State Board of Equalization*, 109 Cal.App.2d 99 [240 P.2d 322]; *State* v. *City of Racine*, 220 Wis. 490 [264 N.W. 490]; *Ex parte Velasco*, (Tex.Civ.App.) 225 S.W. 2d 921; *Harrison* v. *People*, 222 Ill. 150 [78 N.E. 52].)

The question is, therefore, whether the board acted arbitrarily in denying the application for the license on the ground of the proximity of the premises to the school. No question is raised as to the personal qualifications of the applicants. [5] We cannot say, however, that it was unreasonable for the board to decide that public welfare and morals would be jeopardized by the granting of an off-sale license at premises

within 80 feet of some of the buildings on a school ground. As has been seen, a liquor license may be refused when the premises, where it is to be used, are in the vicinity of a school. While there may not be as much probability that an off-sale license in such a place would be as detrimental as an on-sale license, yet we believe a reasonable person could conclude that the sale of any liquor on such premises would adversely affect the public welfare and morals.

[6] Plaintiffs argue, however, that assuming the foregoing is true, the action of the board was arbitrary because there are other liquor licensees operating in the vicinity of the school. All of them, except the drugstore at the northeast corner of Fairfax and Melrose, are at such a distance from the school that we cannot say the board acted arbitrarily. It should be noted also that as to the drugstore, while it is within 80 feet of a corner of the school grounds, it does not appear whether there were any buildings near that corner, and as to all of the licensees, it does not appear when those licenses were granted with reference to the establishment of the school.

Aside from these factors, plaintiffs' argument comes down to the contention that because the board may have erroneously granted licenses to be used near the school in the past it must continue its error and grant plaintiffs' application. That problem has been discussed: "Not only does due process permit omission of reasoned administrative opinions but it probably also permits substantial deviation from the principle of stare decisis. Like courts, agencies may overrule prior decisions or practices and may initiate new policy or law through adjudication. Perhaps the best authority for this observation is *FCC* v. *WOKO* [329 U.S. 223 (67 S.Ct. 213, 91 L.Ed. 204).] The Commission denied renewal of a broadcasting license because of misrepresentations made by the licensee concerning ownership of its capital stock. Before the reviewing courts one of the principal arguments was that comparable deceptions by other licensees had not been dealt with so severely. A unanimous Supreme Court easily rejected this argument: 'The mild measures to others and the apparently unannounced change of policy are considerations appropriate for the Commission in determining whether its action in this case is too drastic, but we cannot say that the Commission is bound by anything that appears before us to deal with all cases at all times as it has dealt with some that seem com-

parable.' In rejecting a similar argument that the SEC without warning had changed its policy so as to treat the complainant differently from others in similar circumstances, Judge Wyzanski said: 'Flexibility was not the least of the objectives sought by Congress in selecting administrative rather than judicial determination of the problems of security regulation. . . . The administrator is expected to treat experience not as a jailer but as a teacher.' Chief Justice Vinson, speaking for a Court of Appeals, once declared: 'In the instant case, it seems to us there has been a departure from the policy of the Commission expressed in the decided cases, but this is not a controlling factor upon the Commission.' Other similar authority is rather abundant. Possibly the outstanding decision the other way, unless the dissenting opinion in the second Chenery case is regarded as authority, is *NLRB* v. *Mall Tool Co.* [119 F.2d 700.] The Board in ordering back pay for employees wrongfully discharged had in the court's opinion departed from its usual rule of ordering back pay only from time of filing charges, when filing of charges is unreasonably delayed and no mitigating circumstances are shown. The Court, assuming unto itself the Board's power to find facts, said: 'We find in the record no mitigating circumstances justifying the delay.' Then it modified the order on the ground that 'Consistency in administrative rulings is essential, for to adopt different standards for similar situations is to act arbitrarily.' From the standpoint of an ideal system, one can hardly disagree with the court's remark. But from the standpoint of a workable system, perhaps the courts should not impose upon the agencies standards of consistency of action which the courts themselves customarily violate. Probably deliberate change in or deviation from established administrative policy should be permitted so long as the action is not arbitrary or unreasonable. This is the view of most courts.'' (Davis, Administrative Law, § 168; see also Parker, Administrative Law, pp. 250-253; 73 C.J.S., Public Administrative Bodies and Procedure, § 148; *California Emp. Com.* v. *Black-Foxe M. Inst.*, 43 Cal.App.2d Supp. 868 [110 P.2d 729].) Here the board was not acting arbitrarily if it did change its position because it may have concluded that another license would be too many in the vicinity of the school.

[7] The contention is also advanced that the neighborhood is predominantly Jewish and plaintiffs intend to sell wine to customers of the Jewish faith for sacramental purposes. We fail to see how that has any bearing on the issue. The wine

to be sold is an intoxicating beverage, the sale of which requires a license under the law. Furthermore, it cannot be said that wine for this purpose could not be conveniently obtained elsewhere.

The judgment is affirmed.

Gibson, C. J., Shenk, J., Edmonds, J., Traynor, J., Schauer, J., and Spence, J., concurred.

Appellants' petition for a rehearing was denied May 21, 1953.

ATTACHMENT "7"

Sierra Club v. San Joaquin Local Agency Formation Commission (1999)
21 Cal.4th 489; 87 Cal.Rptr. 2d 702; 981 P.2d 543

[No. S072212. Aug. 19, 1999.]

SIERRA CLUB et al., Plaintiffs and Appellants, v.
SAN JOAQUIN LOCAL AGENCY FORMATION COMMISSION, Defendant and Respondent;
CALIFIA DEVELOPMENT GROUP et al., Real Parties in Interest and Respondents.

SUMMARY

The trial court dismissed a petition for a writ of mandate filed by an environmental group and others, challenging a local agency formation commission's approval of a proposed city annexation, on the ground that plaintiffs had failed to exhaust their administrative remedies under Gov. Code, § 56857, subd. (a), which provides that a person or agency "may" seek rehearing of a commission action. (Superior Court of San Joaquin County, No. CV001997, Bobby W. McNatt, Judge.) The Court of Appeal, Third Dist., No. C027361, affirmed.

The Supreme Court reversed the judgment of the Court of Appeal and remanded for further proceedings. The court held that, when the Legislature has provided that a person or agency "may" seek reconsideration or rehearing of an adverse administrative agency decision, that person or agency need not exercise that rehearing option prior to seeking judicial recourse. The exhaustion of administrative remedies doctrine is adequately safeguarded by the requirement that the administrative proceeding must be completed before the right to judicial review arises. A person or agency is not required, after an agency's final decision, to raise for a second time the same evidence and legal arguments previously raised solely to exhaust administrative remedies. The court further held that this new judicial rule was entitled to retroactive application. (Opinion by Werdegar, J., expressing the unanimous view of the court.)

HEADNOTES

Classified to California Digest of Official Reports

(1) **Administrative Law § 95—Judicial Review and Relief—Mandamus—Quasi-Legislative Determination: Municipalities § 7—Alteration and Disincorporation—Annexation—Agency Determination.** —A determination regarding a proposed city annexation by a local agency formation commission is quasi-legislative; judicial review thus arises under the ordinary mandamus provisions of Code Civ. Proc., § 1085, rather than the administrative mandamus provisions of Code Civ. Proc., § 1094.5.

(2) **Administrative Law § 86—Judicial Review and Relief—Exhaustion of Administrative Remedies.**—Exhaustion of administrative remedies is not a matter of judicial discretion, but is a fundamental rule of procedure laid down by courts of last resort, followed under the doctrine of stare decisis, and binding upon all courts. Exhaustion of the administrative remedy is a jurisdictional prerequisite to resort to the courts.

(3) **Administrative Law § 88—Judicial Review and Relief—Exhaustion of Administrative Remedies—Particular Applications—When Rehearing Prescribed.**—When the administrative procedure prescribes a rehearing, the rule of exhaustion of remedies will apply in order that the board may be given an opportunity to correct any errors that it may have made.

(4a-4f) **Administrative Law § 89—Judicial Review and Relief—Exhaustion of Administrative Remedies—Exceptions—When Statute Provides Person or Agency "May" Seek Reconsideration of Adverse Agency Decision.**—The trial court erred in dismissing a petition for a writ of mandate filed by an environmental group and others, challenging a local agency formation commission's approval of a proposed city annexation, on the ground that plaintiffs had failed to exhaust their administrative remedies by failing to request rehearing of the agency's decision under Gov. Code, § 56857, subd. (a), which provides that a person or agency "may" seek rehearing of a commission action. When the Legislature has provided that a person or agency "may" seek reconsideration or rehearing of an adverse administrative agency decision, that person or agency need not exercise that rehearing option prior to seeking judicial recourse. The exhaustion of administrative remedies doctrine is adequately safeguarded by the requirement

that the administrative proceeding must be completed before the right to judicial review arises. A person or agency is not required, after an agency's final decision, to raise for a second time the same evidence and legal arguments previously raised solely to exhaust administrative remedies. Furthermore, this new judicial rule was entitled to retroactive application, which would not create any unusual hardships. (Overruling *Alexander* v. *State Personnel Bd.* (1943) 22 Cal.2d 198 [137 P.2d 433], *Clark* v. *State Personnel Bd.* (1943) 61 Cal.App.2d 800 [144 P.2d 84], and *Child* v. *State Personnel Bd.* (1950) 97 Cal.App.2d 467 [218 P.2d 52], to the extent they held otherwise.)

[See 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 309.]

(5) **Administrative Law § 87—Judicial Review and Relief—Exhaustion of Administrative Remedies—Purpose.**—The basic purpose of the doctrine of exhaustion of administrative remedies is to lighten the burden of overworked courts in cases where administrative remedies are available and are as likely as the judicial remedy to provide the wanted relief. Even when the administrative remedy may not resolve all issues or provide the precise relief requested by a plaintiff, the exhaustion doctrine is still viewed with favor because it facilitates the development of a complete record that draws on administrative expertise and promotes judicial efficiency. It can serve as a preliminary administrative sifting process, unearthing the relevant evidence and providing a record which the court may review.

(6) **Courts § 39.5—Decisions and Orders—Doctrine of Stare Decisis—Opinions of California Supreme Court.**—It is a fundamental jurisprudential policy that prior applicable precedent usually must be followed even though the case, if considered anew, might be decided differently by the current justices. This policy, known as the doctrine of stare decisis, is based on the assumption that certainty, predictability, and stability in the law are the major objectives of the legal system; that is, that parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law. It is likewise well established, however, that this policy is a flexible one which permits the California Supreme Court to reconsider, and ultimately to depart from, its own prior precedent in an appropriate case. Although the doctrine of stare decisis does indeed serve important values, it nevertheless should not shield court-created error from correction.

(7) **Courts § 37—Decisions and Orders—Doctrine of Stare Decisis—Application—Significant Legislative Reliance on Prior Decision.**—

The significance of stare decisis is highlighted when legislative reliance is potentially implicated. Certainly, stare decisis has added force when the Legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, since overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.

(8) **Administrative Law § 89—Judicial Review and Relief—Exhaustion of Administrative Remedies—Exceptions—Administrative Procedure Act—Failure to Seek Rehearing.**—The Administrative Procedure Act (APA) (Gov. Code, § 11340 et seq.), which governs a substantial portion of the administrative hearings held in this state, was the final culmination of a detailed Judicial Council administrative law study ordered by the Legislature two years earlier. The Legislature determined the right to judicial review under the APA would not be affected by failure to seek reconsideration before the agency in question, because of the council's finding that the policy requiring the exhaustion of administrative remedies is adequately safeguarded by the requirement that the administrative proceeding must be completed before the right to judicial review exists. In the absence of compelling language in the APA to the contrary, it is assumed that the Legislature adopted the proposed legislation with the intent and meaning expressed by the council in its report.

(9a, 9b) **Courts § 39.5—Decisions and Orders—Prospective and Retroactive Decisions—Judicial Discretion—Factors Considered.**—A decision of the California Supreme Court overruling one of its prior decisions ordinarily applies retroactively. A court may decline to follow that standard rule when retroactive application of a decision would raise substantial concerns about the effects of the new rule on the general administration of justice, or would unfairly undermine the reasonable reliance of parties on the previously existing state of the law. In other words, courts have looked to the hardships imposed on parties by full retroactivity, permitting an exception only when the circumstances of a case draw it apart from the usual run of cases. All things being equal, it is preferable to apply decisions in such a manner as to preserve, rather than foreclose, a litigant's day in court on the merits of his or her action.

COUNSEL

Brandt-Hawley & Zoia and Susan Brandt-Hawley for Plaintiffs and Appellants.

Nancy N. McDonough and David Guy for Plaintiff and Appellant San Joaquin Farm Bureau Federation.

Remy, Thomas and Moose, Michael H. Remy, James G. Moose, John H. Mattox and Lee Axelrad for the Planning and Conservation League as Amicus Curiae on behalf of Plaintiffs and Appellants.

Herum, Crabtree, Dyer, Zolezzi & Terpstra, Steven A. Herum and Thomas H. Terpstra for Defendant and Respondent and for Real Parties in Interest and Respondents Gold Rush City Holding Company, Inc., and Califia Development Group.

Susan Burns Cochran, City Attorney, for Real Party in Interest and Respondent City of Lathrop.

Van Bourg, Weinberg, Roger & Rosenfeld and Sandra Rae Benson for the Northern California District Council of Laborers as Amicus Curiae on behalf of Defendant and Respondent and Real Parties in Interest and Respondents.

Meyers, Nave, Riback, Silver & Wilson, Andrea J. Saltzman and Rick W. Jarvis for Seventy Four California Cities as Amicus Curiae on behalf of Real Parties in Interest and Respondents.

OPINION

WERDEGAR, J.—In *Alexander* v. *State Personnel Bd.* (1943) 22 Cal.2d 198 [137 P.2d 433] (*Alexander*), we held that when the Legislature has provided that a petitioner before an administrative tribunal "may" seek reconsideration or rehearing[1] of an adverse decision of that tribunal, the petitioner always must seek reconsideration in order to exhaust his or her administrative remedies prior to seeking recourse in the courts. The *Alexander* rule has received little attention since its promulgation, and several legal scholars and at least one Court of Appeal have expressed the belief that the rule has been abandoned or legislatively abrogated. That conclusion was premature; the rule remains controlling law. However, as it serves little practical purpose and is inconsistent with procedure in parallel contexts, we hereby abandon it. This is not to say that reconsideration of agency actions need never be sought prior to judicial review. Such a request is necessary

[1] The terms "reconsideration" and "rehearing" are used interchangeably by the literature and case authority in this area, as well as by the parties to this appeal. Perceiving no fundamental difference between the two terms for purposes of this case, we will do the same.

where appropriate to raise matters not previously brought to the agency's attention. We simply see no necessity that parties file pro forma requests for reconsideration raising issues already fully argued before the agency, and finally decided in the administrative decision, solely to satisfy the procedural requirement imposed in *Alexander*.

I. FACTUAL AND PROCEDURAL HISTORY

In early 1996, the City of Lathrop (City) approved a proposal for a large development project on several thousand acres of farmland outside of city limits. A plan was approved, an environmental impact report (EIR) was certified, and a development agreement was executed. A second plan was approved to double the capacity of the City's wastewater treatment facility, and a separate EIR was certified for that project.

Proceedings were commenced before the San Joaquin Local Agency Formation Commission (SJLAFCO) to obtain approval of the City's annexation of the territory. The Sierra Club, the San Joaquin Farm Bureau Federation, Eric Parfrey and Georgianna Reichelt (collectively petitioners) objected in that proceeding. SJLAFCO overruled their objections and approved the proposed annexation; it also adopted a finding of overriding considerations with regard to the environmental impacts identified in the EIR.

Parfrey sent a letter to SJLAFCO requesting reconsideration of the approval. In the letter he asserted the required $700 filing fee for the reconsideration would be forthcoming. The next day he withdrew his request and, together with the other petitioners, filed this mandamus petition in the superior court. The suit named SJLAFCO as respondent, and various developers including Califia Development Group (Califia), the City and others as real parties in interest. The petition alleged a lack of substantial evidence to support the finding of overriding considerations with respect to the environmental impacts identified in the EIR and, alternatively, that SJLAFCO failed to follow the applicable statutory provisions related to territory annexation.

Califia moved to dismiss the petition. Observing that Government Code section 56857, subdivision (a) provides that an aggrieved person may request reconsideration of an adverse local agency formation commission (LAFCO) resolution, Califia argued that under the authority of *Alexander*, *supra*, 22 Cal.2d at page 200, such a request is a mandatory prerequisite to filing in the courts. Petitioners responded that the *Alexander* rule is no longer good law, as reflected in *Benton* v. *Board of Supervisors* (1991) 226 Cal.App.3d 1467, 1475 [277 Cal.Rptr. 481]. The trial court granted the motion to dismiss.

The Court of Appeal affirmed. The majority concluded dismissal was compelled by *Alexander*, despite its view that the *Alexander* rule is "outmoded" and "presents a fitful trap for the unwary." We granted review.

II. THE LAFCO STATUTORY SCHEME

LAFCO's are administrative bodies created pursuant to the Cortese-Knox Local Government Reorganization Act of 1985 (Gov. Code, § 56000 et seq.) to control the process of municipality expansion. The purposes of the act are to encourage "planned, well-ordered, efficient urban development patterns with appropriate consideration of preserving open-space lands within those patterns" (*id.*, § 56300), and to discourage urban sprawl and encourage "the orderly formation and development of local agencies based upon local conditions and circumstances" (*id.*, § 56301). (1) A LAFCO annexation determination is quasi-legislative; judicial review thus arises under the ordinary mandamus provisions of Code of Civil Procedure section 1085, rather than the administrative mandamus provisions of Code of Civil Procedure section 1094.5. (*City of Santa Cruz* v. *Local Agency Formation Com.* (1978) 76 Cal.App.3d 381, 387, 390 [142 Cal.Rptr. 873].)

Government Code section 56857, subdivision (a) provides: "Any person or affected agency *may* file a written request with the executive officer requesting amendments to or reconsideration of any resolution adopted by the commission making determinations. The request shall state the specific modification to the resolution being requested." (Italics added.) Such requests must be filed within 30 days of the adoption of the LAFCO resolution, and no further action may be taken on the annexation until the LAFCO has acted on the request. (*Id.*, subds. (b), (c).) Nothing in the statutory scheme explicitly states that an aggrieved party must seek rehearing prior to filing a court action.

III. THE *ALEXANDER* RULE

(2) That failure to exhaust administrative remedies is a bar to relief in a California court has long been the general rule. In *Abelleira* v. *District Court of Appeal* (1941) 17 Cal.2d 280 [109 P.2d 942, 132 A.L.R. 715] (*Abelleira*), a referee issued a ruling awarding unemployment insurance benefits to striking employees. The affected employers filed a petition for a writ of mandate without first completing an appeal to the California Employment Commission, as required by the statutory scheme. The appellate court issued an alternative writ and a temporary restraining order blocking payment of the benefits. We, in turn, issued a peremptory writ of prohibition restraining the appellate court from enforcing its writ and order. In so doing, we stated

the general rule that exhaustion of administrative remedies "is not a matter of judicial discretion, but is a fundamental rule of procedure laid down by courts of last resort, followed under the doctrine of *stare decisis*, and binding upon all courts. . . . [E]xhaustion of the administrative remedy is a jurisdictional prerequisite to resort to the courts." (*Id.* at p. 293, italics in original.)

The employers in *Abelleira* argued that completing the administrative process would have been futile because the commission had already ruled against their position in prior decisions based upon similar facts. We rejected this argument, noting that a civil litigant is not permitted to bypass the superior court and file an original suit in the Supreme Court merely because the local superior court judge might be hostile to the plaintiff's views. "The whole argument rests upon an illogical and impractical basis, since it permits the party applying to the court to assert without any conclusive proof, and without any possibility of successful challenge, the outcome of an appeal which the administrative body has not even been permitted to decide." (*Abelleira*, *supra*, 17 Cal.2d at p. 301.)

We then stated: "It should be observed also that this argument is completely answered by those cases which apply the rule of exhaustion of remedies to rehearings. Since the board has already made a decision, if the argument of futility of further application were sound, then surely this is the instance in which it would be accepted. (3) But it has been held that where the administrative procedure prescribes a rehearing, the rule of exhaustion of remedies will apply in order that the board may be given an opportunity to correct any errors that it may have made. [Citations.]" (*Abelleira*, *supra*, 17 Cal.2d at pp. 301-302.)

Two years later we issued *Alexander*, *supra*, 22 Cal.2d 198. In that case two civil service employees sought a writ of mandate directing the State Land Commission to reinstate them after the State Personnel Board had upheld their dismissals in an administrative proceeding. The Civil Service Act at the time provided that employees "may apply" for a rehearing within 30 days of receiving an adverse decision of the State Personnel Board. The employees did not seek rehearing before filing the writ petition, and the deadline for doing so passed. The trial court sustained the defendants' demurrer. (*Id.* at p. 199.)

We affirmed. "The rule that administrative remedies must be exhausted before redress may be had in the courts is established in this state. (*Abelleira* v. *District Court of Appeal*, 17 Cal.2d 280 [109 P.2d 942, 132 A.L.R. 715],

and cases cited at pages 292, 293, 302.) The provision for a rehearing is unquestionably such a remedy. . . . [¶] The petitioners ask this court to distinguish between a provision in a statute which requires the filing of a petition for rehearing before an administrative board as a condition precedent to commencing proceedings in the courts [citations], and a provision such as in the present act which it is claimed is permissive only. The distinction is of no assistance to the petitioners under the rule. If a rehearing is available it is an administrative remedy to which the petitioners must first resort in order to give the board an opportunity to correct any mistakes it may have made. As noted in the Abelleira case, *supra*, at page 293, the rule must be enforced uniformly by the courts. Its enforcement is not a matter of judicial discretion. It is true, the Civil Service Act does not expressly require that application for a rehearing be made as a condition precedent to redress in the courts. But neither does the act expressly designate a specific remedy in the courts. So that where, as here, the act provides for a rehearing, but makes no provision for specific redress in the courts and resort to rehearing as a condition precedent, the rule of exhaustion of administrative remedies supplies the omission." (*Alexander*, *supra*, 22 Cal.2d at pp. 199-200.)

Justices Carter and Traynor each dissented.[2] Both dissents noted that the Legislature has the ability to make an administrative rehearing a mandatory requirement if it chooses to do so, and that it had already done so explicitly in two statutory schemes enacted prior to *Alexander*. (22 Cal.2d at p. 201 (dis. opn. of Carter, J.); *id.* at pp. 204-205 (dis. opn. of Traynor, J.).) Justice Carter further emphasized that the majority's broad interpretation of the exhaustion requirement is contrary to the principles of procedure ordinarily applicable in judicial and quasi-judicial forums. (*Id.* at p. 201.) For example, a litigant need not make a motion for a new trial before pursuing an appeal after final judgment in the trial court, nor must that litigant petition the Court of Appeal for rehearing prior to seeking review (or, at that time, hearing) before the Supreme Court after the appellate court issues its decision. (*Ibid.*) Justice Traynor additionally noted that the majority's interpretation was neither compelled by *Abelleira* (22 Cal.2d at p. 205) nor in accordance with the federal rule (*id.* at p. 204).

In 1945, the Legislature passed the Administrative Procedure Act (APA) (then Gov. Code, § 11500 et seq., now Gov. Code, § 11340 et seq.), which governs a substantial portion of the administrative hearings held in this state. The APA and related legislative enactments were the final culmination of a detailed Judicial Council administrative law study ordered by the Legislature

[2]Chief Justice Gibson did not participate in the decision.

two years earlier.[3] The Judicial Council reported its conclusions and recommendations in its Tenth Biennial Report to the Governor and the Legislature. With regard to permissive rehearings, the report states: "The [draft] statute provides . . . that the right to judicial review is not lost by a failure to petition for reconsideration. The Council decided that the established policy requiring the exhaustion of administrative remedies is adequately safeguarded by the requirement that the administrative proceeding must be completed before the right to judicial review exists. . . . [¶] The proposals in the field of judicial review are in substantially the form in which they were submitted publicly in a tentative draft. They have received general approval from the agencies and from members of the bar and the Council believes that the enactment of these recommended statutes will produce a substantial improvement in our present procedure for the judicial review of administrative orders and decisions." (Judicial Council of Cal., 10th Biennial Rep. (1944) Rep. on Administrative Agencies Survey, p. 28.)

In enacting the APA, the Legislature concurred with this recommendation. Government Code section 11523 controls judicial review of agency rulings under the APA and provides that "[t]he right to petition shall not be affected by the failure to seek reconsideration before the agency." Of course, section 11523 applies only in proceedings arising under the APA.

Over the next half-century, the *Alexander* rule remained controlling authority but garnered little attention in either case law or legal scholarship. *Alexander* was expressly followed in two early decisions. (*Clark* v. *State Personnel Board* (1943) 61 Cal.App.2d 800 [144 P.2d 84]; *Child* v. *State Personnel Board* (1950) 97 Cal.App.2d 467 [218 P.2d 52].) While over the decades *Alexander* was cited in decisions several dozen other times, the citation was nearly always a reference to the *Abelleira* principle, i.e., the general proposition that one must exhaust administrative remedies before seeking recourse in the courts.

The specific effect of failing to seek a seemingly permissive rehearing was not at issue in another published case until *Benton* v. *Board of Supervisors*, *supra*, 226 Cal.App.3d 1467. In *Benton*, opponents of a California Environmental Quality Act (CEQA) decision by a county board of supervisors did not request reconsideration by the board before seeking a writ of mandate in the superior court. The Court of Appeal rejected the argument the petitioners

[3]The Judicial Council was entrusted to "make a thorough study of the subject . . . of review of decisions of administrative boards, commissions and officers . . . [and] formulate a comprehensive and detailed plan . . . [including] drafts of such legislative measures as may be calculated to carry out and effectuate the plan." (Stats. 1943, ch. 991, § 2, p. 2904.)

had failed to exhaust administrative remedies, concluding that because county ordinances and CEQA guidelines expressly denied the board any authority to reconsider its decision, there was no additional remedy to pursue. (*Id.* at pp. 1474-1475.)

