Hearing Date: January 29, 2004
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ITEM 5
TEST CLAIM
FINAL STAFF ANALYSIS

Penal Code Section 148.6

Statutes 1995, Chapter 590
Statutes 1996, Chapter 586
Statutes 2000, Chapter 289

False Reports of Police Misconduct (K-14) (02-TC-09)

Santa Monica Community College District, Claimant

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EXECUTIVE SUMMARY

Background

On July 5, 2001, the Commission received a test claim filing on behalf of claimant, County of San Bernardino, entitled *False Reports of Police Misconduct* (00-TC-26). On September 16, 2002, the Commission received a test claim filing, *False Reports of Police Misconduct, K-14* (02-TC-09), on behalf of claimant Santa Monica Community College District. Both test claims allege a reimbursable state-mandated program for compliance with Penal Code section 148.6, specifying that any law enforcement agency accepting an allegation of peace officer misconduct is to require the complainant to read and sign a specific advisory. Although the same statutory provisions are involved, these two test claims were not consolidated due to different threshold issues on the applicability of the California Constitution, article XIII B, section 6.

Department of Finance, in comments received October 24, 2002, concluded that although the test claim legislation "may result in additional costs to school districts, those costs are not reimbursable." This conclusion is based in part on the observation that the establishment of school police departments is undertaken at the discretion of the governing board of a district, thus any costs imposed on a district as a result of employing peace officers are not reimbursable.

Particularly in light of the California Supreme Court's decision in *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, in conjunction with the discretionary nature of the Education Code provisions permitting, but not requiring school districts to form police departments, Commission staff agrees with DOF's conclusions. Staff finds that pursuant to state law, school districts and community college districts remain free to discontinue providing their own police department and employing peace officers. Any statutory duties imposed by Penal Code section 148.6 that follow from such discretionary activities do not impose a reimbursable state mandate. Therefore, staff finds that the test claim legislation is not subject to article XIII B, section 6 of the California Constitution for school district peace officer employers, and school districts are not eligible claimants for the test claim statutes.

Conclusion

Staff concludes that Penal Code section 148.6, as added or amended by Statutes 1995, chapter 590, Statutes 1996, chapter 586, and Statutes 2000, chapter 289, is not subject to article XIII B, section 6 of the California Constitution in regard to this test claimant, and thus does not constitute a reimbursable state-mandated program for school districts. No legal determination is made regarding the test claim statutes as they apply to city and county peace officer employers.

Staff Recommendation

Staff recommends that the Commission adopt the final staff analysis, denying this test claim as filed on behalf of K through 14 school districts.

STAFF ANALYSIS

Claimant

Santa Monica Community College District

Chronology

09/16/02	Claimant files test claim with the Commission on State Mandates (Commission)[1]
09/20/02	Commission staff determines test claim is complete
10/21/02	Department of Finance files response to test claim
11/26/03	Commission staff issues draft staff analysis
12/29/03	Claimant files comments on draft staff analysis

Background

On July 5, 2001, the Commission received a test claim filing on behalf of claimant, County of San Bernardino, entitled *False Reports of Police Misconduct* (00-TC-26). On September 16, 2002, the Commission received a test claim filing, *False Reports of Police Misconduct, K-14* (02-TC-09), on behalf of claimant Santa Monica Community College District. Both test claims allege a reimbursable state-mandated program for compliance with Penal Code section 148.6, as added by Statutes 1995, chapter 590, and amended by Statutes 1996, chapter 586, and Statutes 2000, chapter 289. Although the same statutory provisions are involved, these two test claims were not consolidated due to different threshold issues on the applicability of the California Constitution, article XIII B, section 6. As background, the complete text of Penal Code section 148.6 follows:

> (a)(1) Every person who files any allegation of misconduct against any peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, knowing the allegation to be false, is guilty of a misdemeanor.
>
> (2) Any law enforcement agency accepting an allegation of misconduct against a peace officer shall require the complainant to read and sign the following advisory, all in boldface type:
>
> > **You have the right to make a complaint against a police officer for any improper police conduct. California law requires this agency to have a procedure to investigate citizens' complaints. You have a right to a written description of this procedure. This agency may find after investigation that there is not enough evidence to warrant action on your complaint; even if that is the case, you have the right to make the complaint and have it investigated if you believe an officer behaved improperly. Citizen complaints and any reports or findings relating to complaints must be retained by this agency for at least five years.**

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[1] Potential reimbursement period for this claim begins no earlier than July 1, 2001. (Gov. Code, § 17557, subd. (c).)