The Court of Appeal went on to bolster its conclusion, stating: "Second, even if we assume arguendo that the board had the authority to reconsider its adoption of the mitigated negative declaration, we are satisfied that the Bentons exhausted their administrative remedies. At one time, the California Supreme Court required an aggrieved person to apply to the administrative body for a rehearing after a final decision had been issued in order to exhaust administrative remedies. (*Alexander* v. *State Personnel Bd.* (1943) 22 Cal.2d 198, 199-201 [137 P.2d 433]; see 3 Witkin, Cal. Procedure ([4th]ed. [1996]) Actions, § [309, p. 398].) This holding—criticized by at least one legal scholar as 'extreme'—has been repealed by statute. (Gov. Code, § 11523 [Administrative Procedure Act cases]; see 3 Witkin, Cal. Procedure, *supra*, § 309, p. 398].) Therefore, we are not bound by it. The Bentons complied with the exhaustion requirement when they filed a timely appeal of the commission's decision to the board and argued their position before that body. [Citations.]" (*Benton* v. *Board of Supervisors*, *supra*, 226 Cal.App.3d at p. 1475, fn. omitted.)

The Legislature, of course, did not directly overturn the *Alexander* rule by enacting the APA, because the procedural changes it created were limited to APA cases. To directly repudiate the *Alexander* rule, the Legislature would have had to enact a contrary statute of general application, providing that in all cases not otherwise provided for by statute or regulation, the failure to seek reconsideration before an administrative body does not affect the right to judicial review. The *Alexander* rule thus remains the controlling common law of this state, even though the only recent case specifically to discuss that rule opined it is no longer in force.

IV. MERITS OF THE *ALEXANDER* RULE

(4a) We have reconsidered the *Alexander* rule and come to the conclusion that it suffers from several basic flaws. First, the *Alexander* rule might easily be overlooked, even by a reasonably alert litigant. At the most basic level, when a party has been given ostensibly permissive statutory authorization to seek reconsideration of a final decision, that he or she is affirmatively *required* to do so in order to obtain recourse to the courts is not intuitively obvious. Even to attorneys, the word "may" ordinarily means just that. It does not mean "must" or "shall."

Likewise, attorneys and litigants familiar with the rudiments of court procedure know that one need not make a request for a new trial prior to filing an appeal of an adverse judgment, nor seek reconsideration of an adverse appellate decision prior to seeking review in this court. Without receiving explicit notification from within the statutory scheme, they are unlikely to anticipate that a different rule will apply in administrative proceedings. This requirement, indeed, may not be apparent even to practitioners with experience in administrative law, since under the APA a rehearing opportunity styled as permissive is actually permissive, and not a mandatory prerequisite to court review. (Gov. Code, § 11523.)

Nor would an attorney familiar with federal law be placed on notice. The relevant section of the federal Administrative Procedure Act, 5 United States Code section 704, provides: "Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes [of judicial review] whether or not there has been presented or determined an application . . . for any form of reconsideration . . . ." In spite of the citations to federal case law in the *Alexander* majority opinion, this is the common law rule in federal courts and had been for decades before *Alexander* was decided. (See, e.g., *Prendergast* v. *N. Y. Tel. Co.* (1923) 262 U.S. 43, 48 [43 S.Ct. 466, 468, 67 L.Ed. 853]; *Levers* v. *Anderson* (1945) 326 U.S. 219, 222 [66 S.Ct. 72, 73-74, 90 L.Ed. 26].)[4]

In sum, even an alert legal practitioner could overlook the necessity of seeking rehearing, as a condition to judicial review, until after the deadline to act had passed, and many who petition before administrative bodies do so without the benefit of legal training. In recent years, moreover, even an awareness of the rehearing issue might not have avoided the potential pitfall, given that the only recent Court of Appeal decision (*Benton* v. *Board of Supervisors*, *supra*, 226 Cal.App.3d at p. 1475) declares the rule to have been legislatively repealed, and a leading treatise on California procedure, citing that decision, strongly implies the rule is no longer in force.[5]

[4]Neither federal case relied upon by the *Alexander* majority actually holds that a rehearing must be sought whenever available. In each case, the litigants attempted to raise issues before the courts that had never been raised in the proceeding before the administrative tribunal. (*Vandalia R. R.* v. *Public Service Comm.* (1916) 242 U.S. 255 [37 S.Ct. 93, 61 L.Ed. 276]; *Red River Broadcasting Co.* v. *Federal C. Commission* (D.C. Cir. 1938) 98 F.2d 282 [69 App.D.C. 1].) Neither case stands for anything more than a general exhaustion principle, à la *Abelleira*.

[5]Witkin states: "In [*Alexander*], a split court took the extreme position that the exhaustion doctrine included a requirement of application to the administrative body for a *rehearing* of its final determination. [Citation.] This view was later repudiated by statute, both for the Personnel Board (Govt.C. 19588) and for agencies under the Administrative Procedure Act (Govt.C. 11523)." (3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 309, p. 398, italics in

Of course, circumstances can exist where enforcement of a judicially created procedural rule is justifiable even though the rule is neither intuitively expected nor consistent with other procedural schemes. If the *Alexander* rule were necessary to the purposes behind the doctrine of exhaustion of administrative remedies, or at least significantly advanced those purposes, then its usefulness might well outweigh its drawbacks. This does not appear to be the case.

(5) "There are several reasons for the exhaustion of remedies doctrine. 'The basic purpose for the exhaustion doctrine is to lighten the burden of overworked courts in cases where administrative remedies are available and are as likely as the judicial remedy to provide the wanted relief.' (*Morton* v. *Superior Court* [(1970)] 9 Cal.App.3d 977, 982 [88 Cal.Rptr. 533].) Even where the administrative remedy may not resolve all issues or provide the precise relief requested by a plaintiff, the exhaustion doctrine is still viewed with favor 'because it facilitates the development of a complete record that draws on administrative expertise and promotes judicial efficiency.' (*Karlin* v. *Zalta* (1984) 154 Cal.App.3d 953, 980 [201 Cal.Rptr. 379].) It can serve as a preliminary administrative sifting process (*Bozaich* v. *State of California* (1973) 32 Cal.App.3d 688, 698 [108 Cal.Rptr. 392]), unearthing the relevant evidence and providing a record which the court may review. (*Westlake Community Hosp.* v. *Superior Court* (1976) 17 Cal.3d 465, 476 [131 Cal.Rptr. 90, 551 P.2d 410].)" (*Yamaha Motor Corp.* v. *Superior Court* (1986) 185 Cal.App.3d 1232, 1240-1241 [230 Cal.Rptr. 382].)

(4b) In cases such as this, however, the administrative record has been created, the claims have been sifted, the evidence has been unearthed, and the agency has already applied its expertise and made its decision as to whether relief is appropriate. The likelihood that an administrative body will reverse itself when presented only with the same facts and repetitive legal arguments is small. Indeed, no court would do so if presented with such a motion for reconsideration, since such a filing is expressly barred by statute. (Code Civ. Proc., § 1008.)

We also think it unlikely the *Alexander* rule has any substantial effect in reducing the burden on the courts. When the parties are aware of the rule and

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original.) Some specific practice guides are even more emphatic in their view the *Alexander* rule is no longer good law. (See, e.g., 1 Fellmeth & Folsom, Cal. Administrative and Antitrust Law (1992) § 8.04, p. 361 ["Although at one time a litigant was required to seek a rehearing or petition for reconsideration, that requirement is no longer commonly applied." (Fn. omitted.)]; 2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act Cont.Ed.Bar 1997) § 23.100, pp. 1015-1016 ["The continuing vitality of the *Alexander* rule . . . is questionable."].)

comply with it, the administrative body presented with the same facts and arguments is unlikely to reverse its decision. The only likely consequence is delay and expense for both the parties and the administrative agency prior to the commencement of judicial proceedings. Of course, the courts' burden is marginally reduced by the occasional case when a party, unaware of the rule, fails to comply and thus is barred from seeking judicial review, but we believe the striking of potentially meritorious claims solely to clear them from a court's docket should not stand as a policy goal in and of itself.

The primary useful purpose the rule might serve was expressed in *Alexander* itself. Theoretically, the rule "give[s] the [administrative body] an opportunity to correct any mistakes it may have made." (*Alexander*, *supra*, 22 Cal.2d at p. 200.) We presume, however, that the decisions of the various agencies of this state are reached, in the overwhelming majority of the proceedings undertaken, only after due consideration of the issues raised and the evidence presented. While occasional mistakes are an unfortunate by-product of all tribunals, judicial or administrative, the fact remains that a petition for reconsideration, raising the same arguments and evidence for a second time, will not likely often sway an administrative body to abandon the conclusions it has reached after full prior consideration of those same points.

We are not alone in our reasoning. After a multiyear consideration and public review process, the California Law Revision Commission recently issued a report recommending a complete overhaul and consolidation of the myriad statutes for judicial review of California agency decisions under one uniform procedural scheme. (Judicial Review of Agency Action (Feb. 1997) 27 Cal. Law Revision Com. Rep. (1997) p. 13 (Revision Report).) The commission's proposed legislation provides in pertinent part: "all administrative remedies available within an agency are deemed exhausted . . . if no higher level of review is available within the agency, whether or not a rehearing or other lower level of review is available within the agency, unless a statute or regulation requires a petition for rehearing or other administrative review." (*Id.*, § 1123.320, p. 75.) The comment to this section is clear: "Section 1123.320 restates the existing California rule that a petition for a rehearing or other lower level administrative review is not a prerequisite to judicial review of a decision in an adjudicative proceeding. See former Gov't Code § 11523, Gov't Code § 19588 (State Personnel Board). This overrules any contrary case law implication. *Cf.* Alexander v. State Personnel Bd., 22 Cal.2d 198, 137 P.2d 433 (1943)." (*Id.* at pp. 75-76.)

The Revision Report also contains several background studies by Professor Michael Asimow, who was retained by the commission as a special

consultant for this project. In discussing this issue, Professor Asimow opines: "Both the existing California APA and other statutes provide that a litigant need not request reconsideration from the agency before pursuing judicial review. However, the common law rule in California may be otherwise [citing *Alexander*]. A request for reconsideration should never be required as a prerequisite to judicial review unless specifically provided by statute to the contrary." (Revision Rep., *supra*, at pp. 274-275, fns. omitted.) We recognize that, to date, the Legislature has not acted on the Law Revision Commission's recommendations; we do not suggest that the unenacted recommendation reflects the current state of California law. It does reflect, however, the opinion of a learned panel as to the wisdom of and necessity for the *Alexander* rule.

Over 50 years ago, the United States Supreme Court suggested that: "motions for rehearing before the same tribunal that enters an order are under normal circumstances mere formalities which waste the time of litigants and tribunals, tend unnecessarily to prolong the administrative process, and delay or embarrass enforcement of orders which have all the characteristics of finality essential to appealable orders." (*Levers* v. *Anderson*, *supra*, 326 U.S. at p. 222 [66 S.Ct. at pp. 73-74]; see also Rames, *Exhausting the Administrative Remedies: The Rehearing Bog* (1957) 11 Wyo. L.J. 143, 149-153.) We agree. There is little reason to maintain "an illogical extension of this general rule [of exhaustion of administrative remedies that] require[s] an idle act." (Cal. Administrative Mandamus (Cont.Ed.Bar. 1989) § 2.30, p. 52.) Were the issue before us in the first instance, we would have little difficulty concluding that the rule concerning administrative rehearings should be made consistent with judicial procedure, the federal rule, and California's own APA.[6]

V. STARE DECISIS AND LEGISLATIVE INTENT

(6) The issue of whether seemingly permissive reconsideration options in administrative proceedings need be exhausted is not before us for the first time, however, and we do not lightly set aside a 50-year-old precedent of this court. "It is, of course, a fundamental jurisprudential policy that prior

[6]An amicus curiae submission from 74 California cities suggests that reversing the *Alexander* rule would interfere with the uniformity of California exhaustion law and create confusion as to which administrative remedies need be followed and which could be bypassed. The concern is overstated. There is nothing uniform about the current state of exhaustion law with regard to permissive reconsideration. Reversal would merely make California common law consistent with the APA, federal law, and parallel judicial procedure. The effect of such a reversal is limited to reconsideration and has no effect on general principles requiring that each available stage of administrative appeal be exhausted.

applicable precedent usually must be followed even though the case, if considered anew, might be decided differently by the current justices. This policy, known as the doctrine of stare decisis, 'is based on the assumption that certainty, predictability and stability in the law are the major objectives of the legal system; i.e., that parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law.' [Citation.] [¶] It is likewise well established, however, that the foregoing policy is a flexible one which permits this court to reconsider, and ultimately to depart from, our own prior precedent in an appropriate case. [Citation.] As we stated in *Cianci* v. *Superior Court* (1985) 40 Cal.3d 903, 924 [221 Cal.Rptr. 575, 710 P.2d 375], '[a]lthough the doctrine [of stare decisis] does indeed serve important values, it nevertheless should not shield court-created error from correction.' " (*Moradi-Shalal* v. *Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 296 [250 Cal.Rptr. 116, 758 P.2d 58].)

(7) The significance of stare decisis is highlighted when legislative reliance is potentially implicated. (See, e.g., *People* v. *Latimer* (1993) 5 Cal.4th 1203, 1213-1214 [23 Cal.Rptr.2d 144, 858 P.2d 611] (*Latimer*).) Certainly, "[*s*]*tare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response." (*Hilton* v. *South Carolina Public Railways Comm'n* (1991) 502 U.S. 197, 202 [112 S.Ct. 560, 564, 116 L.Ed.2d 560].)

In *Latimer*, *supra*, 5 Cal.4th 1203, we considered the ongoing vitality of a 30-year-old precedent of this court interpreting Penal Code section 654 as prohibiting multiple punishments for multiple criminal acts when those acts had been committed with a single intent and objective. (*Neal* v. *State of California* (1960) 55 Cal.2d 11, 19 [9 Cal.Rptr. 607, 357 P.2d 839] (*Neal*).) Although the *Neal* rule had been the subject of criticism, and we acknowledged we might now decide the matter differently had it been presented to us as a matter of first impression (*Latimer*, *supra*, 5 Cal.4th at pp. 1211-1212), we concluded we were not free to do so because of the collateral consequences such a reversal might have on the entire complicated determinate sentencing structure the Legislature had enacted in the intervening years. "At this time, it is impossible to determine whether, or how, statutory law might have developed differently had this court's interpretation of section 654 been different. For example, the limitations the *Neal* rule placed on consecutive sentencing may have affected legislative decisions regarding the length of sentences for individual crimes or the development of sentence enhancements. [¶] . . . [¶] . . . What would the Legislature have intended if it had

known of the new rule? On a more general front, what other statutes and legislative decisions may have been influenced by the *Neal* rule, and in what ways? These are questions the Legislature, not this court, is best equipped to answer." (*Id.* at pp. 1215-1216.)

Of course, principles of stare decisis do not preclude us from ever revisiting our older decisions. Indeed, in the same year we decided *Latimer* we overruled a different sentencing precedent in *People* v. *King* (1993) 5 Cal.4th 59 [19 Cal.Rptr.2d 233, 851 P.2d 27] (*King*). The primary difference between the cases was the extent to which a reversal of precedent would cast uncertainty on the appropriate interpretation of the other statutes and case law that make up California's criminal sentencing structure. As we explained in *Latimer*, the sentencing precedent at issue in *King* "was a specific, narrow ruling that could be overruled without affecting a complete sentencing scheme. The [rule at issue in *Latimer*], by contrast, is far more pervasive; it has influenced so much subsequent legislation that stare decisis mandates adherence to it. It can effectively be overruled only in a comprehensive fashion, which is beyond the ability of this court. The remedy for any inadequacies in the current law must be left to the Legislature." (*Latimer*, *supra*, 5 Cal.4th at p. 1216.)

(4c) We do not perceive legislative reliance to be a substantial obstacle in this case. Like the precedent at issue in *King*, *Alexander* sets forth a narrow rule of limited applicability. Certainly, no reason appears to believe the rule is a vital underpinning of the entire administrative law structure of California. Unlike the precedent at issue in *Latimer*, little hard evidence suggests the Legislature has affirmatively taken the *Alexander* rule into account in enacting subsequent legislation.

Unlike the rules at issue in both *King* and *Latimer*, the *Alexander* rule is not a matter of statutory interpretation, as it does not hinge on the meaning of specific words as used in a particular statute. It is a rule of procedure that comes into play whenever the Legislature offers parties the option to seek reconsideration of a final administrative decision without specifying in the relevant statute the consequences, if any, of failing to do so. Thus, the Legislature has not had an opportunity affirmatively to acquiesce in the *Alexander* rule by reenacting or reaffirming exact statutory language. (See, e.g., *Fontana Unified School Dist.* v. *Burman* (1988) 45 Cal.3d 208, 219 [246 Cal.Rptr. 733, 753 P.2d 689]; *Marina Point., Ltd.* v. *Wolfson* (1982) 30 Cal.3d 721, 734 [180 Cal.Rptr. 496, 640 P.2d 115, 30 A.L.R.4th 1161].)

Likewise, as noted previously, in order directly to repudiate the *Alexander* rule, the Legislature would have been required to enact a contrary statute of

general application, providing that in all cases not otherwise provided for by statute or regulation, the failure to seek reconsideration before an administrative body does not, standing alone, affect the right to judicial review. The Legislature has not enacted such a statute, but that it has not chosen to do so is not necessarily dispositive of its intentions. "The Legislature's failure to act may indicate many things other than approval of a judicial construction of a statute: the '"'sheer pressure of other and more important business,'"' '"'political considerations,'"' or a '"'tendency to trust to the courts to correct their own errors . . . .'"'" (*County of Los Angeles* v. *Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 391, 404 [179 Cal.Rptr. 214, 637 P.2d 681]; see also *King*, *supra*, 5 Cal.4th at p. 77; *Latimer*, *supra*, 5 Cal.4th at p. 1213; *People* v. *Escobar* (1992) 3 Cal.4th 740, 750-751 [12 Cal.Rptr.2d 586, 837 P.2d 1100].)

No explicit evidence of legislative acquiescence in the *Alexander* rule appears. Neither are there any indications of a legislative view as to the application of the *Alexander* rule specifically to the LAFCO statutory scheme. Respondents argue the Legislature must have enacted Government Code section 56857, subdivision (a) with the implicit understanding the *Alexander* rule would apply and with the affirmative intention that it do so. As we have noted, nothing in the language of the statute compels this conclusion or provides affirmative evidence of legislative approval or disapproval, or even awareness, of the *Alexander* rule.

Respondents alternatively argue that the Legislature invested the LAFCO reconsideration remedy with special significance by providing that, if a request for amendment or reconsideration is filed, the annexation process is suspended until the LAFCO has acted upon the request. (Gov. Code, § 56857, subd. (c).) From this, they extrapolate that the Legislature must consider reconsideration to be especially meaningful in the LAFCO context and, thus, that the Legislature must affirmatively believe requests for reconsideration are a mandatory remedy that must always be exhausted prior to judicial review. We do not agree. These sections merely demonstrate the Legislature considers such requests to have significance when they are actually made. They cast no light on whether the Legislature wants parties to file pro forma requests for reconsideration.

We have not been provided with, nor has our research disclosed, any legislative history demonstrating that, in enacting Government Code section 56857, subdivision (a), the Legislature affirmatively considered the significance of providing a permissive reconsideration remedy to a party who has already obtained a final decision. In lieu of direct indications of legislative

intent, respondents argue the Legislature's awareness and approval of the general applicability of the *Alexander* rule may indirectly be demonstrated by the existence of other statutes containing reconsideration options. The Legislature has enacted several statutes that provide for reconsideration before the administrative body, but specify that the right to seek judicial review is *not* affected by the failure to seek reconsideration. Respondents have identified several statutes worded in this manner, in addition to the APA itself: (Wat. Code, § 1126, subd. (b); Health & Saf. Code, § 40864, subd. (a); Gov. Code, § 19588; Stats. 1989, ch. 1392, § 421, pp. 6023-6024, Deering's Wat.—Uncod. Acts (1999 Supp.) Act 2793, p. 162; Stats. 1989, ch. 844, § 504, p. 2777, Deering's Wat.—Uncod. Acts (1999 Supp.) Act 4833, p. 26.) Because these statutes postdate and thus supersede the *Alexander* rule where applicable, their enactment permits an inference of ongoing legislative awareness of the *Alexander* rule. Reversing course at this date, respondents maintain, would render the relevant language in these provisions surplusage.

As petitioners point out, however, at least one statute provides the opposite. Labor Code section 5901 was amended in 1951 to provide in pertinent part: "No cause of action arising out of any final order, decision or award made and filed by a [workers' compensation] commissioner or a referee shall accrue in any court to any person until and unless . . . such person files a petition for reconsideration, and such reconsideration is granted or denied." (Stats. 1951, ch. 778, § 14, pp. 2268-2269.) Among other things, the 1951 amendment replaced the word "rehearing" in the statute with the word "reconsideration." (See Historical Note, 45 West's Ann. Lab. Code (1989 ed.) foll. § 5901, p. 177.) Thus, the Legislature chose to fine-tune language in a statute providing that a workers' compensation claimant must request reconsideration of a final decision prior to recourse to the courts, even though the entire provision would be surplusage were we to assume the Legislature's awareness of the rule of general application provided by *Alexander*.

Further ambiguity may be found in other statutes. Health and Safety Code section 121270, the AIDS Vaccine Victims Compensation Fund statute, provides in pertinent part: "(h) . . . Upon the request by the applicant within 30 days of delivery or mailing [of the written decision], the board may reconsider its decision. [¶] (i) Judicial review of a decision shall be under Section 1094.5 of the Code of Civil Procedure, and the court shall exercise its independent judgment. A petition for review shall be filed as follows: [¶] (1) If no request for reconsideration is made, within 30 days of personal delivery or mailing of the board's decision on the application. [¶] (2) If a

timely request for reconsideration is filed and rejected by the board, within 30 days of . . . the notice of rejection. [¶] (3) *If* a timely request for reconsideration is filed and granted by the board, . . . [within 30 days of the final decision]." Although the statute does not expressly state that a party who fails to seek reconsideration may seek judicial review, by providing for different time limitations depending on whether reconsideration was sought, the statutory wording arguably implies that in enacting the statute the Legislature was operating under the assumption that failure to seek reconsideration of a final administrative decision is not ordinarily a bar to further judicial review. Any such inference, however, is weak.

In sum, all the inferences the parties would have us draw are insubstantial and do not provide us with a sufficient basis to extrapolate legislative approval of the *Alexander* rule. The most one can say is that at times the Legislature has had a specific intention regarding the significance of reconsideration in an administrative scheme and has chosen to craft a statute so as to accomplish its intentions.

We ultimately return to the sole reliable indication of the Legislature's view of the need for the *Alexander* rule. (8) In enacting the APA, the Legislature was aware it was creating a general statutory framework that would be applied by myriad agencies under varying circumstances, not a specific scheme applicable to only one type of administrative hearing. Despite this anticipation of broad applicability, the Legislature determined the right to judicial review under the APA shall not be affected by failure to seek reconsideration before the agency in question, because the "policy requiring the exhaustion of administrative remedies is adequately safeguarded by the requirement that the administrative proceeding must be completed before the right to judicial review exists." (Judicial Council of Cal., 10th Biennial Rep., *supra*, at p. 28.)

"[The Tenth Biennial Report] is a most valuable aid in ascertaining the meaning of the statute. While it is true that what we are interested in is the legislative intent as disclosed by the language of the section under consideration, the council drafted this language at the request of the Legislature, and in this respect was a special legislative committee. As part of its special report containing the proposed legislation it told the Legislature what it intended to provide by the language used. In the absence of compelling language in the statute to the contrary, it will be assumed that the Legislature adopted the proposed legislation with the intent and meaning expressed by the council in its report." (*Hohreiter* v. *Garrison* (1947) 81 Cal.App.2d 384, 397 [184 P.2d 323]; accord, *Anton* v. *San Antonio Community Hosp.* (1977) 19 Cal.3d 802, 817 [140 Cal.Rptr. 442, 567 P.2d 1162].)

(4d) Neither the APA nor any other statute has any compelling language to the contrary. As best we can surmise, the considered public policy judgment of the Legislature is that the exhaustion of administrative remedies doctrine is adequately safeguarded by the requirement that the administrative proceeding must be completed before the right to judicial review arises. This judgment is consistent with our own conclusion the *Alexander* rule is neither necessary nor useful.

Respondents argue that if we determine to overrule the *Alexander* rule, the decision should have only prospective effect. We do not agree. (9a) A decision of this court overruling one of our prior decisions ordinarily applies retroactively. (*Newman* v. *Emerson Radio Corp.* (1989) 48 Cal.3d 973, 978 [258 Cal.Rptr. 592, 772 P.2d 1059]; *Peterson* v. *Superior Court* (1982) 31 Cal.3d 147, 151 [181 Cal.Rptr. 784, 642 P.2d 1305].) Admittedly, "we have long recognized the potential for allowing narrow exceptions to the general rule of retroactivity when considerations of fairness and public policy are so compelling in a particular case that, on balance, they outweigh the considerations that underlie the basic rule. A court may decline to follow the standard rule when retroactive application of a decision would raise substantial concerns about the effects of the new rule on the general administration of justice, or would unfairly undermine the reasonable reliance of parties on the previously existing state of the law. In other words, courts have looked to the 'hardships' imposed on parties by full retroactivity, permitting an exception only when the circumstances of a case draw it apart from the usual run of cases." (*Newman*, *supra*, at p. 983.)

(4e) We do not perceive that retroactive application of our decision will create any unusual hardships. *Alexander* set forth a rule of very limited application. That the general administration of justice will be significantly affected by its abrogation or many pending actions will be affected is unlikely. No issue of substantial detrimental reliance is present here; no one has acquired a vested right or entered into a contract based on the existence of the *Alexander* rule. (E.g., *Peterson* v. *Superior Court*, *supra*, 31 Cal.3d at p. 152.) (9b) Finally, all things being equal, we deem it preferable to apply our decisions in such a manner as to preserve, rather than foreclose, a litigant's day in court on the merits of his or her action. (See, e.g., *Newman* v. *Emerson Radio Corp.*, *supra*, 48 Cal.3d at p. 990; *Moradi-Shalal* v. *Fireman's Fund Ins. Companies*, *supra*, 46 Cal.3d at pp. 304-305.)

(4f) Respondents argue that to permit petitioners to receive the benefit of our decision would be inequitable, since they were presumably aware of the *Alexander* rule and made a voluntary decision to ignore it. Respondents

infer this awareness solely from petitioner Parfrey's initial request for reconsideration of SJLAFCO's approval of the annexation of the development property, which he later withdrew. In reality, the filing and subsequent withdrawal of a reconsideration request are equally consistent with an understanding that reconsideration is merely permissive as with a belief it is mandatory. Indeed, to assume petitioners consciously chose to expose their action to dismissal on purely procedural grounds is difficult. Moreover, as we have discussed in detail above, although *Alexander* was decided over a half-century ago, the rule of the case has remained relatively obscure since that time, and that a litigant would be uncertain of its vitality today is not at all unlikely. The filing and withdrawal of a request for reconsideration appear to reflect only a judgment that perfecting the request would not be worthwhile.

We hereby overrule *Alexander*, *supra*, 22 Cal.2d 198, and hold that, subject to limitations imposed by statute, the right to petition for judicial review of a final decision of an administrative agency is not necessarily affected by the party's failure to file a request for reconsideration or rehearing before that agency.

We emphasize this conclusion does not mean the failure to request reconsideration or rehearing may never serve as a bar to judicial review. Such a petition remains necessary, for example, to introduce evidence or legal arguments before the administrative body that were not brought to its attention as part of the original decisionmaking process. (See, e.g., 2 Davis & Pierce, Administrative Law Treatise (3d ed. 1994) § 15.8, p. 341.) Our reasoning here is not addressed to new evidence, changed circumstances, fresh legal arguments, filings by newcomers to the proceedings and the like. Likewise, a rehearing petition is necessary to call to the agency's attention errors or omissions of fact or law in the administrative decision itself that were not previously addressed in the briefing, in order to give the agency the opportunity to correct its own mistakes before those errors or omissions are presented to a court. The general exhaustion rule remains valid: Administrative agencies must be given the opportunity to reach a reasoned and final conclusion on each and every issue upon which they have jurisdiction to act before those issues are raised in a judicial forum. Our decision is limited to the narrow situation where one would be required, after a final decision by an agency, to raise for a second time the same evidence and legal arguments one has previously raised solely to exhaust administrative remedies under *Alexander*.

The judgment of the Court of Appeal is reversed, and the cause is remanded for further proceedings in accordance with this decision.

George, C. J., Mosk, J., Kennard, J., Baxter, J., Chin, J., and Brown, J., concurred.

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Labor Code Section 3212.1; Statutes 1999, Chapter 595, Statutes 2000, Chapter 887; Filed on June 27, 2002; By California State Association of Counties – Excess Insurance Authority (CSAC-EIA) and County of Tehama.	No. 01-TC-19 *Cancer Presumption for Law Enforcement and Firefighters* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 *(Adopted on May 27, 2004)*

STATEMENT OF DECISION

The attached Statement of Decision of the Commission on State Mandates is hereby adopted in the above-entitled matter.

PAULA HIGASHI, Executive Director Date

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Labor Code Section 3212.1; Statutes 1999, Chapter 595, Statutes 2000, Chapter 887; Filed on June 27, 2002; By California State Association of Counties – Excess Insurance Authority (CSAC-EIA) and County of Tehama.	No. 01-TC-19 *Cancer Presumption for Law Enforcement and Firefighters* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 *(Adopted on May 27, 2004)*

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on May 27, 2004. Juliana F. Gmur appeared for claimant, County of Tehama. Gina C. Dean appeared for claimant, California State Association of Counties-Excess Insurance Authority (CSAC-EIA). Jaycee Nitchke appeared for the Department of Finance. Allan P. Burdick appeared for interested party, CSAC SB 90 Group.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission adopted the staff analysis at the hearing by a vote of 4 to 0.

BACKGROUND

This case addresses an evidentiary presumption given to certain firefighters and peace officers in workers compensation cases. Normally, before an employer is liable for payment of workers compensation benefits, the employee must show that the injury arose out of and in the course of employment, and that the injury was proximately caused by the employment. The burden of proof is normally on the employee to show proximate cause by a preponderance of the evidence.[1]

The Legislature eased the burden of proving industrial causation for certain public employees that provide vital and hazardous services by establishing a series of presumptions.[2] In 1982, the Legislature enacted Labor Code section 3212.1, which provided a limited presumption, easing the burden of proving industrial causation for specified firefighters that developed cancer during

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[1] Labor Code sections 3202.5 and 3600. Labor Code section 3202.5 defines preponderance of the evidence as such evidence, "when weighed with that opposed to it, has more convincing force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence."

[2] See, Labor Code sections 3212, 3212.1 – 3212.7, and 3213.

the period of employment. In 1989, certain peace officers were also given the cancer presumption. In these cases, there was a presumption that the cancer arose out of and in the course of employment, and the employer was liable for full hospital, surgical, and medical treatment, disability indemnity, and death benefits, if the firefighter or peace officer could show that:

- He or she was exposed, while in the service of the department or unit, to a known carcinogen as defined by the International Agency for Research on Cancer, or as defined by the director; and that
- The carcinogen is reasonably linked to the disabling cancer.

Labor Code section 3212.1 further provided that the presumption of industrial causation was disputable and could be controverted by the employer by other evidence that the cancer was caused by non-industrial factors.[3]

Following the enactment of Labor Code section 3212.1, the courts struggled with the employee's burden of proving that the carcinogen was reasonably linked to the cancer. In *Zipton v. Workers' Compensation Appeals Board*[4], the survivors of a firefighter, who died at age 39 of metastatic undifferentiated epithelial cancer, were held ineligible for workers compensation benefits because the nature of the diagnosis made it impossible to reasonably link the carcinogens and the cancer. Metastatic cancer is a secondary cancer growth that migrates from the primary site of the disease to another part of the body. The primary site of the disease was unknown.[5] The court stated the following about the reasonable link requirement:

> While the legislative history reveals an intent on the part of the Legislature to ease the burden of proof of industrial causation by removing the barrier of proximate cause, in application a reasonable link requirement is no less than the logical equivalent of proximate cause. Moreover, we discern that the requirement was precipitated by a fear of financial doom [by self-insured state and local agencies], but that this fear may be unfounded.
>
> In summary, it may be that there is no purpose to be served by the reasonable link requirement. If indeed metastatic cancer, primary site unknown, is a common medical diagnosis in cancer cases, and therefore results in a pattern of defeating cancer claims of firefighters and police officers by requiring a burden of proof which is medically impossible to sustain, the Legislature may wish to reexamine the reasonable link requirement.[6]

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[3] The courts have described the rebuttable presumption as follows: "Where facts are proven giving rise to a presumption ..., the burden of proof shifts to the party, against whom it operates [i.e., the employer], to prove the nonexistence of the presumed fact, to wit, an industrial relationship." (*Zipton v. Workers' Compensation Appeals Board* (1990) 218 Cal.App.3d 980, 988, fn. 4.)

[4] *Zipton, supra,* 218 Cal.App.3d 980.

[5] *Id.* at page 991.

[6] *Id.* at page 990.

In a case after *Zipton*, the First District Court of Appeal noted that Labor Code section 3212.1 does not provide the same level of presumption enumerated in other presumption statutes. Rather, Labor Code section 3212.1 contained a "limited and disputable presumption."[7] The court also disagreed with the interpretation in *Zipton* that the reasonable link standard was the same as the proximate cause standard. The court held the following:

> We hold that more is required under section 3212.1 than the mere coincidence of exposure and cancer. But a showing of proximate cause is not required. Rather, if the evidence supports a reasonable inference that the occupational exposure contributed to the worker's cancer, then a "reasonable link" has been shown, and the disputable presumption of industrial causation may be invoked.[8]

Test Claim Legislation

In 1999, the Legislature enacted the test claim statute (Stats. 1999, ch. 595), which amended Labor Code section 3212.1 to address the court's criticism of the reasonable link standard in *Zipton*.[9] The test claim statute eliminates the employee's burden of proving that a carcinogen is reasonably linked to the cancer before the presumption that the cancer arose out of and in the course of employment is triggered. Thus, the employee need only show that he or she was exposed, while in the service of the department or unit, to a known carcinogen as defined by the International Agency for Research on Cancer, or as defined by the director, for the presumption of industrial injury to arise.

The employer still has a right to dispute the employee's claim. But, when disputing the claim, the burden of proving that the carcinogen is not reasonably linked to the cancer has been shifted to the employer. Labor Code section 3212.1, subdivision (d), as amended in 1999, now states the following:

> The cancer developing or manifesting itself in these cases shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by evidence that the primary site of the cancer has been established and that the carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer. Unless so controverted, the appeals board is bound to find in accordance with the presumption.

The 1999 test claim statute also specifies that leukemia is included as a type of cancer for which the presumption of industrial injury can apply.

Finally, the 1999 test claim statute retroactively applies the amendments to section 3212.2 to workers compensation claims filed or pending on January 1, 1997. Labor Code section 3212.1, subdivision (e), states that "[t]he amendments to this section enacted during the 1999-2000 Regular Session shall apply to claims for benefits filed or pending on or after January 1, 1997,

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[7] *Riverview Fire Protection District v. Workers' Compensation Appeals Board* (1994) 23 Cal.App.4th 1120, 1124.

[8] *Id.* at page 1128.

[9] Assembly Floor Analysis on Assembly Bill 539, dated September 8, 1999.

including, but not limited to, claims for benefits filed on or after that date that have previously been denied, or that are being appealed following denial."

In 2000, the Legislature enacted the second test claim statute (Stats. 2000, ch. 887) to extend the cancer presumption to peace officers "primarily engaged in law enforcement activities" as defined below in Penal Code section 830.37, subdivisions (a) and (b):

> (a) Members of an arson-investigating unit, regularly paid and employed in that capacity, of a fire department or fire protection agency of a county, city, city and county, district, or the state, if the primary duty of these peace officers is the detection and apprehension of persons who have violated any fire law or committed insurance fraud.
>
> (b) Members other than members of an arson-investigating unit, regularly paid and employed in that capacity, of a fire department or fire protection agency of a county, city, city and county, district or the state, if the primary duty of these peace officers, when acting in that capacity, is the enforcement of law relating to fire prevention or fire suppression.

Prior Test Claim Decisions on Labor Code Section 3212.1

In 1982, the Board of Control approved a test claim on Labor Code section 3212.1, as originally added by Statutes 1982, chapter 1568 (*Firefighter's Cancer Presumption*). The parameters and guidelines authorize insured local agencies and fire districts to receive reimbursement for increases in workers compensation premium costs attributable to Labor Code section 3212.1. The parameters and guidelines also authorize self-insured local agencies to receive reimbursement for staff costs, including legal counsel costs, in defending the section 3212.1 claims, and benefit costs including medical costs, travel expenses, permanent disability benefits, life pension benefits, death benefits, and temporary disability benefits paid to the employee or the employee's survivors.

In 1992, the Commission adopted a statement of decision approving a test claim on Labor Code section 3212.1, as amended by Statutes 1989, chapter 1171 (*Cancer Presumption – Peace Officers*, CSM 4416.) The parameters and guidelines authorize reimbursement to local law enforcement agencies that employ peace officers defined in Penal Code sections 830.1 and 830.2 for the same costs approved in the Board of Control decision in the *Firefighter's Cancer Presumption* test claim.[10]

Claimants' Position

The claimants contend that the test claim legislation constitutes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. The claimants assert the following:

> [The test claim legislation takes] an element that once had to be proved by the employee – that the disabling cancer is reasonably related to the carcinogen – and shifts that element so the employer must now show that the disabling cancer is not reasonably related to the carcinogen. Further, the employer is only allowed to address the reasonably-related element if the employer can establish the

[10] Exhibit J to Item 5, May 27, 2004 Commission Hearing

primary site of the cancer. The employer must establish both to make use of this defense. And this defense is now the one and only way to defeat the presumption.

The net effect of this legislation is to further encourage the filing of workers' compensation claims for cancer and markedly increase the probability that the claims will be successful. Thus, the total costs of these claims, from initial prosecution to ultimate resolution are reimbursable.[11]

The claimants further argue that the "only way to rebut the presumptions [in the test claim statute] is by tracking the employee's non-work hour movements and contacts for a several month period."[12]

Position of the Department of Finance

The Department of Finance filed comments on August 8, 2002, concluding that the test claim legislation may create a reimbursable state-mandated program.[13]

On April 14, 2004, the Department of Finance filed comments on the draft staff analysis, withdrawing their original comments and agreeing that the test claim legislation does not constitute a reimbursable state-mandated program.[14]

Position of the Department of Industrial Relations

The Department of Industrial Relations contends that the test claim legislation is not a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution. The Department asserts that the presumption in favor of safety officers does not result in a new program or higher level of service for the following reasons:

1. Local governments are not required to accept all workers' compensation claims. They have the option to rebut any claim before the Workers' Compensation Appeals Board by presenting a preponderance of evidence showing the non-existence of industrial causation.
2. Statutes mandating a higher level of compensation to local government employees, such as workers' compensation benefits, are not "new programs" whose costs would be subject to reimbursement under article XIII B, section 6.
3. There is no shift of a financial burden from the State to local governments because local governments, by statute, have always been solely liable for providing workers' compensation benefits to their employees.[15]

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[11] Test Claim, page 3 (Exhibit A to Item 5, May 27, 2004 Commission Hearing).

[12] Claimants' Response to State Agency Comments, page 3 (Exhibit D to Item 5, May 27, 2004 Commission Hearing).

[13] Exhibit B to Item 5, May 27, 2004 Commission Hearing.

[14] Exhibit I to Item 5, May 27, 2004 Commission Hearing.

[15] Exhibit C to Item 5, May 27, 2004 Commission Hearing.

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[16] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[17] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[18] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[19] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[20]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[21] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim

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[16] Article XIII B, section 6 provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: (a) Legislative mandates requested by the local agency affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[17] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 735.

[18] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

[19] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174. In *Department of Finance v. Commission on State Mandates, supra*, 30 Cal.4th at page 742, the court agreed that "activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds - even if the local entity is obligated to incur costs as a result of its discretionary decision to participate in a particular program or practice." The court left open the question of whether non-legal compulsion could result in a reimbursable state mandate, such as in a case where failure to participate in a program results in severe penalties or "draconian" consequences. (*Id.*, at p. 754.)

[20] *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836.

[21] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

legislation.[22] Finally, the newly required activity or increased level of service must impose costs mandated by the state.[23]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[24] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[25]

Issue 1: Does CSAC-EIA have standing as a claimant for this test claim?

The Commission finds that California State Association of Counties – Excess Insurance Authority (CSAC-EIA) does not have standing, and is not a proper claimant for this test claim.

Government Code sections 17550 and 17551 authorize local agencies and school districts to file test claims seeking reimbursement pursuant to article XIII B, section 6. Government Code section 17518 defines "local agencies" to mean "any city, county, special district, authority, or other political subdivision of the state." Government Code section 17520 defines "special district" to include a "joint powers agency."

CSAC-EIA is a joint powers authority established pursuant to the Joint Exercise of Powers Act ("Act") in Government Code section 6500 et seq. and is formed for insurance and risk management purposes.[26] Under the Act, school districts and local agencies are authorized to enter into agreements to "jointly exercise any power common to the contracting parties."[27] The entity provided to administer or execute the agreement (in this case CSAC-EIA) may be a firm or corporation, including a nonprofit corporation, designated in the agreement.[28] A joint powers authority is a separate entity from the parties to the agreement and is not legally considered to be the same entity as its contracting parties.[29] CSAC-EIA contends that, as a joint powers agency, it

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[22] *Lucia Mar, supra*, 44 Cal.3d 830, 835.

[23] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

[24] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

[25] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817; *County of Sonoma, supra*, 84 Cal.App.4th 1265, 1280.

[26] Letter dated February 4, 2004, by Gina C. Dean, Assistant General Manager for CSAC-EIA (Exhibit F to Item 5, May 27, 2004 Commission Hearing).

[27] Government Code section 6502.

[28] Government Code section 6506.

[29] Government Code section 6507; 65 Opinions of the California Attorney General 618, 623 (1982).

is a type of local agency that can file a test claim based on the plain language of Government Code section 17520.[30]

Based on the facts of this case, the Commission disagrees.

In 1991, the California Supreme Court decided *Kinlaw v. State of California, supra,* a case that is relevant here. In *Kinlaw*, medically indigent adults and taxpayers brought an action against the state alleging that the state violated article XIII B, section 6 by enacting legislation that shifted financial responsibility for the funding of health care for medically indigent adults to the counties. The Supreme Court denied the claim, holding that the medically indigent adults and taxpayers lacked standing to prosecute the action and that the plaintiffs have no right to reimbursement under article XIII B, section 6.[31] The court stated the following:

> Plaintiffs' argument that they must be permitted to enforce section 6 as individuals because their right to adequate health care services has been compromised by the failure of the state to reimburse the county for the cost of services to medically indigent adults is unpersuasive. *Plaintiffs' interest,* although pressing, *is indirect* and does not differ from the interest of the public at large in the financial plight of local government. Although the basis for the claim that the state must reimburse the county for its costs of providing the care that was formerly available to plaintiffs under Medi-Cal is that AB 799 created a state mandate, plaintiffs have no right to have any reimbursement expended for health care services of any kind.[32] (Emphasis added.)

Like the plaintiffs in *Kinlaw*, CSAC-EIA, as a separate entity from the contracting counties, is not directly affected by the test claim legislation. The Legislature, in Labor Code section 3212.1, gave specified peace officers a presumption of industrial causation that the cancer arose out of and in the course of their employment. The counties, as employers of peace officers, argue that the presumption creates a reimbursable state-mandated program and that the increased costs are reimbursable.

But, CSAC-EIA does not employ peace officers specified in the test claim legislation.[33] Thus, while CSAC-EIA may have an interest in this claim as the insurer, its interest is indirect. As expressed in an opinion of the California Attorney General, a joint powers authority "is simply not a city, a county, or the state as those terms are normally used."[34] Thus, under the *Kinlaw* decision, CSAC-EIA lacks standing in this case to act as a claimant.

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[30] Claimants' response to draft staff analysis (Exhibit H to Item 5, May 27, 2004 Commission Hearing).

[31] *Kinlaw, supra*, 54 Cal.3d at pages 334-335.

[32] *Ibid.*

[33] In response to the draft staff analysis, CSAC-EIA states the following: "Indeed, CSAC-EIA is a separate entity comprised of counties to act as a mechanism to protect the counties' fisc. Although CSAC-EIA does not employ peace officers, when it comes to their workers' compensation, the buck stops at CSAC-EIA." (Exhibit H, p. 2, to Item 5, May 27, 2004 Commission Hearing.)

[34] 65 Opinions of the California Attorney General 618, 623 (1982).

This conclusion is further supported by the decision of the Third District Court of Appeal in *Redevelopment Agency of the City of San Marcos v. Commission on State Mandates* (1997) 55 Cal.App.4th 976. Although Government Code section 17520 expressly includes redevelopment agencies in the definition of "special districts" that are eligible to file test claims with the Commission, the court found that redevelopment agencies are not subject to article XIII B, section 6 since they are not bound by the spending limitations in article XIII B, and are not required to expend any "proceeds of taxes." The court stated the following:

> Because of the nature of the financing they receive, tax increment financing, redevelopment agencies are not subject to this type of appropriations limitations or spending caps; they do not expend any "proceeds of taxes." Nor do they raise, through tax increment financing, "general revenues for the local entity."[35]

The Third District Court of Appeal affirmed the *Redevelopment Agency* decision in *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 281, again finding that redevelopment agencies are not entitled to claim reimbursement for state-mandated costs because they are not required to expend "proceeds of taxes."

In the present case, CSAC-EIA is also not subject to the appropriations limitation of article XIII B and does not expend any "proceeds of taxes" within the meaning of article XIII B. According to the letter dated February 4, 2004, from CSAC-EIA, "CSAC-EIA has no authority to tax" and instead receives proceeds of taxes from its member counties in the form of premium payments.[36] Therefore, the Commission concludes CSAC-EIA is not an eligible claimant for this test claim.

Issue 2: Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?

The Commission finds that the test claim legislation is not subject to article XIII B, section 6 of the California Constitution because it does not mandate a new program or higher level of service on local agencies within the meaning of article XIII B, section 6.

Labor Code section 3212.1, subdivision (d), as amended by the test claim legislation, states the following:

> The cancer developing or manifesting itself in these cases shall be presumed to arise out of and in the course of the employment. This presumption is disputable and ***may*** be controverted by evidence that the primary site of the cancer has been established and that the carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer. Unless so controverted, the appeals board is bound to find in accordance with the presumption. (Emphasis added.)

The test claim legislation also extends the presumption of industrial causation to peace officers "primarily engaged in law enforcement activities" as defined in Penal Code section 830.37, subdivisions (a) and (b). Finally, the legislation specifies that leukemia is included as a type of cancer for which the presumption of industrial injury can apply.

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[35] *Redevelopment Agency, supra*, 55 Cal.App.4th at page 986.

[36] Exhibit F to Item 5, May 27, 2004 Commission Hearing.

The claimant contends that the test claim legislation constitutes a new program or higher level of service:

> The presumption in the applicant's favor increases the likelihood that his claim will result in money payments from his employer as well as full coverage of his medical costs. The greater the number of successful applicants, the more the employer will pay in workers' compensation benefits. Thus the new program or higher level of service is the creation of the presumption.[37]

The claimant further argues that local agencies are now required to track the employee's non-work hour movements and contacts for a several month period in order to rebut the presumption that the cancer is an industrial injury.

The express language of Labor Code section 3212.1 does not impose any state-mandated requirements on local agencies. Rather, the decision to dispute this type of workers compensation claim and prove that the injury is non-industrial remains entirely with the local agency, as it has since Labor Code section 3212.1 was enacted in 1982.[38] The plain language of Labor Code section 3212.1 states that the "presumption is disputable and *may* be controverted by evidence that the primary site of the cancer has been established and that the carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer."

Under the rules of statutory construction, when the statutory language is plain, as the statute is here, the court is required to enforce the statute according to its terms. The California Supreme Court determined that:

> In statutory construction cases, our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. We begin by examining the statutory language, giving the words their usual and ordinary meaning. If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs. [Citations omitted.][39]

Moreover, the court may not disregard or enlarge the plain provisions of a statute, nor may it go beyond the meaning of the words used when the words are clear and unambiguous. Thus, the court is prohibited from writing into a statute, by implication, express requirements that the Legislature itself has not seen fit to place in the statute.[40] Consistent with this principle, the courts have strictly construed the meaning and effect of statutes analyzed under article XIII B, section 6, and have not applied section 6 as an equitable remedy:

> A strict construction of section 6 is in keeping with the rules of constitutional interpretation, which require that constitutional limitations and restrictions on legislative power "are to be construed strictly, and are not to be extended to

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[37] Claimants' response to draft staff analysis (Exhibit H, p. 4, to Item 5, May 27, 2004 Commission Hearing).

[38] See also, *Zipton, supra*, 218 Cal.App.3d 980, 988.

[39] *Estate of Griswald* (2001) 25 Cal.4th 904, 910-911.

[40] *Whitcomb v. California Employment Commission* (1944) 24 Cal.2d 753, 757.

include matters not covered by the language used." [Citations omitted.]["Under our form of government, policymaking authority is vested in the Legislature and neither arguments as to the wisdom of an enactment nor questions as to the motivation of the Legislature can serve to invalidate particular legislation."] Under these principles, there is no basis for applying section 6 as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding policies.[41]

In the present case, the claimant reads requirements into Labor Code section 3212.1, which, by the plain meaning of the statute, are not there.

This conclusion is further supported by the California Supreme Court's recent decision in *Department of Finance v. Commission on State Mandates*.[42] In *Department of Finance*, the court considered the meaning of the term "state mandate" as it appears in article XIII B, section 6 of the California Constitution. The court reviewed the ballot materials for article XIII B, which provided that "a state mandate comprises something that a local government entity is required or forced to do."[43] The ballot summary by the Legislative Analyst further defined "state mandates" as "requirements imposed on local governments by legislation or executive orders."[44]

The court also reviewed and affirmed the holding of the *City of Merced* case.[45, 46] The court stated the following:

> In *City of Merced*, the city was under no legal compulsion to resort to eminent domain-but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a reimbursable state mandate, because the city was not required to employ eminent domain in the first place. Here as well, if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate. (Emphasis in original.)[47]

Thus, the Supreme Court held as follows:

> [W]e reject claimants' assertion that they have been legally compelled to incur notice and agenda costs, and hence are entitled to reimbursement from the state, based merely upon the circumstance that notice and agenda provisions are

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[41] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1816-1817.

[42] *Department of Finance, supra*, 30 Cal.4th 727.

[43] *Id.* at page 737.

[44] *Ibid.*

[45] *Id.* at page 743.

[46] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777.

[47] *Ibid.*

> mandatory elements of education-related programs in which claimants have participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled.* [Emphasis added.][48]

The Supreme Court left undecided whether a reimbursable state mandate "might be found in circumstances short of legal compulsion—for example, if the state were to impose a substantial penalty (independent of the program funds at issue) upon any local entity that declined to participate in a given program."[49]

The decision of the California Supreme Court in *Department of Finance* is relevant and its reasoning applies in this case. The Supreme Court explained that "the proper focus under a legal compulsion inquiry is upon the nature of the claimants' participation in the underlying programs themselves."[50] Thus, based on the Supreme Court's decision, the Commission must determine if the underlying program (in this case, the decision to rebut the presumption that the cancer is an industrial injury) is a voluntary decision at the local level or is legally compelled by the state. As indicated above, school districts are not legally compelled by state law to dispute a workers compensation case. The decision to litigate such cases is made at the local level and is within the discretion of the local agency. Thus, the employer's burden to prove that the carcinogen is not reasonably linked to the cancer is also not state-mandated.

Further, there is no evidence in the law or in the record that local agencies are practically compelled by the state through the imposition of a substantial penalty to dispute such cases. While it may be true that local agencies will incur increased costs in insurance premiums as a result of the test claim legislation, as alleged by claimant here, increased costs alone are not determinative of the issue whether the legislation imposes a reimbursable state-mandated program. The California Supreme Court has ruled that evidence of additional costs alone, even when those costs are deemed necessary by the local agency, do not result in a reimbursable state-mandated program under article XIII B, section 6.

> We recognize that, as is made indisputably clear from the language of the constitutional provision, local entities are not entitled to reimbursement for all increased costs mandated by state law, but only those costs resulting from a new program or an increased level of service imposed upon them by the state.[51]

Finally, the claimant argues that this claim is just like two prior test claim decisions approving reimbursement in cancer presumption workers compensation cases and, thus, this test claim should likewise be approved. However, prior Board of Control and Commission decisions are not controlling in this case.

Since 1953, the California the California Supreme Court has held that the failure of a quasi-judicial agency to consider prior decisions on the same subject is not a violation of due process

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[48] *Id.* at page 731.

[49] *Ibid.*

[50] *Id.* at page 743.

[51] *County of Los Angeles, supra,* 43 Cal.3d at page 54; see also, *Department of Finance v. Commission on State Mandates, supra,* 30 Cal.4th at page 735.

and does not constitute an arbitrary action by the agency.[52] In *Weiss v. State Board of Equalization*, the plaintiffs brought mandamus proceedings to review the refusal of the State Board of Equalization to issue an off-sale beer and wine license at their premises. Plaintiffs contended that the action of the board was arbitrary and unreasonable because the board granted similar licenses to other businesses in the past. The California Supreme Court disagreed with the plaintiffs' contention and found that the board did *not* act arbitrarily. The Court stated, in pertinent part, the following:

> [P]laintiffs argument comes down to the contention that because the board may have erroneously granted licenses to be used near the school in the past it must continue its error and grant plaintiffs' application. That problem has been discussed: *'Not only does due process permit omission of reasoned administrative opinions but it probably also permits substantial deviation from the principle of stare decisis.* Like courts, agencies may overrule prior decisions or practices and may initiate new policy or law through adjudication. (Emphasis added.) [53]

In 1989, the Attorney General's Office issued an opinion, citing the *Weiss* case, agreeing that claims previously approved by the Commission have no precedential value. Rather, "[a]n agency may disregard its earlier decision, provided that its action is neither arbitrary nor unreasonable [citing *Weiss, supra*, 40 Cal.2d. at 777]."[54] While opinions of the Attorney General are not binding, they are entitled to great weight.[55]

Moreover, the merits of a claim brought under article XIII B, section 6 of the California Constitution, must be analyzed individually. Commission decisions under article XIII B, section 6 are not arbitrary or unreasonable as long as the decision strictly construes the Constitution and the statutory language of the test claim statute, and does not apply section 6 as an equitable remedy.[56] The analysis in this case complies with these principles, particularly when recognizing the recent California Supreme Court statements on the issue of voluntary versus compulsory programs -- direction that the Commission must now follow.

Accordingly, the Commission finds that the test claim legislation is not subject to article XIII B, section 6 of the California Constitution because the legislation does not mandate a new program or higher level of service on local agencies.[57]

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[52] *Weiss v. State Board of Equalization* (1953) 40 Cal.2d 772, 776-777.

[53] *Id.* at page 776.

[54] 72 Opinions of the California Attorney General 173, 178, fn.2 (1989).

[55] *Rideout Hospital Foundation, Inc. v. County of Yuba* (1992) 8 Cal.App.4th 214, 227.

[56] *City of San Jose, supra,* 45 Cal.App.4th at 1816-1817; *County of Sonoma, supra,* 84 Cal.App.4th 1264, 1280-1281.

[57] Because this conclusion is dispositive of the case, the Commission need not reach the other issues raised by the Department of Industrial Relations.

CONCLUSION

Based on the foregoing, the Commission concludes that California State Association of Counties – Excess Insurance Authority (CSAC-EIA) does not have standing, and is not a proper claimant for this test claim. The Commission further concludes that Labor Code section 3212.1, as amended by the test claim legislation, is not subject to article XIII B, section 6 of the California Constitution because it does not mandate a new program or higher level of service on local agencies.

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940 P.2d 906, 66 Cal.Rptr.2d 319, 97 Cal. Daily Op. Serv. 6463, 97 Daily Journal D.A.R. 10,553
(Cite as: 16 Cal.4th 469)

DANNY GARCIA, Plaintiff and Appellant,
v.
CHARLES McCUTCHEN et al., Defendants and Respondents.

No. S052920.

Supreme Court of California

Aug. 14, 1997.

SUMMARY

The trial court dismissed a personal injury action for the failure of plaintiff's counsel to comply with local "fast track" rules that implemented the Trial Court Delay Reduction Act (Gov. Code, § 68600 et seq.). (Superior Court of Fresno County, No. 485411-3, Dwayne Keyes, Judge.) The Court of Appeal, Fifth Dist., No. F022172, reversed.

The Supreme Court affirmed the judgment of the Court of Appeal. The court held that Code Civ. Proc., § 575.2, subd. (b), which provides that it is the Legislature's intent that if a failure to comply with local rules is the responsibility of counsel and not of the party, the penalty shall be imposed on counsel and shall not adversely affect the party's cause of action or defense thereto, prohibits dismissal as a sanction where noncompliance with local court rules is the responsibility of counsel, not of the litigant. Although Gov. Code, § 68608, subd. (b), gives judges the power to impose sanctions, including dismissal, for noncompliance with fast track rules, that subdivision allows sanctions "authorized by law," and is therefore subject to the limits of Code Civ. Proc., § 575.2, subd. (b); it does not establish a separate sanctioning power. Also, the two statutes can be harmonized, and there is no indication that the Legislature intended to repeal Code Civ. Proc., § 575.2, subd. (b), as it applies to fast track rules. Further, the act's policy of reducing delay in litigation overrides neither the express policy of Code Civ. Proc., § 575.2, subd. (b), nor the policy of allowing cases to be determined on the merits. Finally, courts have other methods for maintaining control over their calendars. (Opinion by Chin, J., expressing the unanimous view of the court.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c, 1d, 1e) Courts § 9--Trial Court Delay Reduction Act--Sanctions for Noncompliance--Dismissal of Action--Where Noncompliance Is *470 Solely Responsibility of Counsel:Dismissal and Nonsuit § 22-- Involuntary Dismissal--Delay.
The trial court erred in dismissing a personal injury action for the failure of plaintiff's counsel to comply with local "fast track" rules that implemented the Trial Court Delay Reduction Act (Gov. Code, § 68600 et seq.). Code Civ. Proc., § 575.2, subd. (b), which provides that it is the Legislature's intent that if a failure to comply with local rules is the responsibility of counsel and not of the party, the penalty shall be imposed on counsel and shall not adversely affect the party's cause of action or defense thereto, prohibits dismissal as a sanction where noncompliance with local court rules is the responsibility of counsel, not of the litigant. Although Gov. Code, § 68608, subd. (b), gives judges the power to impose sanctions, including dismissal, for noncompliance with fast track rules, that subdivision allows sanctions "authorized by law," and is therefore subject to the limits of Code Civ. Proc., § 575.2, subd. (b); it does not establish a separate sanctioning power. Also, the two statutes can be harmonized, and there is no indication that the Legislature intended to repeal Code Civ. Proc., § 575.2, subd. (b), as it applies to fast track rules. Further, the act's policy of reducing delay in litigation overrides neither the express policy of Code Civ. Proc., § 575.2, subd. (b), nor the policy of allowing cases to be determined on the merits. Finally, courts have other methods for maintaining control over their calendars. (Disapproving to the extent they are inconsistent: *Intel Corp. v. USAIR, Inc.* (1991) 228 Cal.App.3d 1559 [279 Cal.Rptr. 569]; *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal.App.3d 481 [282 Cal.Rptr 530].)

[See 2 Witkin, Cal. Procedure (4th ed. 1996) Courts, §§ 445-447; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 1997) ¶ 12:90 et seq.]

(2) Statutes § 30--Construction--Language--Plain Meaning Rule.
In any case involving statutory interpretation, the court's first step is to scrutinize the actual words of the statute, giving them a plain and commonsense meaning.

(3) Statutes § 38--Construction--Language--Construing Every Word.
When interpreting a statute, a court is required, if possible, to give effect and significance to every word and phrase of the statute. When two statutes touch upon a common subject, the court must construe them in reference to each other, so as to harmonize the two in such a way that no part of either becomes surplusage. The court must presume that the Legislature intended every word, phrase, and provision in a statute to have meaning and to perform a useful function. *471

(4) Statutes § 16--Repeal--By Implication.
All presumptions are against a repeal by implication. Absent an express declaration of legislative intent, a court will find an implied repeal only when there is no rational basis for harmonizing two potentially conflicting statutes, and the statutes are irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation.

(5) Statues § 52--Construction--Conflicting Provisions--General and Specific Provisions.
The principle that a specific statute prevails over a general one applies only when the two statutes cannot be reconciled. If a court can reasonably harmonize two statutes dealing with the same subject, the court must give concurrent effect to both, even though one is specific and the other general.

COUNSEL

Tomas Nunez and Henry D. Nunez for Plaintiff and Appellant.

Steven Rood, Eisen & Johnston, Jay-Allen Eisen and Marian M. Johnston as Amici Curiae on behalf of Plaintiff and Appellant.

Borton, Petrini & Conron and Gary C. Harvey for Defendants and Respondents.

CHIN, J.

In this case, we consider the scope of a trial court's power to dismiss an action for noncompliance with local court rules implementing the 1990 Trial Court Delay Reduction Act (Act) (Gov. Code, § 68600 et seq.). We conclude that, under the governing statutes, a court may not impose this sanction if noncompliance is the responsibility of counsel, not of the litigant. Therefore, we affirm the Court of Appeal judgment, which reversed the trial court's dismissal of plaintiff's action.

Facts

In April 1993, plaintiff Danny Garcia filed a complaint in the Fresno County Superior Court seeking damages for injuries he received during an altercation at Henry's Cantina, a cocktail lounge in Clovis, California. The complaint alleged claims for personal injury, general negligence, premises liability, and intentional tort, and named, among other defendants, Fern and *472 David Avila, individually and doing business as Henry's Cantina (collectively the Avilas). On June 28, 1993, the clerk of the court served on Garcia's counsel, Tomas Nunez, a notice of failure to comply with former rule 5.4A of the Superior Court of Fresno County Rules, [FN1] which required a plaintiff to serve the complaint on all named defendants and file a proof of service within 60 days of filing the complaint. Former rule 5.4A was one of the rules that the Fresno County Superior Court promulgated "pursuant to Code of Civil Procedure $575.1" to implement the Act. [FN2] (Former rule 5.1.) The notice also cautioned: "It Is the Plaintiff's Responsibility to Timely Prosecute General Civil Actions Filed in Fresno County. See [former] Rule 5."

FN1 Except as otherwise indicated, all further rule references are to the Superior Court of Fresno County Rules. A revised set of local rules for Fresno County took effect January 1, 1997.

FN2 Except as otherwise indicated, all further statutory references are to the Code of Civil Procedure.

On November 1, 1993, the clerk served Nunez with a notice pursuant to former rule 5.6B ordering him to appear at a status hearing on January 19, 1994. Former rule 5.6B directed the trial court to order all parties to attend a status hearing if an at issue memorandum was not filed within 180 days after filing of the complaint. The notice ordered Nunez to comply with former rule 5.7, which required counsel for each represented party to file and serve at least five court days before the status hearing a sworn declaration addressing a number of matters, including counsel's explanation for failing to satisfy the requirements of former rules 5.4 (serving complaint and filing proof of service) and 5.6 (filing at issue memorandum). The notice also ordered Nunez to appear in person unless he was going to be out of the county on the hearing date and he arranged at least 14 days before that date to appear by telephone.

Nunez did not appear at the status hearing on January 19, 1994. Instead, that morning he informed the court he was out of the county in trial, but he did not arrange to appear by telephone. The Honorable Gary R. Kerkorian sanctioned Nunez $50 for failing to appear and $50 for failing to serve and file the required declaration. Judge Kerkorian continued the matter to April 19, 1994, "for hearing on the Court's sua sponte motion to dismiss the entire action." The court's minute order indicated that counsel's appearance would be unnecessary if an at issue memorandum was filed, or a dismissal or judgment was entered.

On January 27, 1994, Judge Kerkorian followed up his order by issuing a notice of motion to dismiss the action, citing in the caption former rule *473 5.10. [FN3] Former rule 5.10 provided: "In the event that any attorney, or any party represented by counsel or any party appearing in pro se fails to comply with any of the requirements of [former] Rule 5 or any order made pursuant to [former] Rule 5, the Court may, upon motion of a party or on its own motion: [¶] ... [¶] B. Dismiss the action or proceeding or any part thereof ...." Consistent with the caption's reference to former rule 5.10, the notice cited as grounds for the motion "Plaintiff['s] ... fail[ure] to comply with ... [former] rule 5, and the Court's directives thereunder." The notice provided that all supporting or opposing papers should be filed at least five calendar days before the hearing. Although the notice was directed to "all parties and their attorneys," the clerk mailed it only to counsel.

> FN3 The caption also cited section 583.410 and California Rules of Court, rule 372, which address discretionary dismissal for delay in prosecuting an action that has been pending at least two years. Garcia's action did not satisfy this requirement, and the trial court ultimately did not dismiss it under these provisions.

At the hearing on April 19, Judge Kerkorian sanctioned Nunez $300 for not complying with the court's service and at issue memorandum requirements and $25 for late filing of a declaration explaining his noncompliance. Judge Kerkorian continued the hearing on the dismissal motion to June 21 before the Honorable Dwayne Keyes. He cautioned that, if the case was not at issue by June 21, counsel would "have to show Judge Keyes very good cause why he shouldn't dismiss it." Judge Kerkorian's minute order provided that counsel's appearance would be unnecessary if an at issue memorandum was filed, or a dismissal or judgment was entered.

In May, Nunez sought and obtained permission to serve summons on several defendants by publication. Also in May, several of the other defendants who had already been served, including the Avilas, filed demurrers to Garcia's second amended complaint. On June 17, the Honorable Gary S. Austin sustained the demurrer of one defendant without leave to amend. He sustained the demurrer of the Avilas only in part and granted Garcia leave to amend until July 20.

As scheduled, on June 21, four days after the demurrer hearing, a hearing on the motion to dismiss was held before Judge Keyes. Nunez did not appear at the hearing. Judge Keyes granted the motion and dismissed the case without prejudice. Although the dismissal was without prejudice, the statute of limitations would have barred claims alleged in a new complaint.

Accordingly, after learning of the dismissal, Nunez filed a motion for reconsideration on Garcia's behalf. In support of the motion, Nunez asserted that the dismissal was based on failure to serve the remaining defendants *474 with the second amended complaint by June 21. He explained that he had not served the remaining defendants because of the demurrers that had been pending before Judge Austin. The Avilas opposed the motion, arguing that the court's dismissal was not based on failure to serve the remaining defendants, but "on plaintiff's willful and repeated failure to file status conference declarations, repeated *failure* to appear at status hearings, and finally, failure to appear at the June 21, 1994, hearing on the court's motion to dismiss."

At the hearing on the reconsideration motion, Nunez asserted that he had not attended the June 21 hearing on the dismissal

motion because he believed that Judge Austin's order partially sustaining the demurrer "had obviated [the dismissal] hearing, because he gave me an extension to file a third amended complaint for July 20." Nunez also discussed his efforts to serve the other defendants. Judge Keyes replied: "That does not concern me as much as your cavalier attitude of when you appear in court and when you do not appear in court." Judge Keyes then denied the motion for reconsideration. His order of dismissal states that he based the ruling on "the moving papers, the lack of opposition papers, and the absence of plaintiff's counsel ...."

The Court of Appeal reversed the trial court's ruling, concluding that section 575.2, subdivision (b) (section 575.2(b)), prohibits dismissal as a sanction where noncompliance with local court rules is the fault of counsel, not of the litigant. This section, the court explained, "makes clear the legislative intent that a party's cause of action should not be impaired or destroyed by his or her attorney's procedural mistakes." The court found nothing in the Act rendering section 575.2(b) inapplicable. On the contrary, it concluded that the relevant provision of the Act, Government Code section 68608, subdivision (b) (Government Code section 68608(b)), merely incorporates "the general authority granted to the courts by section 575.2, subdivision (a) to impose sanctions, including the sanction of dismissal. The limitation on that authority, as reflected in [section 575.2(b)], that parties not be punished for counsel's noncompliance with local rules, is not affected by any contrary expression of intent in [Government Code section 68608(b)]."

We then granted review to resolve an apparent conflict between the Court of Appeal's decision and the decision in *Intel Corp. v. USAIR, Inc.* (1991) 228 Cal.App.3d 1559 [279 Cal.Rptr. 569] (*Intel*). The court in *Intel*, construing the predecessor of Government Code section 68608(b), concluded that section 575.2(b) does not limit a court's power to dismiss an action as a sanction for counsel's noncompliance with local rules implementing statutory delay reduction programs (fast track rules). (*Intel, supra*, 228 Cal.App.3d at pp. 1563-1566.) *475

Discussion

In 1982, the Legislature gave courts express statutory power to adopt local rules "designed to expedite and facilitate the business of the court." (§ 575.1.) At the same time, it enacted section 575.2, subdivision (a), which permits a court's local rules to prescribe sanctions, including dismissal of an action, for noncompliance with those rules. Section 575.2(b), on which the Court of Appeal relied, provides: "It is the intent of the Legislature that if a failure to comply with these rules is the responsibility of counsel and not of the party, any penalty shall be imposed on counsel and shall not adversely affect the party's cause of action or defense thereto."

Courts have interpreted section 575.2(b) as "sharply limit[ing] penalties in instances of *attorney* negligence." (*State of California ex rel. Public Works Bd. v. Bragg* (1986) 183 Cal.App.3d 1018, 1025 [228 Cal.Rptr. 576] (*Bragg*), original italics.) In *Bragg*, the court stated that section 575.2(b) creates "an exception to the general rule that the negligence of an attorney is imputed to the client [citations], with the client's only recourse a malpractice action against the negligent attorney. [Citations.]" (*Bragg, supra*, at p. 1026.) Similarly, in *Moyal v. Lanphear* (1989) 208 Cal.App.3d 491, 502 [256 Cal.Rptr. 296] (*Moyal*), the court explained that, in section 575.2(b), "[t]he Legislature has made clear its intent a party's cause of action should not be impaired or destroyed by his or her attorney's procedural mistakes." In *Cooks v. Superior Court* (1990) 224 Cal.App.3d 723, 727 [274 Cal.Rptr. 113], the court construed section 575.2(b) "to proscribe any sanction against an innocent party for local rule violations of counsel and to proscribe sanctions against counsel that adversely affect the party's cause of action or defense thereto." These decisions also hold that a court must invoke section 575.2(b) on its own motion when necessary to protect an innocent party. (*Cooks, supra*, 224 Cal.App.3d at p. 727; *Moyal, supra*, 208 Cal.App.3d at p. 502; *Bragg, supra*, 183 Cal.App.3d at pp. 1028-1029; see also *In re Marriage of Colombo* (1987) 197 Cal.App.3d 572, 579-580 [242 Cal.Rptr. 100] [following *Bragg*].)

(1a) The Avilas do not challenge this judicial construction of section 575.2(b). Rather, they contend that a trial court's power under Government Code section 68608(b) to dismiss an action for violation of local fast track rules is not subject to the limits of section 575.2(b). Government Code section 68608(b) provides: "Judges shall have all the powers to impose sanctions authorized by law, including the power to dismiss actions or strike pleadings, if it appears that less severe sanctions would not be effective after taking into account the effect of previous sanctions or previous lack of compliance in the case. Judges are encouraged to impose sanctions to *476 achieve the purposes of this [Act]." The Avilas view this section as creating a dismissal power that is both independent of and greater than the court's power under section 575.2(b). We disagree.

The Avilas' construction of these provisions violates several rules of statutory interpretation. (2) As in any case involving statutory interpretation, "[o]ur first step is to scrutinize the actual words of the statute, giving them a plain and commonsense meaning. [Citations.]" (*People v. Valladoli* (1996) 13 Cal.4th 590, 597 [54 Cal.Rptr.2d 695, 54 Cal.Rptr.2d 695, 918 P.2d 999].) (1b) By its terms, Government Code section 68608(b) gives trial courts only those sanctioning powers "authorized by law." Under its plain and commonsense meaning, the phrase, "authorized by law," incorporates only those sanctioning powers that the law otherwise establishes, including those set forth in section 575.2. It does not express a legislative intent to establish an independent sanctioning power. Because section 575.2(b) directs that "any penalty shall be imposed on counsel and shall not adversely affect the party's cause of action" when noncompliance "is the responsibility of counsel and not of the party," dismissal without consideration of whether counsel or the client is at fault is not a sanction "authorized by law." (Gov. Code, § 68608(b); cf. *People* ex rel. *Deukmejian v. County of Mendocino* (1984) 36 Cal.3d 476, 486 [204 Cal.Rptr. 897, 683 P.2d 1150] [in conditioning permit on "compliance with the 'law,' " the Legislature "intended to require compliance with other state statutes"]; *Bateman v. Colgan* (1896) 111 Cal. 580, 585 [44 P. 238] [requirement that board proceed " 'in the manner and method authorized by law' " refers "to the manner and method for making improvements provided in the law governing said board"].)

(3) The Avilas' interpretation also violates the rule of statutory interpretation that requires us, if possible, to give effect and significance to every word and phrase of a statute. (*Steinhart v. Amplica, Inc.* (1986) 42 Cal.3d 1198, 1205 [233 Cal.Rptr. 249, 729 P.2d 683].) "When two statutes touch upon a common subject," we must construe them "in reference to each other, so as to 'harmonize the two in such a way that no part of either becomes surplusage.' [Citations.]" (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 778-779 [38 Cal.Rptr.2d 699, 889 P.2d 1019].) We must presume that the Legislature intended "every word, phrase and provision ... in a statute ... to have meaning and to perform a useful function." (*Clements v. T. R. Bechtel Co.* (1954) 43 Cal.2d 227, 233 [273 P.2d 5].) (1c) Contrary to these principles, the Avilas' view that Government Code section 68608(b) establishes an independent sanctioning power reads the phrase "authorized by law" out of the statute.

Finally, the Avilas' interpretation runs counter to the rule regarding repeal by implication. (4) "[A]ll presumptions are against a repeal by implication. [Citations.]" (*477 *Flores v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 171, 176 [113 Cal.Rptr. 217, 520 P.2d 1033].) Absent an express declaration of legislative intent, we will find an implied repeal "only when there is no rational basis for harmonizing the two potentially conflicting statutes [citation], and the statutes are 'irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation.' " (*In re White* (1969) 1 Cal.3d 207, 212 [81 Cal.Rptr. 780, 460 P.2d 980].) (1d) As we have explained, there is a rational basis for harmonizing section 575.2(b) and Government Code section 68608(b). By reading Government Code section 68608(b) as incorporating the limits of section 575.2(b), we "maintain the integrity of both statutes ...." (*Penziner v. West American Finance Co.* (1937) 10 Cal.2d 160, 176 [74 P.2d 252].) In contrast, the Avilas, by reading Government Code section 68608(b) as authorizing dismissal for counsel's noncompliance with local rules, would repeal section 575.2(b) with respect to all fast track rules.

To support their interpretation, the Avilas invoke the principle that "specific statutory provisions relating to a particular subject will govern, as against a general provision, in matters concerning that subject." Citing *Intel*, they assert that, because Government Code section 68608(b) is the more specific statute regarding delay reduction, it "controls over" section 575.2(b). In *Intel*, the court considered section 575.2(b)'s application to fast track cases in light of Government Code section 68608(b)'s predecessor, Government Code former section 68609, subdivision (d). That section provided in relevant part: "In order to enforce the requirements of an exemplary delay reduction program and orders issued in cases assigned to it, the judges of the program shall have all the powers to impose sanctions authorized by law, including the power to dismiss actions or strike pleadings, if it appears that less severe sanctions would not be effective after taking into account the effect of previous sanctions or previous lack of compliance in the case." (Stats. 1988, ch. 1200, § 1, pp. 4008-4009.) The court held that, notwithstanding section 575.2(b), dismissal for noncompliance with local delay reduction rules was proper, stating: "While [section 575.2(b)] is concerned with penalties for violation of any local rules, the Government Code provision addresses imposition of sanctions for violation of local delay reduction rules. The Government Code provision is clearly more narrowly circumscribed and specific than [section 575.2(b)], and is therefore controlling." (*Intel, supra*, 228 Cal.App.3d at p. 1565.) The Avilas urge that the same analysis governs interpretation of Government Code section 68608(b).

The Avilas have incorrectly applied this principle of statutory construction. Initially, we question the assertion that Government Code section 68608(b) is the more specific provision. Although that section applies specifically to delay reduction programs, it speaks only generally about a *478 court's power to impose sanctions "authorized by law" in

connection with these programs. It does *not* expressly address the power of a court to impose sanctions for noncompliance with local rules. The Legislature has expressly addressed that subject in section 575.2 and has expressly limited the court's power in subdivision (b) of that section. Thus, it is arguable which statute is the more specific and which the more general. (Cf. *People v. Tanner* (1979) 24 Cal.3d 514, 521 [156 Cal.Rptr. 450, 596 P.2d 328].)

(5) In any event, "[t]he principle that a specific statute prevails over a general one applies only when the two sections cannot be reconciled. [Citations.]" (*People v. Wheeler* (1992) 4 Cal.4th 284, 293 [14 Cal.Rptr.2d 418, 841 P.2d 938].) If we can reasonably harmonize "[t]wo statutes dealing with the same subject," then we must give "concurrent effect" to both, "even though one is specific and the other general. [Citations.]" (*People v. Price* (1991) 1 Cal.4th 324, 385 [3 Cal.Rptr.2d 106, 821 P.2d 610].) (1e) As we have explained, Government Code section 68608(b) and section 575.2(b) are not irreconcilable. By granting trial courts sanctioning powers "authorized by law," Government Code section 68608(b) expressly incorporates the terms of section 575.2, including the limitations of subdivision (b). More generally, the Act mandates that courts, in carrying out their responsibility to eliminate delay, must act "consistent with statute ...." (Gov. Code, § 68607.) Where, as here, "the [assertedly] specific statute expressly requires compliance with other laws and when there is no direct conflict between the various laws," the principle on which the Avilas rely "is entitled to little weight." (*People ex rel. Deukmejian v. County of Mendocino, supra*, 36 Cal.3d at p. 488.) Accordingly, we reject the Avilas' claim that, because Government Code section 68608(b) specifically addresses fast track matters, it "controls over" section 575.2(b). [FN4] (See *International Assn. of Fire Fighters Union v. City of Pleasanton* (1976) 56 Cal.App.3d 959, 975-976 [129 Cal.Rptr. 68].)

> FN4 We disapprove *Intel* and dictum in *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal.App.3d 481, 490 [282 Cal.Rptr. 530], to the extent they are inconsistent with our conclusion.

The Avilas additionally insist that, as a matter of public policy, the power to dismiss actions when counsel violate fast track rules is necessary to further the public's interest in reducing litigation delay. They assert: "[A]ny delay in the resolution of litigation severely undermines the public confidence in the fairness and utility of the judiciary as a public institution since delay in the process reduces the chance that justice will be done and imposes severe hardships on the litigants." To support their assertion, they *partially* quote the following legislative findings and conclusions that were part of the original Trial Court Delay Reduction Act of 1986 (1986 Act): "(a) The *479 expeditious and timely resolution of [legal] actions is an integral and necessary function of the judicial branch .... [¶] (b) Delay in the resolution of ... litigation is not in the best interests of the state and the public. The people ... expect and deserve prompt justice and the speedy resolution of disputes. Delay in the resolution of litigation may reflect a failure of justice and subjects the judiciary to a loss of confidence by the public in both its fairness and utility as a public institution. Delay reduces the chance that justice will in fact be done, and often imposes severe emotional and financial hardship on litigants. [¶] (c) Cases filed in California's trial courts should be resolved as expeditiously as possible ...." [FN5] (Gov. Code, former § 68601.)

> FN5 The Legislature repealed the 1986 Act, including former section 68601, in 1990 when it enacted the current version of the Act. (Stats. 1990, ch. 1232, § 2, p. 5140.) The Avilas also rely heavily on the amended version of another repealed provision of the 1986 Act, Government Code former section 68612. That section permitted a court's delay reduction rules to be "inconsistent with the California Rules of Court," to "impose procedural requirements in addition to those authorized by statute," and to "shorten any time specified by statute for performing an act." (Stats. 1988, ch. 1200, § 3, p. 4009.) Because the current Act contains no similar authorization, the repealed statute and the cases construing it are no longer relevant. (See *La Seigneurie U.S. Holdings, Inc. v. Superior Court* (1994) 29 Cal.App.4th 1500, 1503 [35 Cal.Rptr.2d 175]; *Wagner v. Superior Court* (1993) 12 Cal.App.4th 1314, 1318-1319 [16 Cal.Rptr.2d 534].)

For two reasons, we reject the Avilas' claim. First, the general policy underlying legislation "cannot supplant the intent of the Legislature as expressed in a particular statute. [Citation.]" (*Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 8 [128 Cal.Rptr. 673, 547 P.2d 449].) As we have shown, Government Code section 68608(b) expresses a legislative intent to grant trial courts only those sanctioning powers "authorized by law." Government Code section 68607 expresses a legislative intent to require courts, in carrying out their responsibility to eliminate delay, to act "consistent with statute ...." Section 575.2(b) expresses a legislative intent that sanctions not affect a party's cause of action if a failure to comply with local rules "is the responsibility of counsel and not of the party ...." The Avilas err in relying on the general policy of delay reduction underlying the Act to the exclusion of the language of these statutes.

Second, the Avilas are incorrect in suggesting that either the 1986 Act or the current Act directs that the goal of delay reduction take precedence over all other considerations. On the contrary, in the part of Government Code former section 68601, subdivision (c), that the Avilas have failed to quote, the Legislature recognized "the strong public policy that litigation be disposed of on the merits wherever possible." (See *Hocharian v. Superior Court* (1981) 28 Cal.3d 714, 724 [170 Cal.Rptr. 790, 621 P.2d 829].) That section provided *in full*: "Cases filed in California's trial courts should be resolved as expeditiously as possible, *consistent with the obligation of the courts to *480 give full and careful consideration to the issues presented, and consistent with the right of parties to adequately prepare and present their cases to the courts.*" (Gov. Code, former § 68601, subd. (c), italics added.) Thus, in establishing delay reduction programs, the Legislature recognized *competing* public policy considerations and "attempt[ed] to balance the need for expeditious processing of civil matters with the rights of individual litigants." (*Moyal, supra*, 208 Cal.App.3d at p. 500.) Unlike the Avilas, we find no evidence that the Legislature intended "the policy of expeditious processing of civil cases [to] override, in all situations, the trial court's obligation to hear cases on the merits. [Citations.]" [FN6] (*Wantuch v. Davis* (1995) 32 Cal.App.4th 786, 795 [39 Cal.Rptr.2d 47].)

FN6 In analogous contexts, the Legislature has also recognized the public interest in disposition of cases on the merits. (See, e.g., § 583.130 ["Except as otherwise provided by statute or by rule of court adopted pursuant to statute, ... the policy favoring trial or other disposition of an action on the merits [is] generally to be preferred over the policy that requires dismissal for failure to proceed with reasonable diligence in the prosecution of an action in construing the provisions of this chapter."].)

Finally, we find unpersuasive the Avilas' assertion that an expanded dismissal power regarding fast track rules is necessary to promote calendar control. Courts have numerous other methods for maintaining control of their calendars. Under section 1209, subdivision (a)5, "[d]isobedience of any lawful ... order ... of the court" constitutes contempt. (See *In re Young* (1995) 9 Cal.4th 1052, 1053 [40 Cal.Rptr.2d 114, 892 P.2d 148].) For each separate act of contempt, the court may impose monetary sanctions or imprisonment. (§§ 1218, subd. (a), 1219.) [FN7] Applying section 1209, courts have treated "an attorney's failure to appear in court at a time he was personally ordered to appear, without valid excuse" as a punishable contempt. (*In re Baroldi* (1987) 189 Cal.App.3d 101, 106 [234 Cal.Rptr. 286].) Under Penal Code section 166, subdivision (a)(4), "[w]illful disobedience of any ... order lawfully issued by any court" is a form of contempt that is criminally punishable as a misdemeanor by jail sentence of up to six months and/or fine of up to $1,000. (See Pen. Code, § 19.) Under section 128.5, subdivision (a), courts may "order a party, the party's attorney, or both to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely *481 intended to cause unnecessary delay." [FN8] Under section 177.5, courts may "impose reasonable money sanctions, not to exceed fifteen hundred dollars ($1,500) ... for any violation of a lawful court order by a person, done without good cause or substantial justification." Thus, application of section 575.2(b)'s limits on the dismissal power to violations of fast track rules will not leave courts without power to control their calendars. [FN9]

FN7 The court may fine the contemner up to $1,000 and, if the contemner is subject to the disobeyed order "as a party to the action," may order the contemner to pay to the party initiating the contempt proceeding the reasonable attorney fees and costs incurred in that proceeding. (§ 1218, subd. (a).) The court may also imprison the contemner for up to five days (§ 1218, subd. (a)) and, if "the contempt consists of the omission to perform an act which is yet in the power of the [contemner] to perform," may order the contemner "imprisoned until he or she has performed it ...." (§ 1219, subd. (a).)

FN8 Section 128.5 currently applies only to actions, like Garcia's, filed before December 31, 1994. (§ 128.5, subd. (b)(1).) As to actions filed after that date, the Legislature has suspended operation of section 128.5 until January 1, 1999, substituting in its place on a trial basis section 128.7, which was modeled on rule 11 of the Federal Rules of Civil Procedure. (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 690, fn. 13 [34 Cal.Rptr.2d 386, 881 P.2d 1083].) Section 128.7 sets forth certification requirements for pleadings and authorizes courts to impose sanctions for violations of those requirements upon "the attorneys, law firms, or parties that have violated" the certification requirements "or are responsible for the violation." (§ 128.7, subd. (c).)

FN9 Adoption of section 177.5 directly influenced the Legislature's decision to limit judicial power under section 575.2 to impose sanctions for noncompliance with local rules. The Senate Committee on the Judiciary cited the availability of monetary sanctions under section 177.5 as a justification for proposing the addition of subdivision (b)

to section 575.2. The committee explained: "[Last] week this committee passed [Assembly Bill No. 3573,] ... a bill that would allow courts to fine lawyers up to $1,500 for failing to comply with court orders. It would appear, therefore, that authorizing courts to indirectly penalize lawyers by dismissing causes of action under this bill would be superfluous should [Assembly Bill No.] 3573 become law." (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 3784 (1981-1982 Reg. Sess.) as amended Aug. 5, 1982, p. 4.) At the request of amicus curiae Pacific Software Services, Inc., we take judicial notice of the committee's report. We also take judicial notice of the legislative reports the Avilas have submitted, and of legislative reports relating to other relevant statutes. (Evid. Code, §§ 452, 459; see also *People v. Cruz* (1996) 13 Cal.4th 764, 773, 780, fn. 9 [55 Cal.Rptr.2d 117, 919 P.2d 731].)

In any event, the Avilas' interpretation of Government Code section 68608(b) might result in a proliferation of malpractice suits against counsel that would hinder, rather than promote, calendar control. This possibility was one of the concerns the Senate Committee on the Judiciary cited in recommending that the Legislature adopt section 575.2(b). The committee explained: "While the client would likely have a malpractice cause of action against a lawyer whose misconduct resulted in dismissal or default, that remedy would be counter productive, since it would result in even more complicated litigation, further clogging the courts." (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 3784 (1981-1982 Reg. Sess.) as amended Aug. 5, 1982, pp. 3-4.)

As our discussion demonstrates, granting a trial court power to dismiss an action where counsel alone is responsible for noncompliance with local rules would be a significant change in the law. Nothing in either the statutory language or the legislative history of the Act reflects a legislative intent to override section 575.2(b)'s limits on a court's sanctioning powers or to give *482 courts expanded dismissal powers with respect to fast track rules. Instead, the words the Legislature chose reflect a contrary intent, i.e., to give courts only those sanctioning powers "authorized by law." (Gov. Code, § 68608(b).) "We are not persuaded the Legislature would have silently, or at best obscurely, decided so important ... a public policy matter and created a significant departure from the existing law." (*In re Christian S.* (1994) 7 Cal.4th 768, 782 [30 Cal.Rptr.2d 33, 872 P.2d 574].) Accordingly, we affirm the judgment of the Court of Appeal. [FN10]

FN10 In their reply brief, the Avilas for the first time assert, with little argument in support, that the phrase "authorized by law" in Government Code section 68608(b) includes a "trial court's inherent authority to dismiss cases for disobedience of its orders." Obvious reasons of fairness militate against our considering this poorly developed and untimely argument. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1116, fn. 20 [36 Cal.Rptr.2d 235, 885 P.2d 1]; *Variabedian v. City of Madera* (1977) 20 Cal.3d 285, 295 [142 Cal.Rptr. 429, 572 P.2d 43].) This is especially true here, given the statutes we have discussed that specify the courts' sanctioning options. (See *Tide Water Assoc. Oil Co. v. Superior Court* (1955) 43 Cal.2d 815, 825 [279 P.2d 35] [court's inherent power may be reasonably limited by statute].)

Disposition

The judgment of the Court of Appeal is affirmed.

George, C. J., Mosk, J., Kennard, J., Baxter, J., Werdegar, J., and Brown, J., concurred.

Cal. 1997.

Garcia v. McCutchen

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C

PHILIP SONDENO et al., Plaintiffs and Appellants,
v.
UNION COMMERCE BANK et al., Defendants and Respondents

Civ. No. 39722.

Court of Appeal, First District, Division 3, California.

June 16, 1977.

SUMMARY

The trial court dismissed a complaint for actual and punitive damages for alleged usury against an Ohio banking corporation. The claim of usury was based on the terms of an extension of a loan, conditioned on payment of interest at 11 1/2 percent plus a fee, as in excess of the maximum rate permitted by the California Constitution. The Ohio banking corporation participated to the extent of 75 percent of the loan amount; a California bank participated to the extent of 25 percent. (Superior Court of Santa Clara County, No. 346701, Stanley R. Evans, Judge.)

The Court of Appeal affirmed, holding that Fin. Code, § 1757, authorizing foreign banks to make loans in California secured by mortgages on real property, exempted a foreign bank from the requirements of Fin. Code, § 1756, which specifies transactions that a licensed foreign banking corporation may enter in California and which does not include the making of a loan secured by real property. (Opinion by Good, J., [FN#] with Draper, P. J., and Scott, J., concurring.)

FN# Retired judge of the superior court sitting under assignment by the Chairperson of the Judicial Council.

HEADNOTES

Classified to California Digest of Official Reports

(1) Statutes § 51--Construction--Codes--Conflicting Provisions--Harmonious Construction.
Statutes that are inconsistent dealing with the same subject matter must be construed with reference to the *392 whole system of law of which they are a part so that all parts may be harmonized and given effect.

(2) Statutes § 46--Construction--Presumptions--Legislative Intent--Effect of Statute.
It is presumed that the Legislature does not indulge in idle acts and that a statute is intended to have some effect.

(3) Statutes § 24--Construction--Necessarily Implied Effect of Statute.
Whatever is necessarily implied in a statute is as much a part of the statute as that which is expressed.

(4) Banks and Banking § 1--Authority of Foreign Bank to Make Loan in California Secured by Real Property.
In view of the rule of statutory construction that statutes that are inconsistent and deal with the same subject matter are to be construed with reference to the whole system of law of which they are part, in order that all parts may be harmonized and given effect, Fin. Code, § 1757, authorizing foreign banking corporations to make loans in California secured by mortgages on real property, precludes application, to a foreign bank that makes a loan in California secured by real property, of the requirements of Fin. Code, § 1756, specifying the kind of business within the state expressly permitted to foreign banking corporations. Fin. Code, § 1757, must be read as an express permission for the transaction of such business.

[See Cal.Jur.3d, Banks and Other Financial Institutions, §§ 17, 20; Am.Jur.2d, Banks, §§ 9, 280, 282, 283.]

COUNSEL

Bertram Berns and Raymond C. Grueneich for Plaintiffs and Appellants.

Cotton, Seligman & Ray, Lawrence W. Jordan, Jr., P. Brooks McChesney, Duane W. Dresser and Kirk E. Koning for Defendants and Respondents. *393

GOOD, J. [FN*]

FN* Retired judge of the superior court sitting under assignment by the Chairperson of the Judicial Council.

The plaintiffs appeal from a judgment dismissing their complaint after a general demurrer was sustained without leave to amend. The complaint sought actual and punitive damages for an alleged usury. In brief, it was alleged: Union Commerce Bank, an Ohio banking corporation, offered to lend plaintiffs $1,912,000 for construction of an office building in the San Jose area with interest at 8 1/2 percent on funds as drawn during a 24-month construction period ending February 8, 1975, plus a 2 percent loan fee; that the offer provided for permanent long-term financing after completion. Among the conditions of Union's offer was the proviso that a California lending institution acceptable to it should participate in the loan for at least 10 percent and that the loan and all documents connected with it would be closed in the California agency and be subject to Union's approval. Barclays of California became the participating California institution for 25 percent and the note ($1,912,500) and deed of trust were executed in favor of Barclays. In December 1974, some seven weeks before due date, plaintiffs requested a six-month extension because the permanent financing then available to them was disadvantageous. Union wrote Barclays in January 1975 that it would approve the extension conditioned, among other things, upon payment of interest at 11 1/2 percent and payment of a fee of $9,562.50. Plaintiffs accepted these terms and paid the fee with the increased interest for some ten months when the loan was paid off.

It was further alleged that the terms of the extension were usurious because they were in excess of the maximum rate allowed by article XX, section 22, of the California Constitution. [FN1] Additional causes of action charged that Barclays and Union conspired together to effect the usurious extension terms because Barclays was exempt as a California bank while Union was not; and further conspired to use the permanent financing commitment as leverage to coerce plaintiffs' acceptance of the extension. Charges of oppressive and malicious conduct were leveled and, in addition to $140,035.89 (extension interest and fee), which was sought to be trebled, punitive damages of $750,000 were sought. *394

FN1 After the June 1976 election, article XX, section 22, dealing with usury was replaced by article XV which is identical with the former section. The change was made to avoid the awkwardness of the Constitution's containing two articles bearing the same number but dealing with disparate subjects.

The dispositive issue is whether or not Union, as an Ohio bank, is within the exemption provision of the Constitution which, after setting legal interest at 7 percent, authorizes a rate not to exceed 10 percent in written contracts, prohibits interest in excess of said rate and then provides: "However, none of the above restrictions shall apply to any ... bank as defined in and operating under that certain act known as 'Bank Act,' approved March 1, 1909, as amended; or any bank created and operating under and pursuant to any laws of this State or of the United States of America ...." Plaintiffs concede that Barclays is an exempt bank defined in the Bank Act of 1909, which since 1951 has been incorporated into division 1 of California's Financial Code as "the Banking Law" to which all code sections below cited will refer. (See § 99.)

"Bank" is defined in section 102 as "any incorporated banking institution which shall have been incorporated to conduct the business of receiving money on deposit, or transacting a trust business as herein defined." The narrow compass of the definition indicates that the Legislature's primary concern has been with the security of the funds of depositors. However, the section does not differentiate between domestic and foreign banking corporations and is broad enough to include both.

Foreign banking corporations are regulated by chapter 14 of division 1 of said Financial Code. Section 1750 reads: "A foreign corporation shall not engage in the banking or trust business in this State unless it is licensed to do so and unless it first complies with all of the provisions of this chapter and then *only to the extent expressly permitted* in this chapter. In transacting such business a foreign corporation shall comply with all applicable provisions of this division and of the laws of this State." (Italics added.) After several licensing and regulatory sections, section 1756 specifies the kind of business expressly permitted to foreign corporations: "(a) A foreign corporation which is authorized by license under Section 1754 may transact in this state the business of buying, selling, paying, or collecting bills of exchange, of issuing letters of credit, of receiving money for transmission by draft, check, cable or otherwise, and of making loans." The remainder of the section is

not relevant to the issue at hand. But section 1757 then provides: "Nothing in this chapter shall be deemed to prohibit a foreign banking corporation which does not maintain an office in this State for the transaction of business from making loans in this State secured by mortgages on real property ...." *395 The sections of the Banking Law above quoted derive from the Bank Act of 1909 as it had been amended in 1913, 1917 and 1923, and so far as relevant herein, were in effect in 1934 and 1976 when the constitutional provision was approved by the electorate. Pursuant to section 2 (Fin. Code), they are to be "construed as reinstatements and continuations" of the 1909 Bank Act "and not as new enactments."

There is a manifest inconsistency between the categorical and unambiguous prohibition of a foreign banking corporation from engaging in business in California unless it is licensed and has complied with the other regulations of the Banking Law "and then only to the extent expressly permitted" therein (§ 1750 and the express permission for specified transactions contained in § 1756) and the implied approval of ("Nothing in this chapter shall be deemed to prohibit ...") a foreign bank's making a loan in California secured by real property as contained in section 1757. This inconsistency and the resulting ambiguity in status of a foreign bank making a loan so secured must be resolved in order to ascertain the meaning of the constitutional language exempting a bank "defined in and operating under" the Banking Law from the usury law.

(1) It is a cardinal rule of statutory construction that where statutes are inconsistent and deal with the same subject matter, they must be construed with reference to the whole system of law of which they are part so that all may be harmonized and be given effect. (2) It is presumed that the Legislature does not indulge in idle acts and that a statute is to have some effect. (*Stafford v. Realty Bond Service Corp.* (1952) 39 Cal.2d 797, 805 [249 P.2d 241].) (3) Further, whatever is necessarily implied in a statute is as much a part of it as that which is expressed. (*Charles S. v. Board of Education* (1971) 20 Cal.App.3d 83, 94 [97 Cal.Rptr. 422]; *Johnston v. Baker* (1914) 167 Cal. 260, 264 [139 P. 86].) (4) With these rules in mind, it is our opinion that section 1757 precludes application of the requirements of section 1756 to a foreign bank which makes a loan in California secured to real property and must be read as an express permission for the transaction of such business. The intent of section 1757 appears to have been to encourage and facilitate a flow of foreign capital into California.

We do not accept defendant's argument that the complaint with its incorporated documentation established that the loan was made solely by Barclays, the sole payee and beneficiary of the note and trust deed. The complaint charged that the form of the transaction was a device to *396 evade the Constitution's usury prohibitions. If that allegation were proved, Union, at least, would be liable unless it was within the constitutional exemption. "[S]ubstance not form must dictate the treatment that a transaction is to be accorded under the usury law, and the question of substance is predominately a factual inquiry." (*Glaire v. La Lanne-Paris Health Spa, Inc.* (1974) 12 Cal.3d 915, 927 [117 Cal.Rptr. 541, 528 P.2d 357].)

We find no case wherein a similar charge of usury is made. In discussing relationships between exempt and nonexempt lenders, one writer speculated: "Finally, suppose that the non-exempt lender procures a loan and submits it to an exempt lender. The latter acts as a lender solely for the purpose of permitting the non-exempt lender to avoid the usury law. Absent authority on this point, it is reasonable to assume that the courts could find the benefits derived from the transaction by the non-exempt lender to be usurious." (See Comment, *Comprehensive View of California Usury Law* (1974) 6 Sw.U.L.Rev. 166, 182.) Nor do we find a case which interprets the language of the Constitution's exemption of a "bank as defined in and operating *under* [the] ... 'Bank Act,' approved March 1, 1909, as amended." (Italics added.) But the only definition of the seemingly simple word "under" that can have meaning in the context of the constitutional phrase is found in Webster's Third New International, 8a: "required by: in accordance with: bound by."

The article in question was drafted by the Assembly and submitted to the electorate in 1934. It was resubmitted as article XV in 1976 in the same language. We may assume that the Legislature had in mind the definitions and regulations it had enacted in the Banking Law as well as judicial decisions which involved them. It has been held that one of the purposes of the constitutional amendment as proposed in 1934 was to confer power upon the Legislature to regulate interest rates that may be charged by exempt lending agencies and limit the rates thereof whenever it was deemed necessary or appropriate. (*Carter v. Seaboard Finance Co.* (1949) 33 Cal.2d 564, 581 [203 P.2d 758].) It is most unlikely in the prevailing difficult economic conditions of 1934 that the Legislature intended to depart from the policy reflected in section 1757 or to impede the investment of foreign capital in this state by constitutional amendment. In the context of the Banking Law provisions and the language of the Constitution, there is substance to the trial judge's comment that, if the Legislature had intended to differentiate between categories of sister-state banks lending money upon the security of real property, it *397 could have done so in clear and unambiguous language. We conclude that insofar as section 1757 of the Banking Law authorizes the

transaction in question for a foreign bank and exempts it from the requirements of section 1756, Union was operating in accordance with the provisions of California law and was, therefore, a bank defined in and operating under our Banking Law.

The Judgment is affirmed.

Draper, P. J., and Scott, J., concurred.

Appellants' petition for a hearing by the Supreme Court was denied August 11, 1977. *398

Cal.App.1.Dist.,1977.

Sondeno v. Union Commerce Bank

END OF DOCUMENT

Office of the Attorney General
State of California

*1 Opinion No. 02-908
June 20, 2003

THE HONORABLE JOHN J. SANSONE
COUNTY COUNSEL
COUNTY OF SAN DIEGO

THE HONORABLE JOHN J. SANSONE, COUNTY COUNSEL, COUNTY OF SAN DIEGO, has requested an opinion on the following question:

May a security officer employed by a community college district exercise the powers of a peace officer on behalf of the district?

CONCLUSION

A security officer employed by a community college district may not exercise the powers of a peace officer on behalf of the district.

ANALYSIS

We are informed that prior to 1987, a community college district employed security officers to patrol its property. In 1987, the district formed a police department with the expectation that its security officers would become district police officers. However, four of its security officers failed to satisfactorily complete their training as peace officers and remained employed by the district as security officers. The question presented for resolution concerns whether these security officers may exercise the powers of a peace officer on behalf of the district. We conclude that they may not.

The Legislature has adopted a comprehensive statutory scheme authorizing community college districts to employ security officers as well as police officers. (Ed. Code, §§ 72330-72332.) A security officer is defined in Education Code section 72330.5, subdivision (c) as follows:

"For purposes of this chapter, 'security officer' means any person primarily employed or assigned pursuant to subdivision (b) to provide security services as a watchperson, security guard, or patrolperson on or about premises owned or operated by the community college district to protect persons or property or to prevent the theft or unlawful taking of district property of any kind or to report any unlawful activity to the district and local law enforcement."

Education Code section 72330.5, subdivision (b), describes the training necessary for performing the duties of a community college district security officer:

"After July 1, 2000, every school security officer employed by a community college district who works more than 20 hours a week as a school security officer shall complete a course of training developed no later than July 1, 1999, by the Bureau of Security and Investigative Services of the Department of Consumer Affairs in consultation with the Commission on Peace Officer Standards and Training pursuant to Section 7583.31 of the Business and Professions Code. If any community college security officer subject to the requirements of this subdivision is required to carry a firearm while employed, that security officer shall additionally satisfy the training requirements of Section 832 of the Penal Code." [FN1]

Community college security officers are not "peace officers." Penal Code section 830 states:

"Any person who comes within the provisions of this chapter and who otherwise meets all standards imposed by law on a peace officer is a peace officer, and notwithstanding any other provision of law, no person other than those designated in this chapter is a peace officer...."

*2 "This chapter" (Pen. Code, §§ 830-832.9) does not designate community college security officers as peace officers; accordingly, they do not have such status. (See County of Santa Clara v. Deputy Sheriffs' Assn. (1992) 3 Cal.4th 873, 879-880; Service Employees Internat. Union v. City of Redwood City (1995) 32 Cal.App.4th 53, 59-60.)

In contrast, community college district police officers are "peace officers" whose training and duties differ significantly from the training and duties of district security officers. Penal Code section 830.32 provides:

"The following persons are peace officers whose authority extends to any place in the state for the purpose of performing their primary duty or when making an arrest pursuant to Section 836 as to any public offense with respect to which there is immediate danger to person or property, or of the escape of the perpetrator of that offense, or pursuant to Section 8597 or 8598 of the Government Code. Those peace officers may carry firearms only if authorized and under terms and conditions specified by their employing agency.

"(a) Members of a California Community College police department appointed pursuant to Section 72330 of the Education Code, if the primary duty of the police officer is the enforcement of the law as prescribed in Section 72330 of the Education Code.

"....."

"(c) Any peace officer employed by a K-12 public school district or California Community College district who has completed training as prescribed by subdivision (f) of Section 832.3 shall be designated a school police officer."

Education Code section 72330 states in turn:

"(a) The governing board of a community college district may establish a community college police department under the supervision of a community college chief of police and, in accordance with Chapter 4 (commencing with Section 88000) of Part 51, may employ personnel as necessary to enforce the law on or near the campus of the community college and on or near other grounds or properties owned, operated, controlled, or administered by the community college or by the state acting on behalf of the community college. Each campus of a multicampus community college district may designate a chief of police.

"(b) Persons employed and compensated as members of a community college police department, when so appointed and duly sworn, are peace officers as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code.

"....."

Penal Code section 832.3, subdivision (f), provides:

"Any school police officer first employed by a K-12 public school district or California Community College district after July 1, 1999, shall successfully complete a basic course of training as prescribed by subdivision (a) before exercising the powers of a peace officer...."

Penal Code section 832.3, subdivision (a), specifies that "any police officer of a district authorized by statute to maintain a police department, who is first employed after January 1, 1975, shall successfully complete a course of training prescribed by the Commission on Peace Officer Standards and Training before exercising the powers of a peace officer...."

*3 Besides completing the course of training specified in Penal Code section 832.3,

subdivision (a), a community college district police officer must obtain the "basic certificate" issued by the Commission on Peace Officer Standards and Training ("Commission") within 18 months of being hired as a police officer. Penal Code section 832.4, subdivision (a), provides:

"Any... police officer of a district authorized by statute to maintain a police department, who is first employed after January 1, 1974, and is responsible for the prevention and detection of crime and the general enforcement of the criminal laws of this state, shall obtain the basic certificate issued by the Commission on Peace Officer Standards and Training within 18 months of his or her employment in order to continue to exercise the powers of a peace officer after the expiration of the 18-month period." The basic certificate is obtained by successfully completing the course of study prescribed pursuant to Penal Code section 832.3, subdivision (a), as well as successfully completing a period of probation of at least 12 months. (Cal. Code Regs., tit. 11, §§ 1010, 1012.) Finally, a community college district police officer must also complete a supplemental specialized course of training "to meet the unique safety needs of a school environment." (Pen. Code, § 832.3, subds. (g), (h).)

Hence, the training requirements for community college police officers are considerably more rigorous than for community college security officers. The former have broad authority as peace officers to "enforce the law" (Ed. Code, § 72330, subd. (a); Pen. Code, § 830.32, subd. (a)), while the latter act primarily as security guards who generally "report any unlawful activity to the district and local law enforcement" (Ed. Code, § 72330.5, subd. (c)).

In 80 Ops.Cal.Atty.Gen. 293 (1997), we examined whether a police officer or deputy sheriff who failed to satisfactorily complete the requirements of Penal Code sections 832.3 or 832.4 may nevertheless exercise the powers of a peace officer. We concluded that although the police officer or deputy sheriff could continue to have the status of a peace officer, such officer could only exercise non-peace officer powers. We observed:

"The Commission sets standards and issues various certificates, depending upon the duties and responsibilities of the individual peace officers. [Citation.] The standards serve 'the purpose of raising the level of competence of local law enforcement officers....' [Citation.] Certificates are issued 'for the purpose of fostering professionalism, education, and experience necessary to adequately accomplish the general police service duties performed by peace officer members of city police departments, county sheriffs' departments....' [Citation.] The training includes, among other aspects, a comprehensive firearms course. [Citation.]

"....."

"The requirements of sections 832.3 and 832.4 are not conditions of employment, but rather are limitations placed upon the exercise of peace officer powers. [Citation.] Thus the officers who fail to meet the requirements may retain their 'status' as peace officers, although their powers would change. [Citations.] Even though a police officer or deputy sheriff has not received training (§ 832.3) or obtained the basic certificate (§ 832.4), he or she would nevertheless be considered 'designated' as a peace officer in section 830.1, subdivision (a) ['Any... deputy sheriff,... any police officer... is a peace officer'] for purposes of section 830 ['no person other than those designated in this chapter is a peace officer'].

*4 "We conclude that if a police officer or deputy sheriff fails to complete the training prescribed by the Commission or fails to obtain the basic certificate issued by the Commission, such officer may exercise only non-peace officer powers; the officer may not exercise the powers of arrest, serving warrants, carrying concealed weapons without a permit, or similar peace officer powers." (Id. at pp. 294-298.)

More recently, in 85 Ops.Cal.Atty.Gen. 203 (2002), we concluded that members of the California National Guard must satisfactorily complete the requisite training prescribed by the Commission before exercising the powers of peace officers. We explained:

"The Commission sets minimum standards for the selection and training of peace officers (§ 13510), among its various duties. [Citations.] Certain peace officers are required to take only an introductory course of training in order to exercise peace officer powers. [Citations.] The introductory training course totals 64 hours and primarily covers arrest and firearms training. [Citation.] It is this introductory course that National Guard members would be required to complete if they are found to be subject to the terms of section 832.

"May a person be designated a peace officer but not have peace officer powers? In 80 Ops.Cal.Atty.Gen. 293, supra, we addressed that question and concluded that if a police officer or deputy sheriff failed to complete the training prescribed by the Commission, such officer, although still 'designated' as a peace officer, could not exercise peace officer powers, such as the powers of arrest, serving warrants, and carrying concealed weapons without a permit. (Id. at p. 297.) We found that the relevant training requirements were limitations placed upon the exercise of peace officer powers even though the officers would retain their 'status' as peace officers. (Ibid.)

"Here, members of the National Guard are designated as peace officers under certain circumstances (§ 830.4, subd. (a)), but to exercise peace officer powers, they must comply with the training requirements of section 832, subdivision (b)(1)...." (Id. at p. 207.)

Following the analysis of our prior opinions, we find that a community college district security officer may only exercise non-peace officer powers. Such officer does not have the training to exercise peace officer powers on behalf of the community college district; indeed, such officer is not a peace officer [FN2]

We conclude that a security officer employed by a community college district may not exercise the powers of a peace officer on behalf of the district.

Bill Lockyer

Attorney General

Susan Duncan Lee

Deputy Attorney General

[FN1]. Penal Code section 832 provides for "an introductory course of training prescribed by the Commission on Peace Officer Standards and Training." These training requirements are applicable to community college security officers employed prior to July 1, 2000, unless they have "completed an equivalent course of instruction pursuant to Section 832.2 of the Penal Code." (Ed. Code, § 72330.5, subd. (e).) Penal Code section 832.2 provides for a training course having "guidelines and procedures for reporting offenses to other law enforcement agencies that deal with violence on campus and other school related matters...."

[FN2]. However, a district security officer may exercise peace officer powers in a particular situation if he or she is exercising them in some other statutorily authorized capacity. (See 80 Ops.Cal.Atty.Gen., supra, at p. 296.)

86 Ops. Cal. Atty. Gen. 112, 03 Cal. Daily Op. Serv. 5452, 2003 Daily Journal D.A.R. 6912, 2003 WL 21672837 (Cal.A.G.)

03 Cal. Daily Op. Serv. 5452, 2003 Daily Journal D.A.R. 6912
(Cite as: 2003 WL 21672837 (Cal.A.G.))

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ELLEN MILLER, Petitioner,
v.
THE SUPERIOR COURT OF SAN JOAQUIN COUNTY, Respondent; THE PEOPLE, Real Party in Interest.

No. S073888.

Supreme Court of California

Nov. 1, 1999.

SUMMARY

The trial court ordered a television news director to comply with a court order, issued pursuant to a motion by the People, to produce unpublished parts of a videotaped interview conducted by the television station with a defendant charged with murder, and adjudged her in contempt for her failure to do so. (Superior Court of San Joaquin County, No. 59994, William J. Murray, Jr., Judge.) The Court of Appeal, Third Dist., No. C027176, denied the television director's petition for a writ of prohibition.

The Supreme Court reversed the judgment of the Court of Appeal and remanded to that court with directions to cause issuance of the television director's petition for a writ of prohibition. The court held that the trial court erred in ordering the director to produce unpublished parts of the interview, since the unpublished information was protected from disclosure by the media shield law (Cal. Const., art. I, § 2, subd. (b)). The absoluteness of the immunity embodied in the shield law only yields to a conflicting federal constitutional right; the right asserted by the prosecutor to overcome the shield law, the People's right to due process of law (Cal. Const., art. I, § 29), was not such a right. The court further held that there is no conflict between the shield law and Cal. Const., art. I, § 29, and therefore no need to harmonize the two state constitutional provisions. The People's right to due process of law in Cal. Const., art. I, § 29, does not mean a right of access to evidence in contravention of previously existing evidentiary privileges and immunities, which include those given to the press. (Opinion by Mosk, J., with George, C. J., Kennard, Baxter, and Chin, JJ., concurring. Concurring opinion by Brown, J., with Werdegar, J., concurring (see p. 902).)

HEADNOTES

Classified to California Digest of Official Reports

(1) Witnesses § 16.2--Privileged Relationships and Communications-- Newsperson's Shield Law--Criminal Case--Defendant's Federal *884 Constitutional Right to Fair Trial.
The media shield law (Cal. Const., art. I, § 2, subd. (b)) protects a newsperson from being adjudged in contempt for refusing to disclose either unpublished information, or the source of information, whether published or unpublished. The shield law is, by its own terms, absolute rather than qualified in immunizing a newsperson from contempt for revealing unpublished information obtained in the newsgathering process. Nevertheless, a criminal defendant's federal constitutional right to a fair trial may in some cases overcome a claim of immunity under the shield law. The shield law's protection is overcome in a criminal proceeding on a showing that nondisclosure would deprive the defendant of his or her federal constitutional right to a fair trial. If the shield law restricted a criminal defendant's federal constitutional right to a fair trial, such result would violate the supremacy clauses of the federal and state Constitutions.

(2) Witnesses § 16.2--Privileged Relationships and Communications-- Newsperson's Shield Law--Criminal Case--Defendant's Federal Constitutional Right to Fair Trial--Balancing Test.
A court applies a two-stage inquiry to determine whether a court's contempt power can be invoked to enforce a criminal defendant's subpoena against a newsperson, notwithstanding the shield law (Cal. Const., art. I, § 2, subd. (b)). At the threshold, the defendant must show a reasonable possibility that the information will materially assist his or her defense. If he or she makes this showing, then the court is to proceed to the second stage of the inquiry and balance the criminal defendant's

and the newsperson's rights, considering whether the unpublished information in question is confidential or sensitive, the degree to which the information is important to the criminal defendant, whether there is an alternative source of unpublished information, and whether there are other circumstances which may render moot the need to avoid disclosure.

(3a, 3b, 3c, 3d, 3e, 3f, 3g) Witnesses § 16.2--Privileged Relationships and Communications--Newsperson's Shield Law--Criminal Case-- Disclosure of Unpublished Information--People's Right to Due Process.
The trial court erred in ordering a television news director to comply with a court order, issued pursuant to a motion by the People, to produce unpublished parts of a videotaped interview conducted by the television station with a homicide defendant, and in adjudging her in contempt for failing to do so. The unpublished information was protected from disclosure by the media shield law (Cal. Const., art. I, § 2, subd. (b)). The absoluteness of the immunity embodied in the shield law yields *885 only to a conflicting federal constitutional right; the right asserted by the prosecutor, the People's right to due process of law (Cal. Const., art. I, § 29), was not such a right. Further, there is no conflict between the shield law and Cal. Const., art. I, § 29, and therefore no need to harmonize the two provisions. The relationship between a prosecutorial right to obtain relevant evidence and the various evidentiary privileges and immunities of the press was not addressed in Prop. 115, of which Cal. Const., art. I, § 29, was a part. The closely related subject of the relationship between the right to admit relevant evidence and such evidentiary privileges and immunities was treated in an earlier initiative, Prop. 8, of which Cal. Const., art. I, § 28, subd. (d), the truth in evidence provision, was a part. That provision expressly exempted the shield law, as a preexisting constitutional right of the press. Implicit in the conclusion that the People's right to truth in evidence did not affect the preexisting shield law was a determination that the shield law did not deny due process. Similarly, the People's right to due process of law in Cal. Const., art. I, § 29, does not mean a right of access to evidence in contravention of previously existing evidentiary privileges and immunities, which include those given to the press.

[See 2 Witkin, Cal. Evidence (3d ed. 1986) § 1287 et seq.]

(4) Constitutional Law § 14--Operation, Effect, and Construction-- Reconcilable and Irreconcilable Conflicts.
Separate provisions of the state Constitution have equal dignity. Therefore, provisions must be harmonized or, if there is a conflict, then that conflict must be resolved in some manner.

(5) Constitutional Law § 3--Revision by Initiative Process.
A provision of Prop. 115 mandating that criminal defendants' constitutional rights not be construed to be greater than those afforded under the United States Constitution was an unconstitutional revision of the California Constitution.

(6) Statutes § 34--Construction--Language--Words and Phrases--General Limited by Specific.
A general statutory provision is controlled by one that is special, the latter being treated as an exception to the former. A specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates. This principle applies whether the specific provision was passed before or after the general enactment. *886

(7) Witnesses § 16.2--Privileged Relationships and Communications-- Newsperson's Shield Law--Application to Nonconfidential Information.
The shield law (Cal. Const., art. I, § 2, subd. (b)) applies to unpublished information, whether confidential or not. The provision states plainly that a newsperson shall not be adjudged in contempt for refusing to disclose any unpublished information. The use of the word "any" to modify "unpublished information" makes clear that the shield law applies to all information, regardless of whether it was obtained in confidence.

(8) Witnesses § 16.2--Privileged Relationships and Communications-- Newsperson's Shield Law--Purpose--Press Autonomy.
A comprehensive reporter's immunity provision, in addition to protecting confidential or sensitive sources, has the effect of safeguarding the autonomy of the press. The threat to press autonomy is particularly clear in light of the press's unique role in society. As the institution that gathers and disseminates information, journalists often serve as the eyes and ears of the public. Because journalists not only gather a great deal of information, but publicly identify themselves as possessing it, they are especially prone to be called upon by litigants seeking to minimize the costs of obtaining needed information.

(9) Witnesses § 11--Privileged Relationships and Communications--Executive Privilege--Limitations.

The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense. The right to the production of all evidence at a criminal trial has constitutional dimensions. U.S. Const., 6th Amend., explicitly confers upon every defendant in a criminal trial the right to be confronted with the witnesses against him or her and to have compulsory process for obtaining witnesses in his or her favor. Moreover, U.S. Const., 5th Amend., also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced. Thus, the executive privilege is not absolute, but is a qualified one that must be weighed against the fair administration of criminal justice.

COUNSEL

Diepenbrock, Wulff, Plant & Hannegan, Samuel T. McAdam; Riegels Campos & Kenyon and Charity Kenyon for Petitioner. *887

Crosby, Heafey, Roach & May, John E. Carne, Kathy M. Banke, David E. Durant and Helen N. E. Posnansky for California Newspaper Publishers Association, California First Amendment Coalition, The Society of Professional Journalists, Northern California Chapter, The Copley Press, Inc., Freedom Communicaitons, Knight Ridder, McClatchy Newspapers, Inc., the Ontario Bulletin, the San Francisco Examiner, the San Francisco Chronicle, the San Bernardino Sun, the Santa Rosa Press Democrat and The Times Mirror Company as Amici Curiae on behalf of Petitioner.

Johanson & Robinson and Steve H. Johanson for Hearst-Argyle Television, Inc., A. H. Belo Corporation and Channel 58, Inc., as Amici Curiae on behalf of Petitioner.

No appearance for Respondent.

Daniel E. Lungren and Bill Lockyer, Attorneys General, George Williamson and David P. Druliner, Chief Assistant Attorneys General, Robert R. Anderson, Assistant Attorney General, Edmund D. McMurray, Margaret Venturi and Susan J. Orton, Deputy Attorneys General, for Real Party in Interest.

Gil Garcetti, District Attorney (Los Angeles), George M. Palmer, Head Deputy District Attorney, and Brentford J. Ferreira, Deputy District Attorney, for California District Attorneys Association as Amicus Curiae on behalf of Real Party in Interest.

MOSK, J.

In 1990 the voters of this state enacted a constitutional amendment as part of Proposition 115 affirming that in criminal cases the people of the State of California have "the right to due process of law" (Cal. Const., art. I, § 29). [FN1] In the present case, we consider whether the assertion of that state constitutional right by a district attorney can serve as a justification for holding a newsperson in contempt for refusing to surrender unpublished information, in spite of the newsperson's immunity from contempt for such refusal expressly provided in article I, section 2, subdivision (b) (hereinafter article I, section 2(b)), and reaffirmed in article I, section 28, subdivision (d) (hereinafter article I, section 28(d)). We conclude that a newsperson cannot be held in contempt under these circumstances. We therefore reverse the judgment of the Court of Appeal. *888

FN1 All references to articles hereafter will be to articles of the California Constitution unless otherwise indicated.

I. Facts and Procedural History

The pertinent facts of this case are not in dispute and were largely set forth in *SCI-Sacramento, Inc. v. Superior Court* (1997) 54 Cal.App.4th 654, 657-659 [62 Cal.Rptr.2d 868]:

"KOVR is a television station engaged in the gathering, receiving and processing of information for communication to the public. After learning that one Anthony Lee DeSoto had confessed to sheriff's investigators that he had killed his cellmate, KOVR news reporter Tom Layson conducted a videotaped interview with DeSoto in the San Joaquin County jail.

"Portions of the interview were broadcast on KOVR news programs on March 19 and March 20, 1996.

"In April 1996, the People issued a subpoena duces tecum for KOVR's custodian of records to 'Bring Tape Recording of the Entire Interview at the San Joaquin County Jail of Defendant Anthony Lee De[S]oto on 3/19 or 3/20/96, to Include Portions of Broadcast as Well as Portions That Were Not Broadcasted [*sic*].' The subpoena indicated no appearance was required if the materials were turned over to the prosecution.

"KOVR submitted only the broadcast portions of the interview, invoking the ... shield law (Cal. Const., art. I, § 2; Evid. Code, § 1070) [FN2] as to the 'outtakes' which were not broadcast. The prosecutor reiterated her demand for the unpublished materials.

> FN2 The shield law is found in almost identical versions in both the state Constitution and the Evidence Code. For the sake of convenience, and because the crux of the case is the relation between various state constitutional provisions, we will generally refer solely to the constitutional provision.

"In June 1996, KOVR moved to quash the subpoena on the grounds of the ... shield law. KOVR's motion requested that the subpoena be quashed but asked in the alternative: 'If the court should determine that the District Attorney has established and produced evidence of a colorable interest in this matter, KOVR requests that the court review in camera those portions of the videotape claimed to be essential to protecting the interests of the People. Such in camera review of the unpublished material, with counsel for the media present, would be essential to perform the balancing of the nature described in *Delaney* [v. *Superior Court* (1990) 50 Cal.3d 785 [268 Cal.Rptr. 753, 789 P.2d 934]]. [¶] If the court should determine that ... the District Attorney has established a right to production of the portions of the videotape that have not been broadcast, then in camera review is requested *889 without prejudice to the right of KOVR's custodian of records to review the court's ruling and to decide whether or not to disclose the unbroadcast portions of the videotape or to suffer a judgment of contempt.'...

"At the July 8, 1996, hearing on the motion to quash, the trial court stated (in concurrence with the position taken in the People's opposition to the motion to quash) that the case law requires in camera review only when the material sought to be shielded under the newspersons' shield law is confidential or sensitive--elements not present in the instant case, where KOVR has not contended the unpublished tape is confidential or sensitive. The court further stated that notwithstanding this point of law, the court would exercise its discretion and review the tape in camera. The court asked KOVR's counsel if she had the tape (exhibit C) with her. She did, and she turned it over to the court. The court conducted the in camera review in the presence of KOVR's counsel, defendant, and defense counsel. KOVR's counsel stated she had no objection to the presence of the defense '[a]s long as it would not constitute a waiver of the Shield Law ....' The trial court agreed.

"On July 19, 1996, the trial court issued an order denying KOVR's motion to quash, ordering that the videotape (exhibit C) be unsealed (but staying its order), and directing KOVR to provide a copy of the unedited interview to the prosecution. There are two versions of the court order--a sealed version which has not been provided to the People, and an unsealed version. Both versions of the order stated in part: 'The court hereby denies KOVR's Motion to Quash and orders that Exhibit C be unsealed, but stays the execution of that order until the next hearing on this matter set for July 23, 1996. KOVR is further ordered to provide a complete copy of the unedited interview in continuous sequence at the July 23, 1996 hearing.' " (*SCI-Sacramento, Inc. v. Superior Court*, *supra*, 54 Cal.App.4th at pp. 657-659, fns. and italics omitted.)

The stay was extended when KOVR indicated its intention to petition the Court of Appeal for an extraordinary writ setting aside the superior court's ruling. That petition was filed in that court on August 14, 1996. In *SCI-Sacramento, Inc. v. Superior Court*, *supra*, 54 Cal.App.4th 654, the Court of Appeal concluded the petition was premature as there had been no adjudication of contempt. The court therefore did not reach the merits of the dispute but issued a peremptory writ of mandate directing the superior court to vacate its order and "to enter a new order giving petitioners the opportunity to choose to be held in contempt or to disclose the disputed materials." (*Id.*, at pp. 667-668.) The previously issued stay was dissolved. (*Id.*, at p. 668.)

At the ensuing hearing, the superior court ordered petitioner, KOVR's news director, Ellen Miller, to turn over to the prosecution the unedited *890 videotape. Petitioner refused to do so and was adjudged in contempt. The court ordered petitioner jailed until the tape was produced or the criminal proceedings concluded. She was also ordered to pay the

reasonable attorney fees and costs incurred in connection with the contempt proceedings. However, the court stayed its order to allow filing of a petition for extraordinary relief in the Court of Appeal. Petitioner filed such a petition for "a writ of habeas corpus and/or review," which the court treated as a writ of prohibition. The Court of Appeal issued an alternative writ of prohibition and stayed the judgment of contempt.

The Court of Appeal, relying on article I, section 29, giving "the people of the State of California ... the right to due process of law," and on our decision in *Delaney v. Superior Court* (1990) 50 Cal.3d 785 [268 Cal.Rptr. 753, 789 P.2d 934] (*Delaney*), concluded that a journalist's immunity from contempt is not absolute when the prosecution makes a showing of need for information the journalist possesses. Purportedly following our *Delaney* decision, the court employed a balancing test, weighing the relative importance of the prosecution's interest in uncovering the information and the news organization's interest in keeping it concealed. The court determined that the People had shown the potential importance of the unpublished portions of the interview for the criminal trial against DeSoto and the lack of alternative sources. The court also determined that the concealment of the information was of relatively less importance to the news organization, because it was not protecting a confidential source. The court accordingly upheld the trial court's contempt order, denied the writ of prohibition, and lifted the stay.

We granted review and further stayed enforcement of the contempt order.

II. Discussion

(1) The shield law, article I, section 2(b), enacted in its constitutional form in 1980, provides that a newsperson "shall not be adjudged in contempt ... for refusing to disclose the source of any information procured while so connected or employed [as a newsperson] ... or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public." "Stated more simply, article I, section 2(b) protects a newsperson from being adjudged in contempt for refusing to disclose either: (1) unpublished information, or (2) the source of information, whether published or unpublished." (*Delaney, supra*, 50 Cal.3d at pp. 796-797, fn. omitted.)

The shield law is, by its own terms, *absolute* rather than qualified in immunizing a newsperson from contempt for revealing unpublished information obtained in the newsgathering process. As we have explained: *891 " 'Since contempt is generally the only effective remedy against a nonparty witness, the California enactments [article I, section 2(b) and Evidence Code section 1070] grant such witnesses *virtually absolute protection* against compelled disclosure.' [Citation.] We implicitly reached the same conclusion in *Delaney, supra*, 50 Cal.3d 785, in which we held that a criminal defendant's federal constitutional right to a fair trial may in some cases overcome a claim of immunity under the state shield law. (*Id.*, at p. 805.) If the shield law itself provided for a balancing approach, i.e., a qualified immunity, there would have been no need for us to turn to the federal Constitution .... We find nothing in the shield law's language or history to suggest the immunity from contempt is qualified such that it can be overcome by a showing of need for unpublished information within the scope of the shield law." (*New York Times Co. v. Superior Court* (1990) 51 Cal.3d 453, 461 [273 Cal.Rptr. 98, 796 P.2d 811], fn. omitted.)

Nonetheless, as the above suggests, the protection of the shield law must give way to a conflicting federal constitutional right of a criminal defendant. As we stated in *Delaney*: "[T]he shield law's protection is overcome in a criminal proceeding on a showing that nondisclosure would deprive the defendant of his federal constitutional right to a fair trial. Although this court has not decided a case involving the application of the shield law in a criminal prosecution, the principle is beyond question. [Citations.] The incorporation of the shield law into the California Constitution cannot restrict a criminal defendant's *federal* constitutional right to a fair trial. [Citations.] Such result would violate the supremacy clauses of the federal and state Constitutions." (*Delaney, supra*, 50 Cal.3d at pp. 805-806, fns. omitted.)

(2) At issue in *Delaney* was whether a criminal defendant could, pursuant to the right to a fair trial under the due process clause of the Fourteenth Amendment of the United States Constitution (*Delaney, supra*, 50 Cal.3d at pp. 805-806, fn. 18), compel the testimony of a newspaper reporter who had been a percipient witness to his arrest. In *Delaney*, the court formulated a two-stage inquiry to determine whether a court's contempt power could be invoked to enforce a criminal defendant's subpoena against a newsperson, the shield law notwithstanding. At the threshold, the defendant must show "a reasonable possibility [that] the information will materially *assist his defense*." (*Id.*, at p. 809.) If he makes this showing, then

the court is to proceed to the second stage of the inquiry and balance the criminal defendant's and the newsperson's rights, considering whether the unpublished information in question is confidential or sensitive, the degree to which the information is important to the criminal defendant, whether there is an alternative source of unpublished information, and whether there are other circumstances which *892 may render moot the need to avoid disclosure. (*Id.*, at pp. 810-812.) Applying this test to the facts of the case, we concluded that the defendant was entitled to the information because the reporter's eyewitness testimony was not sensitive or confidential, because such testimony would likely be determinative of the outcome of the defendant's case, and because there was no meaningful alternative to that testimony. (*Id.*, at pp. 814-816.)

(3a) The Court of Appeal in the present case held that the people's "right to due process of law," incorporated in article I, section 29, requires that the prosecution's interest in obtaining relevant evidence be balanced against the newsperson's immunity from contempt under the shield law in the same manner as in *Delaney*. Of course, article I, section 29, is a state constitutional provision, not a federal one, and no supremacy clause issue is presented. (4) But it is nonetheless the case that both provisions have equal dignity as constituents of the state Constitution. As such, the provision must be harmonized if possible (see *City and County of San Francisco v. County of San Mateo* (1995) 10 Cal.4th 554, 563 [41 Cal.Rptr.2d 888, 896 P.2d 1811]) or, if there is a conflict between the shield law and article I, section 29, then that conflict must be resolved in some manner. (3b) The Court of Appeal found such a conflict and held that *Delaney* provides the means for resolving it.

The Court of Appeal's holding, of course, presupposed that there is a conflict between the shield law and article I, section 29, in need of resolution. In order to determine whether this is so, we must inquire into what was meant, or not meant, by the phrase "the people ... have the right to due process of law" in article I, section 29. As stated, that constitutional provision was part of Proposition 115, enacted by the voters in June 1990, which made a number of changes to the Penal Code and the criminal justice system. The provisions of Proposition 115 were reviewed at length in *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 342-346 [276 Cal.Rptr. 326, 801 P.2d 1077]. Entitled the "Crime Victims Justice Reform Act," Proposition 115 included such provisions as more expansive rules for allowing joinder of criminal defendants, reciprocal discovery for the prosecution and the defense, voir dire conducted initially by the court rather than by the parties, augmentation of the felony-murder and special circumstance statutes, and certain measures to discourage delays in bringing cases to trial. (5) Proposition 115 also included a provision mandating that criminal defendants' constitutional rights not be construed to be greater than those afforded under the United States Constitution, a provision we held to be an unconstitutional revision of the California Constitution. (*Raven v. Deukmejian*, *supra*, 52 Cal.3d at p. 355.)

(3c) Article I, section 29, as stated, adds to these specific reform measures the statement: "In a criminal case, the people of the State of California *893 have the right to due process of law and to a speedy and public trial." The term "due process of law" is not defined.

The relationship between a prosecutorial right to obtain relevant evidence and the various evidentiary privileges and immunities of the press was not addressed in Proposition 115. The closely related subject of the relationship between the right to *admit* relevant evidence and such evidentiary privileges and immunities was treated in an earlier anticrime initiative, Proposition 8, enacted in June of 1982. Like Proposition 115, Proposition 8 consisted of a number of reforms of the criminal justice system, including provisions on victim's restitution, rules for granting bail, abolition of the diminished capacity defense, enhancement of sentences for habitual criminals, and curtailment of plea bargaining. (See *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 242-245 [185 Cal.Rptr. 30, 651 P.2d 274].) The so-called "truth-in-evidence" provision of Proposition 8, found at article I, section 28(d), states: "Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103. *Nothing in this section shall affect any existing statutory or constitutional right of the press.*" (Italics added.)

There is no disputing that article I, section 28(d)'s exemptions include the "right" to withhold unpublished information obtained in the newsgathering process pursuant to the protection of the shield law. The enactment of the shield law predated the passage of Proposition 8, and therefore the right derived from that law is an "existing ... constitutional right of the press" within the meaning of article I, section 28(d). Consequently, under the terms of article I, section 28(d), however broadly the right to admit evidence is construed to include the right to obtain such evidence, that right would not include a right to

compel a newsperson to surrender unpublished information by invoking the court's power of contempt. The question then is whether article I, section 29 implicitly expanded the scope of the prosecutor's right to obtain evidence to permit what was forbidden under article I, section 28(d).

We implicitly repudiated such an expansive reading of article I, section 29 in *Menendez v. Superior Court* (1992) 3 Cal.4th 435, 456-457 [11 Cal.Rptr.2d 92, 834 P.2d 786], footnote 18. That case involved the prosecution's access to audiotapes containing confidential material assertedly protected by the defendants' psychotherapist-patient privilege. The prosecution claimed "that the psychotherapist-patient privilege must yield to their *894 interest in successful criminal prosecutions and their state constitutional right to due process of law." (*Ibid.*) We rejected that argument. As we stated: "[A]s a general matter at least, the privilege does not appear to be 'trumped' by the People's state constitutional right to due process. By its very terms, the People's 'right to truth-in-evidence' under article I, section 28, subdivision (d) of the California Constitution does not 'affect any existing statutory rule of evidence relating to the privilege ....' Implicit therein is a constitutional determination that the privilege does not undermine the integrity or reliability of the truth-finding function of legal proceedings. From that determination it appears to follow that the privilege does not deny due process." (*Ibid.*)

Similarly, under article I, section 28(d), the People's "right to truth-in-evidence" does not affect "any existing statutory or constitutional right of the press." Implicit in this conclusion is a constitutional determination that such rights, including that provided by the shield law, "do[ ] not undermine the integrity or reliability of the truth-finding function of legal proceedings. From that determination it appears to follow that the [shield law] does not deny due process." (*Menendez v. Superior Court*, *supra*, 3 Cal.4th at p. 457, fn. 18.)

The Court of Appeal, in concluding to the contrary that invocation of the shield law would deny due process to the People in this case, attempted to distinguish *Menendez* as follows: "The media exception in article I, section 28(d) is expressly confined to 'this section,' i.e., section 28. Section 28(d) addresses the right to present evidence at trial. To interpret article I, section 28(d) as qualifying the People's right to due process is inconsistent with the reasoning of the court in *Delaney*. Article I, section 28(d) applies to both the prosecution and the defense. Hence, if it limits the prosecution's due process rights, it necessarily limits the defendant's rights as well. Although the holding in *Delaney* was based on a *federal* due process claim, which article I, section 28(d) cannot limit, the reasoning of the court was not based on the supremacy of federal over state law but on a balance of competing rights. *Delaney* did not hold the state constitutional shield law must yield to the defendant's federal constitutional due process right as a matter of federal supremacy. It had to yield because in the balance of competing interests, the defendant's federal due process rights outweighed the rights protected by the shield law. In other words, the application of the shield law in that case would 'undermine the integrity or reliability of the truth-finding function.' (*Menendez v. Superior Court*, *supra*, 3 Cal.4th at p. 457, fn. 18.)"

The Court of Appeal misapprehended our reasoning both in *Delaney* and in *Menendez*. In *Delaney*, we had to resolve a conflict between a federal *895 constitutional right and a state constitutional right. The *Delaney* court concluded that the nature of the federal due process right, in the context of compelling witness testimony, is not so absolute as to preclude a balancing of the respective rights if they conflict. But there is no need to balance the two rights if they are not in conflict. In *Menendez* we concluded that whatever "the people['s] ... right to due process of law" in article I, section 29 might mean, in light of article I, section 28(d), it specifically does not mean a right of access to evidence in contravention of previously existing evidentiary privileges and immunities, which include those given to the press. Therefore, there is no conflict between the shield law and the subsequently enacted people's right to due process of law, and accordingly, no need to engage in the balancing of interests prescribed by *Delaney*. Our statement in *Menendez* does not conflict with our holding in *Delaney* because the exemptions set forth in article I, section 28(d) do not affect a criminal defendant's federal constitutional rights to obtain evidence, which was at issue in the latter case.

(6) To state the matter in other terms, " 'It is well settled ... that a general provision is controlled by one that is special, the latter being treated as an exception to the former. A specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates.' " (*San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) 2 Cal.4th 571, 577 [7 Cal.Rptr.2d 245, 828 P.2d 147]; see also *Salazar v. Eastin* (1995) 9 Cal.4th 836, 857 [39 Cal.Rptr.2d 21, 890 P.2d 43].) This principle applies whether the specific provision was passed before or after the general enactment. (*Warne v. Harkness* (1963) 60 Cal.2d 579, 588 [35 Cal.Rptr. 601, 387 P.2d 377].) (3d) In the present case, even if we were to assume

that the people's right to due process of law encompasses a right to obtain and admit evidence, the precise content of that right, and the particular exemptions that apply to it, would be presumably congruent with the specific truth-in-evidence provision found in article I, section 28(d). It is doubtful indeed that the generally worded section 29 impliedly permits what section 28(d) explicitly precludes, i.e., using the prosecutorial need for relevant evidence as a justification for overriding existing evidentiary privileges and rights of the press.

Moreover, the rule that the general law is governed by the specific also applies to the relationship between the shield law itself, article I, section 2(b), and the people's right to due process. The former specifically provides an absolute immunity from contempt for journalists who refuse to furnish unpublished information. We presume that this specific provision was not *896 altered or partially repealed by the general recognition of the people's right to due process later added to the Constitution.

The presumption that a specific governs a general enactment may, of course, be rebutted by evidence of a contrary intent of the Legislature or, as in this case, of the electorate. (*Warne v. Harkness, supra*, 60 Cal.2d at p. 588.) No such contrary intent appears. Nothing in the brief language of article I, section 29 itself evinces such intent. Nor do the pertinent ballot arguments support such a meaning. [FN3]

> FN3 The only portion of the ballot argument in favor of Proposition 115 that commented even obliquely on article I, section 29, focused on the "speedy ... trial" portion of that section. The ballot argument stated that Proposition 115's " 'Nightstalker' Component conforms California's criminal law to federal procedures, bringing California back into the mainstream of American criminal justice. This will mean major time savings for the typical California criminal proceeding. It took an incredible four years just to bring the 'Nightstalker' to justice! Imagine how much that cost you, the taxpayer, and how much anguish it caused his surviving victims through multiple, drawn-out court appearances." (Ballot Pamp., argument in favor of Prop. 115 as presented to the voters, Primary Elec. (June 5, 1990) p. 34.) Nowhere is there mention of the right to due process, nor any suggestion that it might alter existing evidentiary privileges and immunities. Indeed, those arguing in favor of Proposition 115 claimed that its opponents were "[t]he same people who opposed the 'Victims Bill of Rights [Proposition 8] ...,' " (Ballot Pamp., *supra*, at p. 34) thereby implying, if anything, that Proposition 115 was consistent with Proposition 8 and not intended to alter it.

The Court of Appeal's holding appears to have been based on the assumption that the people's right to due process of law must be the exact equivalent to a criminal defendant's right to due process, and that therefore the *Delaney* test should apply as much to the former as the latter, article I, section 28(d) notwithstanding. Nothing in the language or legislative history of article I, section 29 supports this view. Nor does anything in our case law. In some cases, the use of the term "due process of law" in connection with the prosecution was simply another way of formulating the truism that the state has a strong interest in prosecuting criminals, which must be weighed against the criminal defendant's assertion of due process rights. (See *Stein v. New York* (1953) 346 U.S. 156, 197 [73 S.Ct. 1077, 1099, 97 L.Ed. 1522], overruled on other grounds in *Jackson v. Denno* (1964) 378 U.S. 368, 391 [84 S.Ct. 1774, 1788-1789, 12 L.Ed.2d 908, 1 A.L.R.3d 1205]; *Snyder v. Massachusetts* (1934) 291 U.S. 97, 122 [54 S.Ct. 330, 338, 78 L.Ed. 674, 90 A.L.R. 575].) Elsewhere, particularly in California cases, the prosecution's right to due process has been invoked to affirm its right to be heard in various preliminary or collateral proceedings and to oppose a defendant's claim of right to be heard ex parte and in camera. (See *People v. Huston* (1989) 210 Cal.App.3d 192, 212 [258 Cal.Rptr. 393]; *Department of Corrections v. Superior Court* (1988) 199 Cal.App.3d 1087, 1092-1093 [245 Cal.Rptr. 293]; *People v. Dennis* (1986) 177 Cal.App.3d 863, 873 [*897223 Cal.Rptr. 236]; *People v. Sahagun* (1979) 89 Cal.App.3d 1, 25-26 [152 Cal.Rptr. 233].) The prosecution's right to due process, as far as we can determine, has not been recognized to encompass the breach of established evidentiary privileges and immunities, and there is no reason to suppose article I, section 29 intended that meaning.

The People, in contrast to the Court of Appeal and amicus curiae California District Attorneys Association, do not assert article I, section 29 as the primary justification for qualifying the newsperson's privilege. Rather, based on the history and ballot arguments of the shield law, they argue that the main purpose of the law is the protection of confidential sources, and when, as in this case, no confidential sources are involved, the shield law should yield in some cases to effective criminal prosecution.

(7) As we made clear in *Delaney, supra*, 50 Cal.3d at page 798, the shield law applies to unpublished information whether

confidential or not: The provision "states plainly that a newsperson shall not be adjudged in contempt for 'refusing to disclose *any* unpublished information.' " (Italics in original.) Thus, we rejected the argument that "article I, section 2(b) applies only to unpublished information obtained *in confidence* by a newsperson. Such a construction might be possible if the voters had used the phrase ' unpublished information' without the modifier 'any.' They did not do so. The use of the word 'any' makes clear that article I, section 2(b) applies to all information, regardless of whether it was obtained in confidence." (*Ibid.*) Moreover, the meaning of " 'unpublished information' " was defined in broad, nonrestrictive terms: " 'As used in this subdivision, unpublished information includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated.' Nowhere in this broad definition is there an explicit or implied restriction of article I, section 2(b) to confidential information." (*Id.*, at p. 799.)

(3e) Thus, it is beyond dispute that the information sought by the prosecution in the present case, unbroadcast portions of an interview of DeSoto by a newsperson, is "unpublished information" within the meaning of article I, section 2(b) and is thereby protected by that constitutional provision. Nor, as discussed above, is there any question that that protection, by the terms of article I, section 2(b), is absolute, and may be overcome only by a countervailing federal constitutional right, as in *Delaney*. (*New York Times Co. v. Superior Court, supra*, 51 Cal.3d at p. 461.) As explained above, article I, section 29 is not such a right. ***898**

Nor is the interpretation of the shield law to vigorously protect unpublished though nonconfidential information in any sense irrational. (8) "A comprehensive reporter's immunity provision, in addition to protecting confidential or sensitive sources, has the effect of safeguarding '[t]he autonomy of the press.' (*O'Neill v. Oakgrove Constr.* (1988) 71 N.Y.2d 521, 526 [528 N.Y.S.2d 1, 3 ...] [construing a similar state constitutional provision].) ... [¶] The threat to press autonomy is particularly clear in light of the press's unique role in society. As the institution that gathers and disseminates information, journalists often serve as the eyes and ears of the public. [Citations.] Because journalists not only gather a great deal of information, but publicly identify themselves as possessing it, they are especially prone to be called upon by litigants seeking to minimize the costs of obtaining needed information." (*Delaney, supra*, 50 Cal.3d 785, 820- 821 (conc. opn. of Mosk, J.); see also *Matter of Woodhaven Lumber* (1991) 123 N.J. 481 [589 A.2d 135, 143]; *United States v. Cuthbertson* (3d Cir. 1980) 630 F.2d 139, 147.) (3f)The threat to the autonomy of the press is posed as much by a criminal prosecutor as by other litigants.

Thus, there is nothing illogical in interpreting "the people[']s] ... right to due process" *not* to include the right to compel the press through the sanctions of contempt--incarceration and substantial fines--to supply unpublished information obtained in the newsgathering process. The fact that the assertion of this immunity might lead to the inability of the prosecution to gain access to all the evidence it desires does not mean that a prosecutor's right to due process is violated, any more than the assertion of established evidentiary privileges against the prosecution would be a violation. (See *Jones v. Superior Court* (1962) 58 Cal.2d 56, 60-61 [22 Cal.Rptr. 879, 372 P.2d 919, 96 A.L.R.2d 1213] [prosecutorial discovery limited by privilege against self-incrimination and attorney-client privilege]; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 369 [285 Cal.Rptr. 231, 815 P.2d 304] [suggesting the same under Proposition 115's reciprocal discovery provisions].)

The People cite in support of their position the following passage in *Delaney*: "Although the reporters concede that a criminal defendant has a constitutional right to a fair trial, they contend, without citing any authority, that the prosecution does not have a similar right to obtain information subject to the shield law. Of course, the prosecutor vigorously disagrees. There is authority which *suggests* that a state may have a right sufficient to overcome a claim of immunity under the shield law. (*Mitchell* [v. *Superior Court* (1984)] 37 Cal.3d 268, 278 [208 Cal.Rptr. 152, 690 P.2d 625]; *Branzburg* [v. *Hayes* (1972)] 408 U.S. 665, 700 [33 L.Ed.2d 626, 650-651]; *United States v. Nixon* [(1974)] 418 U.S. 683, 709 [41 L.Ed.2d 1039, 1039, 1064-1065].) In light of our determination, however, that Delaney is entitled ***899** to the reporters' testimony, the question as to the state's right to the same evidence is rendered moot. We therefore need not, and do not, decide whether the prosecution in a criminal proceeding can have a constitutional interest sufficient to require the disclosure of information otherwise protected by the shield law." (*Delaney, supra*, 50 Cal.3d at p. 816, fn. 34; italics in original.)

Although we thus posed the question at issue in this case in *Delaney*, we did not decide it. On closer examination, none of the authority cited by *Delaney* (*supra*, 50 Cal.3d at p. 816, fn. 34) as suggesting "a [constitutional] right sufficient to overcome a

claim of immunity under the shield law" on the part of the prosecution in fact supports that position, for none of those cases addressed the shield law. In *Mitchell v. Superior Court* (1984) 37 Cal.3d 268 [208 Cal.Rptr. 152, 690 P.2d 625], we considered whether a newsperson who is a defendant in a libel suit can be compelled to reveal confidential information during the discovery process. As we made clear, the shield law was not at issue; rather, because newspersons and a news organization were parties in the case, they could be subject to sanctions other than contempt for failing to reveal the requested information, including entry of judgment against them. (*Id.*, at p. 274.) Therefore, our analysis was based on an implied First Amendment shield against such sanctions rather than the explicit immunity from contempt found in our state Constitution. (*Id.*, at pp. 274-276.) We concluded that a newsperson who was a party to litigation was eligible for a limited protection from civil discovery, subject to a balancing test similar to the one later articulated in *Delaney*. (*Id.*, at pp. 279-283.) As we made clear subsequently in *New York Times Co. v. Superior Court*, *supra*, 51 Cal.3d at page 461, a newsperson not a party to civil litigation is subject to "virtually absolute immunity" for refusing to testify or otherwise surrender unpublished information.

In *Branzburg v. Hayes* (1972) 408 U.S. 665 [92 S.Ct. 2646, 33 L.Ed.2d 626], the United States Supreme Court held that the First Amendment did not provide a newsperson with a privilege from testifying in front of a grand jury in a criminal case. The *Branzburg* court acknowledged, however, that "state legislatures [are] free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and [the] press in their own areas." (*Id.*, at p. 706 [92 S.Ct. at p. 2669].) As we recognized in *Delaney*, *supra*, 50 Cal.3d at page 796, the current version of the shield law was adopted "apparently in response to *Branzburg*," and, following *Branzburg*'s dictum, expanded the scope of the newsperson's protection from disclosure beyond what the First Amendment provides. The holding in *Branzburg* is therefore inapposite to the present case.

(9) In *United States v. Nixon* (1974) 418 U.S. 683 [94 S.Ct. 3090, 41 L.Ed.2d 1039], a special prosecutor sought from the President of the United *900 States audiotapes of certain confidential communications. The President asserted an executive privilege based in part on the need to protect communication between high-level government officials and in part on the separation of powers doctrine, which gives the executive branch some degree of autonomy from the judicial branch. The United States Supreme Court, while acknowledging an executive privilege, held that it was not absolute, given the importance of furthering the workings of the criminal justice system. As the court stated: "The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense." (*Id.*, at p. 709 [94 S.Ct. at p. 3108].) The court recognized that "[t]he right to the production of all evidence at a criminal trial ... has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right 'to be confronted with the witnesses against him' and 'to have compulsory process for obtaining witnesses in his favor.' Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced." (*Id.*, at p. 711 [94 S.Ct at p. 3109].) The court elsewhere referred to the conflict between the asserted executive privilege "and the constitutional need for relevant evidence in criminal trials." (*Id.*, at p. 712, fn. 19 [94 S.Ct. at p. 3109].)

The *Nixon* court acknowledged that the need for "full disclosure of all the facts" existed side-by-side with well-established evidentiary privileges "designed to protect weighty and legitimate competing interests. Thus, the Fifth Amendment to the Constitution provides that no man 'shall be compelled in any criminal case to be a witness against himself.' And, generally, an attorney or a priest may not be required to disclose what has been revealed in professional confidence. These and other interests are recognized in law by privileges against forced disclosure, established in the Constitution, by statute, or at common law." (418 U.S. at pp. 709-710 [94 S.Ct. at p. 3108].) But as the court further stated: "Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." (*Id.*, at p. 710 [94 S.Ct. at p. 3108].) The court thus concluded that the executive privilege was a qualified one that had to be weighed against the "the fair administration of criminal justice." (*Id.*, at pp. 711-712 [94 S.Ct. at p. 3109].) When the privilege is "based only on the generalized interest in confidentiality," rather than specific national security concerns, "it cannot prevail over the fundamental demands of due process of law and the fair administration of criminal justice." (*Id.*, at p. 713 [94 S.Ct. at p. 3110].) *901

Nixon does not support the People's position. Its significance was recently clarified in *Swidler & Berlin v. United States* (1998) 524 U.S. 399 [118 S.Ct. 2081, 141 L.Ed.2d 379]. In that case, the court rejected the argument that the attorney-client

privilege had to be narrowly construed as not surviving a client's death--contrary to precedent--in order to promote "the paramount judicial goal of truth seeking." (524 U.S. at p. 410 [118 S.Ct. at p. 2087].) The court found the prosecution's reliance on *Nixon* and *Branzburg* in support of its position misplaced. These cases "dealt with the creation of privileges not recognized by the common law, whereas [the attorney-client privilege is] one of the oldest recognized privileges in the law." (*Ibid.* [118 S.Ct. at pp. 2087-2088].) And unlike in *Nixon* and *Branzburg*, the court was being asked not simply to construe the privilege "but to narrow it, contrary to the weight of the existing body of case law," and declined to do so. (*Ibid.* [118 S.Ct. at p. 2088].) Thus, *Swidler & Berlin* clarifies that the "federal constitutional need for relevant evidence in criminal trials" recognized in *Nixon* does not alter the scope of privileges and immunities well established in the law.

(3g) In this case, we are not concerned with the judicial creation of a new privilege. Rather, the Attorney General asks us to narrow the shield law, an evidentiary immunity found in the state constitution, in a manner contrary to its express terms, because federal due process compels such a result. *Swidler & Berlin* makes clear that there is no such constitutional compulsion. Nor may we convert an absolute into a qualified immunity merely because it is in accord with a particular conception of the proper balance between journalists' rights and prosecutor's prerogatives. Thus, the absoluteness of the immunity embodied in the shield law only yields to a conflicting federal or, perhaps, state constitutional right. As explained, there is no such conflicting right presented in this case.

III. Disposition

For all the foregoing reasons, the judgment of the Court of Appeal is reversed and the cause remanded to that court with directions to cause issuance of a peremptory writ of prohibition as prayed.

George, C. J., Kennard, J., Baxter, J., and Chin, J., concurred.

BROWN, J.

Although I concur with the result and the bulk of the majority's reasoning, I do not agree with the majority's analysis of the alleged conflict between California Constitution, article I, sections 28, subdivision *902 (d) [FN1] and 29. (See maj. opn., *ante*, at pp. 895-896.) The principle that a specific provision governs over a general provision only applies if there is an *actual* conflict between the two provisions. No actual conflict exists here. The media exception in section 28, subdivision (d), by its terms, is confined to "this section" and does not expressly preclude a more general provision from narrowing the scope of a newsperson's immunity. This qualified language should not insulate the media exception from future modifications or alterations, especially given that the electorate could have expressly done so. (See, e.g., §§ 27, 30, subd. (a).) Indeed, nothing in the pertinent ballot measures even suggests such an intent. Because this aspect of the majority's analysis is both suspect and unnecessary to its holding and may affect other constitutional provisions with clauses analogous to section 28, subdivision (d) (see, e.g., §§ 7, subd. (a), 24, 31, subds. (c)-(e); art. IV, § 5, subd. (d), art. V, § 14, subd. (d), art. X B, § 15, art. XIII D, § 1, art. XVI, §§ 5, 6, 16, subd. (c)), I decline to adopt it.

FN1 All references are to article I of the California Constitution unless otherwise indicated.

Werdegar, J., concurred. *903

Cal. 1999.

Miller v. Superior Court

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JOHN FUENTES, Petitioner,
v.
WORKERS' COMPENSATION APPEALS BOARD, PACIFIC STATES STEEL CORPORATION et al., Respondents

S.F. No. 23264.

Supreme Court of California

February 2, 1976.

SUMMARY

In computing benefits under Lab. Code, § 4658, for a worker who had a 58 percent permanent disability of which 33.75 percent was industrially caused, the Workers' Compensation Appeals Board awarded the applicant the number of weeks of compensation set forth in that statute for a 33.75 percent permanent disability.

The Supreme Court affirmed, holding that the board properly computed the benefits due the employee. The court first noted that the 1972 amendments to Lab. Code, § 4658, applicable in the case before it, had changed the method of computing benefits to be awarded for a worker's permanent disability from four weeks for each percentage point of disability to a system whereby the number of weekly benefits to be awarded increases exponentially in proportion to the percentage of the disability. It then rejected a formula urged by the employee under which the 58 percent permanent disability would be converted into its monetary equivalent, from which would be subtracted the dollar value of the percentage of noncompensable, nonindustrial disability, and which would result in a substantially larger award. The court held that Lab. Code, § 4750, which requires that compensation for a subsequent injury be computed "as though no prior disability or impairment had existed," is to be construed as a specific rule limiting the benefits available under § 4658, in those cases in which the employee has a preexisting permanent disability and thereafter sustains a further permanent injury, and that, under such construction, the statutes are complementary, not contradictory, and function together harmoniously, thus serving the twin goals of providing proportionately greater benefits for more serious injuries while at the same time protecting employers from bearing a disproportionate *2 share of a financial burden resulting from cumulative injuries. Even assuming a conflict, the court further held, the specific section would prevail over the general.

In Bank. (Opinion by Richardson, J., with Wright, C. J., McComb, Sullivan and Clark, JJ., concurring. Separate dissenting opinion by Mosk, J., with Tobriner, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c) Workers' Compensation § 109--Compensation and Benefits Recoverable--To Employee--Computation of Benefits for Industrially Related Portion of Permanent Disability.
In computing benefits under Lab. Code, § 4658, for a worker who had a 58 percent permanent disability of which 33.75 percent was industrially caused, the Workers' Compensation Appeals Board correctly awarded the applicant the number of weeks of compensation set forth in that statute for a 33.75 percent permanent disability, rather than employing other suggested formulas involving use of the number of weeks applicable to the 58 percent permanent disability, which would result in an enhancement of benefits due to the existence of the nonindustrially caused physical impairment. Lab. Code, § 4750, which requires that compensation for a subsequent injury be computed "as though no prior disability or impairment had existed," was enacted to encourage employers to hire physically handicapped persons, and it is to be construed as a specific statute limiting the general permanent disability benefit provisions of § 4658, to industrially caused disabilities. Under that construction the two statutes are in harmony but, even assuming a conflict, the specific provision prevails over the general.

[See Cal.Jur.2d, Workmen's Compensation, § 152; Am.Jur., Workmen's Compensation, § 296.]

(2) Statutes § 16--Repeal--By Implication.
Statutory repeals by implication are not favored and are recognized only when there is no rational basis for harmonizing two potentially conflicting laws. It must be assumed that the Legislature, when passing a statute, is aware of existing related laws and intends to maintain a consistent body of rules. *3

(3) Statutes § 48--Construction--Reference to Other Laws--Reconciling Statutes.
Whenever possible, a court must reconcile statutes and seek to avoid interpretations which would require it to ignore one statute or the other, and the rule giving precedence to the later statute is invoked only if the two cannot be harmonized.

(4) Workers' Compensation § 5--Constitutionality of Statutes--Liberal Construction.
The policy expressed in Lab. Code, § 3202, of liberal construction of the Workers' Compensation Act in favor of injured employees cannot supplant the intent of the Legislature as expressed in a particular statute.

COUNSEL

Levy, Van Bourg & Hackler, Van Bourg, Allen, Weinberg, Williams & Roger and Barry J. Williams for Petitioner.

Barry Satzman as Amicus Curiae on behalf of Petitioner.

T. Groezinger, James J. Vonk, George S. Bjornsen, Robert A. LaPorta, Hanna & Brophy, Hogen J. Kallemeyn, Warren Hanna, Mullen & Filippi, Charles F. Lee and Adolph J. Capurro for Respondents.

RICHARDSON, J.

Petitioner seeks review of an award by the Workers' Compensation Appeals Board (the Board). We consider and resolve certain conflicts which have arisen over the appropriate method of determining the extent of an employer's liability for an employee's industrial injury resulting in permanent disability in those cases in which a portion of the over-all disability is attributable to a preexisting injury. In particular, we are here concerned with the interpretation and effect of amendments to Labor Code section 4658 which became effective April 1, 1972. (Unless otherwise indicated, all references are to the Labor Code.)

The facts are not disputed. While working for a number of employers over a 32- year period (1940-1972) petitioner sustained cumulative injury *4 to his lungs resulting in an over-all permanent disability rating of 58 percent. One-half of this disability was found by the referee to be industrially related, one-quarter (25 percent) was the result of cigarette smoking, and the final one-quarter (25 percent) due to nonindustrial causes. Of the 25 percent attributable to cigarette smoking, one-third (8.33 percent of over-all disability) was found to have been incurred in the course of "on-the-job" smoking and is accordingly compensable. Thus, of the total 58 percent disability, approximately 33.75 percent (58 percent X 58.33 percent) was industrially related. The remaining 24.25 percent was attributable to other factors, and being nonindustrial in origin is not compensable. (§ 3600.) There is no disagreement among the parties as to the accuracy of these findings.

Under former law, the compensation due petitioner in such a case was easily calculated. Section 4658, as it read prior to April 1, 1972, provided that, for each percentage point of permanent disability which was of industrial origin, an injured worker was entitled to four weeks of compensation. (Stats. 1949, ch. 1583, p. 2833.) In petitioner's situation, this would have meant an award of 135 weeks (4 X 33.75 percent). However, in 1971 the Legislature amended section 4658, establishing a different method for computing the number of weekly benefits to be awarded. Under the new statute, which is applicable to the instant case, the number of weekly benefits increases exponentially in proportion to the percentage of the disability. The following table of selected comparisons utilized by the Court of Appeal illustrates the effect of this change.

Percentage of worker's permanent disability	Number of weekly benefits under § 4658, 1949-1972	Number of weekly benefits under § 4658 as effective 1972
10	40	30.25

24.25	97	91.75
33.75	135	143.25
40	160	180.75
50	200	241
58	236	297
70	280	381.25
80	320	461.25
90	360	541.25

Difficulties in applying the amended law have arisen in cases where, as here, only a portion of the overall disability has industrial origins. In *5 such circumstances, the award is affected by the force of section 4750, which statute reads in full: "An employee who is suffering from a previous permanent disability or physical impairment and sustains permanent injury thereafter shall not receive from the employer compensation for the later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with or in relation to the previous disability or impairment. [¶] The employer shall not be liable for compensation to such an employee for the combined disability, but only for that portion due to the later injury as though no prior disability or impairment had existed." The frequently expressed policy behind this section is that it will encourage employers to hire the handicapped.

The parties have suggested that in computing the number of weekly benefits to which petitioner is entitled under the new section 4658 there are three possible methods which may be utilized, described for the sake of convenience, as formulas A, B, and C. Under former section 4658 the compensation was the same regardless of which formula was applied. However, as a result of the 1971 amendments substantial differences ensue in the amount awarded a claimant depending on which formula is utilized.

Under formula A, adopted by the Board in petitioner's case, there is subtracted from the total disability that portion which is nonindustrial, the remainder being the amount of compensable disability. Thus in the matter before us 24.25 percent, representing nonindustrial origin, is deducted from the 58 percent total disability with a net compensable disability of 33.75 percent. Under the schedule established by section 4658, subdivision (a), this entitled petitioner to 143.25 weekly benefits which may be converted in terms of dollars to an award of $10,027.50.

Formula B contemplates, first, determination of the number of statutory weekly benefits authorized under section 4658 for a 58 percent disability, namely, 297. This figure is then multiplied by the percentage of industrially related disability (58.33). The product is 173.25 weeks, which results in a total monetary award of $12,127.50.

Petitioner urges adoption of formula C, under which the 58 percent permanent disability is converted into its monetary equivalent of $20,790. From this figure is subtracted the dollar value (§ 6,422.50) of the 24.25 percent of the noncompensable, nonindustrial disability. The result is an award of $14,367.50, or the equivalent of 205.25 weekly benefits. *6

(1a) We have concluded that formula A is the proper one, and accordingly affirm the decision of the Board.

In our view this result is required by the express and unequivocal language of section 4750, *supra*. As we have previously noted, the purpose of that statute is to encourage employers to hire physically handicapped persons. The Legislature recognized that employers might refrain from engaging the services of the handicapped if, upon subsequent injury, an employer was required to compensate the employee for an aggregate disability which included a previous injury. (*Hegglin v. Workmen's Comp. App. Bd.* (1971) 4 Cal.3d 162, 173 [93 Cal.Rptr. 15, 480 P.2d 967]; *State Compensation Ins. Fund v. Industrial Acc. Com. (Hutchinson)* (1963) 59 Cal.2d 45, 49 [27 Cal.Rptr. 702, 377 P.2d 902].) In enacting section 4750, the Legislature has expressed a clear intent that the liability of one who employs a previously disabled worker shall, in the event of a subsequent injury, be limited to that percentage of the over-all disability resulting from the later harm considered alone and as if it were the original injury. The principle has been expressed that "... [I]ndustry is to be charged only for those injuries arising out of and in the course of employment and only for the result of that particular injury when considered by itself and not in conjunction with or in relation to a previous injury." (*Gardner v. Industrial Acc. Com.* (1938) 28 Cal.App.2d

682, 684 [83 P.2d 295].)

Bearing in mind the beneficent public policy which prompted adoption of section 4750, as affirmed in *Heggiln* and *Hutchinson*, we conclude that only formula A results in an award complying with the provisions of section 4750. Petitioner has suffered a compensable disability of 33.75 percent. Under formula B, however, he would receive an award which, under the rates provided for in section 4658, subdivision (a), is equivalent to the amount given for a disability carrying a rating of approximately 39 percent. Application of formula C results in a recovery which is the same as that authorized by section 4658, subdivision (a), for a rating of 44 percent. This arithmetic leads to the inevitable conclusion that neither method B nor C can be reconciled with the mandate of section 4750 that the compensation for a subsequent injury be computed "as though no prior disability or impairment had existed." On the contrary, B and C result in an enhancement of the benefits due to the existence of a preexisting physical impairment.

The application of either formula B or C would require us to discern an intent on the part of the Legislature that the 1971 amendments to *7 section 4658 function so as to effect a repeal or at least a partial repeal of section 4750. Generally, we will not presume the existence of such an intent in the absence of an express declaration. (*Ramos v. City of Santa Clara* (1973) 35 Cal.App.3d 93, 97 [110 Cal.Rptr. 485].) (2) Repeals by implication are not favored, and are recognized only when there is no rational basis for harmonizing two potentially conflicting laws. (*In re White* (1969) 1 Cal.3d 207, 212 [81 Cal.Rptr. 780, 460 P.2d 980].) Furthermore, we must assume that when passing a statute the Legislature is aware of existing related laws and intends to maintain a consistent body of rules. (*Estate of Simpson* (1954) 43 Cal.2d 594, 600 [275 P.2d 467, 47 A.L.R.2d 991]; *American Friends Service Committee v. Procunier* (1973) 33 Cal.App.3d 252 [109 Cal.Rptr. 22], hg. den.) In *Theodor v. Superior Court* (1972) 8 Cal.3d 77, 92 [104 Cal.Rptr. 226, 501 P.2d 234], we spoke "... of the policy that it should not be presumed that the Legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication."

(1b) Petitioner contends that there is an irreconcilable conflict between the legislative intent to increase workers' compensation benefits as manifested by section 4658, on the one hand, and the limiting effect of section 4750 on the other. This conflict, it is argued, invokes the familiar rules of statutory construction requiring that we give effect to the more recently enacted law. (See *City of Petaluma v. Pac. Tel. & Tel. Co.* (1955) 44 Cal.2d 284, 288 [282 P.2d 43]; *Rees v. Layton* (1970) 6 Cal.App.3d 815, 821 [86 Cal.Rptr. 268].) (3) Whenever possible, however, we must reconcile statutes and seek to avoid interpretations which would require us to ignore one statute or the other (see *In re White, supra*, 1 Cal.3d 207 at p. 212), and the rule giving precedence to the later statute is invoked only if the two cannot be harmonized. (*Rees v. Layton, supra.*) (1c) This is not such a case.

Section 4658 may be considered as a general provision establishing the amount of compensation benefits for a permanent disability, and section 4750 may be viewed as a specific rule limiting the benefits available in those cases where the employee has a preexisting permanent disability and thereafter sustains a further permanent injury. When so construed the statutes in question are complementary, not contradictory, and function together quite harmoniously, thus, serving the twin goals of providing proportionately greater benefits for more serious injuries while at the same time protecting employers from bearing a disproportionate share of a financial burden resulting from cumulative injuries. Even *8 assuming, however, that a conflict exists, an equally familiar rule of statutory construction requires the more specific section 4750 to prevail over section 4658, the more general law applicable to the same subject (*In re James M.* (1973) 9 Cal.3d 517, 522 [108 Cal.Rptr. 89, 510 P.2d 33]; *Simpson v. Cranston* (1961) 56 Cal.2d 63, 69 [13 Cal.Rptr. 668, 362 P.2d 492]), and petitioner's recovery must be limited in accord with the provisions of section 4750.

(4) In urging the adoption of formula C, petitioner relies heavily on Labor Code section 3202, the so-called "liberality rule," which reads: "The provisions of Division 4 and Division 5 of this code shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment." However, the policy underlying section 3202 cannot supplant the intent of the Legislature as expressed in a particular statute. (*Ruiz v. Industrial Acc. Com.* (1955) 45 Cal.2d 409, 413 [289 P.2d 229].) Where, as here, the relevant statutes may be reconciled, their provisions cannot be disregarded. This is so, as we said 40 years ago, even though the particular statutory language "is contrary to the basic policy of the statute." (See *Earl Ranch, Ltd. v. Industrial Acc. Com.* (1935) 4 Cal.2d 767, 769 [53 P.2d 154].) The fact that the workers' compensation laws are to be liberally construed "... does not mean that the legislative mandate of section 4750 is to be ignored." (*Wolski v. Industrial Acc. Com.* (1945) 70 Cal.App.2d 427, 431-432 [161 P.2d

283).)

As petitioner correctly observes, under formula A adopted by the Board a worker who suffers a single injury resulting in, for example, a disability rating of 50 percent, will receive greater benefits than one who sustains two successive injuries each of which causes a permanent disability of 25 percent when considered alone. This result, however, is neither unjust nor unfair, petitioner's arguments to the contrary notwithstanding. Rather, it is a consequence of the recent amendments to section 4658 and is consistent with the previously noted policy of encouraging employers to hire the disabled. There being no evidence to the contrary, this court must assume that such a result was contemplated by the Legislature.

By applying formula A we give effect, as we must to the express and unambiguous language of section 4750. It follows, accordingly, that the Board properly computed the benefits due petitioner and the award is affirmed.

Wright, C. J., McComb, J., Sullivan, J., and Clark, J., concurred. *9

MOSK, J.

I dissent.

Although only one physical impairment was involved here, and the permanent disability is 58 percent and not the 70 percent required to invoke provisions of the Subsequent Injuries Fund (Lab. Code, §§ 4751-4755), the principle established by the majority undoubtedly would, in an appropriate subsequent injuries case, result in shifting an added portion of the burden of compensation from the employer's insurance carrier to the taxpayers of the state. This we should be reluctant to do unless compelled by statute, and I find the statutory construction employed by the majority to be far short of compelling.

Instead of solving the instant problem by using Labor Code sections 4663 and 4750 as the start and finish of our analysis, the method adopted by the board and the majority, it would seem more logical, as it did to the referee, to refer primarily to the Legislature's *latest* word on the subject: the 1972 and 1974 amendments to section 4658. We should give effect to the most recent legislative intent, except as it may be prohibited by prior unrepealed law.

When that approach is used, I reach the same conclusion as that of Acting Presiding Justice Sims of the Court of Appeal. Thus I adopt his views on this case as my dissent, omitting for editorial convenience his initial paragraph.

Reference to the amended section reveals that the Legislature intended that a person who suffers a disability of 58 percent should receive compensation of $20,790 payable at the rate of $70 per week for 297 weeks. If a nonsmoker suffered from solely industrial causes the same lung injuries which were found to have permanently disabled the petitioner as of May 10, 1972, the revised compensation in the foregoing amount represents the Legislature's view of what would be fair compensation. In the instant case it has been determined by stipulation and by rulings on the stipulated facts that of the total permanent disability rated at 58 percent, 24.17 (rounded to 24.25) percent was not, and 33.83 (rounded to 33.75) percent was, industrially caused. It, therefore, would appear reasonable to conclude that of the total indemnity contemplated by the Legislature, that sum should be paid which is the equivalent of the percentage of disability which was industrially covered, or 58.33 percent (33.83/58.00). This produces compensation of $12,126.81, or a sum the equivalent of the $12,127.50 which the referee awarded by finding permanent disability of 38.75 percent which called for 173.25 weekly payments of $70, for a total of $12,127.50. *10

The respondents contend that it is improper to compute the compensation in the foregoing manner because traditionally it has been the practice to deduct the percentage of nonindustrially related permanent disability from the total disability and then compute the compensation for the remaining percentage of permanent disability. [FN1] That practice worked equitably under a system of compensation which merely progressed arithmetically with the percentage of disability. The fact that it is not equitable under a system where the rate of compensation increases with the severity of the disability is sufficient to warrant its rejection under the new rates. To apply the pre-1972 formula would deprive the employee of a proportion of the compensation which the Legislature intended for a worker suffering permanent disability to the total extent of that incurred by petitioner. To award the top bracket as all industrially caused, as contended for by the petitioner, would unduly enrich him at the expense of the employer or its insurer. The solution selected by the referee does justice to both.

FN1 See *State Compensation Ins. Fund v. Industrial Acc. Com. (Hutchinson)* (1963) 59 Cal.2d 45, 50-54 [27 Cal.Rptr. 702, 377 P.2d 902]; *Subsequent Injuries Fund v. Ind. Acc. Com. (Harris)* (1955) 44 Cal.2d 604, 609 [283 P.2d 1039]; *Edson v. Industrial Acc. Com.* (1928) 206 Cal. 134, 139-140 [273 P. 572]; *Ford Motor Co. v. Industrial Acc. Com.* (1927) 202 Cal. 459, 463-464 [262 P. 466]; *Subsequent Injuries Fund v. Workmen's Comp. Appeals Bd.* (1974) 40 Cal.App.3d 403, 409 [115 Cal.Rptr. 204]; *Avila v. Workmen's Comp. App. Bd.* (1970) 14 Cal.App.3d 33, 39 [91 Cal.Rptr. 853]; *Truck Ins. Exch. v. Industrial Acc. Com.* (1965) 235 Cal.App.2d 207, 209-211 [45 Cal.Rptr. 178]; *Pacific Gas & Elec. Co. v. Ind. Acc. Com.* (1954) 126 Cal.App.2d 554, 556-557 [272 P.2d 818]; *Wolski v. Industrial Acc. Com.* (1945) 70 Cal.App.2d 427, 428-432 [161 P.2d 283]; and *Gardner v. Industrial Acc. Com.* (1938) 28 Cal.App.2d 682, 684 [83 P.2d 295].

It is contended that the provisions of sections 4663 and 4750 of the Labor Code require that the percentage of nonindustrial related disability be first subtracted from the percentages of total permanent disability before computing the award. These sections [FN2] refer to "compensation." It may be noted that "the proportion of the disability due to the aggravation of such prior disease which is reasonably attributed to the injury" as referred to in section 4663, is, as we have seen above, 58.33 *11 percent of the 58 percent disability. The formula proposed in this opinion does not purport to give more than 58.33 percent of the compensation for a 58 percent disability under the tables as amended effective April 1, 1972.

FN2 Section 4663 provides: "In case of aggravation of any disease existing prior to a compensable injury, compensation shall be allowed only for the proportion of the disability due to the aggravation of such prior disease which is reasonably attributed to the injury."
Section 4750 provides: "An employee who is suffering from a previous permanent disability or physical impairment and sustains permanent injury thereafter shall not receive from the employer compensation for the later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with or in relation to the previous disability or impairment. [¶] The employer shall not be liable for compensation to such an employee for the combined disability, but only for that portion due to the later injury as though no prior disability or impairment had existed."

Section 4750 has more stringent requirements. In the first paragraph it prohibits "compensation for the later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with or in relation to the previous disability or impairment." The second paragraph reiterates, "The employer shall not be liable for compensation to such an employee for the combined disability, but only for that portion due to the later injury as though no prior disability or impairment had existed." Read by themselves the provisions of this section appear to unalterably prohibit consideration of that portion of petitioner's disability which is not related to the industrially related injury for which he seeks compensation; 58.33 percent of his total 58 percent disability, or a disability of 33.83 percent, should be considered and the balance would be completely disregarded in determining the compensation.

Section 4750 relates to subsequent injuries. (See §§ 4750-4755.) Therefore it is questionable whether it is properly applicable to the situation here where only one physical impairment has resulted from compensable and noncompensable causes. [FN3] In any event if it is applied literally to the progressive rates it would defeat the intent of the Legislature. In this case for example it is stipulated that the compensable industrial injury occurred over a period of a little over 20 years with varying periods of exposure for each of five carriers. The carriers jointly are apparently reluctantly prepared to assume a collective liability for the compensation payable for 33.75 percent permanent disability at the revised rates in the sum of $10,027.50. Logically, however, if each had represented a separate employer who in turn had taken the employee *12 with the injury suffered under the prior exposure, the sum of each exposure would not equal the total compensation provided for an industrial injury by the graduated rates. (E.g., if the employee had worked four years for each of five employers, each could claim a liability limited to 12 weeks, or $40, and the aggregate would be $4,200, rather than $10,027.50 contemplated by the Legislature.) Of course the exposure cannot be so split by having different carriers for the same employer. The record does show, however, that after working 182 months for one employer, the petitioner worked 54 months for another, and then returned to his original employer for the 8 months preceding his injury. Should the compensation be that for 33.75 percent disability, or, if section 4750 is applied literally, the sum of several fractional parts of 33.75 percent measured by the ratios of 182/244, 54/244 and 8/244?

FN3 See *State Compensation Ins. Fund, v. Industrial Acc. Com. (Hutchinson) supra*, 59 Cal.2d 45, 50-53; and

> *Subsequent Injuries Fund v. Ind. Acc. Com. (Harris) supra*, 44 Cal.2d 604, 608. In the former case, the court after reviewing the earlier case, stated: "Were section 4663 applicable it appears from the above case that the proper apportionment method then is to determine the combined disability and then assign a proportion thereof to the prior and subsequent disabilities to obtain a percentage disability attributable to each. Here, however, section 4750 applies and for the reasons discussed above this figure should be obtained by applying the method of apportionment used in the *Gardner* [*Gardner v. Industrial Acc. Com., supra*, 28 Cal.App.2d 682] case." (59 Cal.2d at p. 56; see also *Hegglin v. Workmen's Comp. App. Bd.* (1971) 4 Cal.3d 162, 173-174 [93 Cal.Rptr. 15, 480 P.2d 967]; and *Granado v. Workmen's Comp. App. Bd.* (1968) 69 Cal.2d 399, 402 [71 Cal.Rptr. 678, 445 P.2d 294].)

In applying the provisions of article 5 (§§ 4750-4755) the employee should be entitled to the full compensation provided by section 4658 when a prior industrial condition is involved. It is unnecessary to determine in these proceedings if, when there are disrelated physical impairments, the formula proposed herein should be used to apportion the total compensation, or whether, in appropriate cases the subsequent injuries fund should bear the full burden of the increased rates. (See *State Compensation Ins. Fund v. Industrial Acc. Com. (Hutchinson) supra*, 59 Cal.2d 45, 52; *Subsequent Injuries Fund v. Ind. Acc. Com. (Harris) supra*, 44 Cal.2d 604, 609-610; and *Subsequent Injuries Fund v. Workmen's Comp. Appeals Bd.* (1974) 40 Cal.App.3d 403, 409-410 [115 Cal.Rptr. 204].) Where, as here, there is but one impairment, the formula applied by the referee and approved herein would equitably apportion the total compensation for the total resultant permanent disability between the last employer and those who preceded him. It is concluded that the legislative intent to increase the rate of compensation can only be implemented by applying a factor determined from the proper graduated rate to the total portion of the last industrially related portion of the total permanent disability as was done by the referee.

It is contended that the construction adopted in this opinion will thwart the recognized intent of the provisions of sections 4663 and 4750 to encourage the employment of the partially disabled. [FN4] If one concludes *13 that the last employer is called upon to pay more than a fair share of the higher rate, such is the case. As pointed out in the majority opinion if the compensation equivalent to that for the percentage of the nonindustrial connected disability is taken off the bottom, as urged by petitioner, the employee would get a considerable windfall and the employer a commensurate penalty. It may also be urged that to require an employer to pay the equivalent of compensation for a rated 38.75 percent disability when the employment has only contributed the disability to a rated amount of 33.83 percent will discourage the employment of the partially disabled. The Legislature in increasing the rates on a graduated scale may be deemed to have had this effect in mind and to that extent has acted to deter the employment of the partially disabled. In return, by its latest enactment it increased the compensation for all who are disabled as a result of industrially related causes.

> FN4 In *State Compensation Ins. Fund v. Industrial Acc. Com. (Hutchinson) supra*, 59 Cal.2d 45, the court observed, "The purpose of this statutory provision [§ 4750] is to encourage the employment of physically disabled persons by assuring an employer that he will not be liable for the total combined disability present after an industrial injury, but only for that portion which is attributable to the subsequent industrial injury. [Citations.]" (59 Cal.2d at p. 49; see also *Hegglin v. Workmen's Comp. App. Bd., supra*, 4 Cal.3d 162, 173 [93 Cal.Rptr. 15, 480 P.2d 967]; *Jones v. Workmen's Comp. App. Bd.* (1968) 267 Cal.App.2d 302, 305 [72 Cal.Rptr. 766]; and *Wolski v. Industrial Acc. Com., supra*, 70 Cal.App.2d 427, 432.)

I would annul the decision of the appeals board and remand the case with instructions to reinstate the award made by the referee.

Tobriner, J., concurred. *14

Cal.,1976.

Fuentes v. Workers' Compensation Appeals Bd.

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