It is against the law to make a complaint that you know to be false. If you make a complaint against an officer knowing that it is false, you can be prosecuted on a misdemeanor charge.

I have read and understood the above statement.

____

Complainant

(3) The advisory shall be available in multiple languages.

(b) Every person who files a civil claim against a peace officer or a lien against his or her property, knowing the claim or lien to be false and with the intent to harass or dissuade the officer from carrying out his or her official duties, is guilty of a misdemeanor. This section applies only to claims pertaining to actions that arise in the course and scope of the peace officer's duties.

Claimant's Position

Claimant alleges that the test claim legislation requires the following reimbursable state-mandated activities:

- establish and periodically update written policies and procedures regarding the requirement to have citizens filing complaints of peace officer misconduct to sign an advisory;
- require each person making a complaint of peace officer misconduct to sign a prescribed advisory;
- transcribe the advisory and make it available in multiple languages;
- train peace officers and personnel on the district's policies and procedures for receiving complaints.

On December 29, 2003 the Commission received extensive claimant comments and case law exhibits in rebuttal to the draft staff analysis.[2] Comments will be addressed, as appropriate, in the analysis below.

State Agency's Position

Department of Finance, in comments received October 24, 2002, concluded that although the test claim legislation "may result in additional costs to school districts, those costs are not reimbursable." This conclusion is based in part on the observation that the establishment of school police departments is undertaken at the discretion of the governing board of a district, thus any costs imposed on a district as a result of employing peace officers are not reimbursable.

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[2] See Exhibit E.

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[3] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[4] "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."[5] 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.[6] 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.[7]

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.[8] 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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[3] 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."

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

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

[6] *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.)

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

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

legislation.[9] Finally, the newly required activity or increased level of service must impose costs mandated by the state.[10]

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.[11] 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."[12]

Issue 1: Is the test claim legislation subject to article XIII B, section 6 of the California Constitution for school district claimants?

As indicated above, reimbursement under article XIII B, section 6 of the California Constitution is required in the present case only if the state mandates a new program or higher level of service on school districts and community college districts. Although a school district may incur increased costs as a result of the statute, as alleged by the claimant here, increased costs alone are not determinative of the issue of whether the statute 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 or school district, do not equate to 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.[13]

For the reasons described below, staff finds that 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.

The test claim legislation provides that "[a]ny law enforcement agency accepting an allegation of misconduct against a peace officer" to require the complainant to read and sign a two-paragraph document that advises the individual of the right to make a complaint, and also describes that a misdemeanor charge may be made if a person knowingly lodges a false complaint.

But, school districts and community college districts are not required by state law to maintain a law enforcement agency or employ peace officers. Claimant asserts "a different standard [is]

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

[10] *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.

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

[12] *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.

[13] *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.

being applied to school districts and community college districts than is applied to counties and cities."[14] Staff disagrees and finds that unlike counties and cities that are required by the California Constitution to provide police protection, no such requirement exists for school districts.

Article XI, Local Government, provides for the formation of cities and counties. Section 1, Counties, states that the Legislature shall provide for an elected county sheriff, and section 5, City charter provision, specifies that city charters are to provide for the "government of the city police force."

In contrast, school districts are not required by the Constitution to employ peace officers. 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."[15] 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,"[16] the Constitution does not require school districts to operate police departments or employ peace officers 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.[17] However, there is no constitutional requirement to maintain safe schools through operating a law enforcement agency and employing peace officers independent of the public safety services provided by the cities and counties a school district serves. 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." 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.][18]

Thus, at the constitutional level, cities and counties are given local law enforcement responsibilities, while the Legislature is only permitted to authorize school districts to act in any manner that is not in conflict with the Constitution.

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[14] Claimant's comments on the draft staff analysis, dated December 24, 2003, page 28. (Exh. E.)

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

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

[17] The provision is *not* applicable to community college districts.

[18] *Leger v. Stockton Unified School Dist.* (1988) 202 Cal.App.3d 1448, 1455. (Claimant's comments on the draft staff analysis (p. 3, fn. 5) assert that this block text is not a direct quotation from *Leger*. Staff contends that the passage is accurately cited. See Exh. E, Bates page 224.)

Moreover, the Legislature does not require school districts and community college districts to employ peace officers. Pursuant to Education Code section 38000:[19]

> [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 addition, Education Code section 35021.5 states that the "governing board of a school district may establish an unpaid volunteer school police reserve officer corps to supplement a police department pursuant to section 38000."

Thus, statutory law does not require school districts and community college districts to hire police officers, security officers, or reserve officers. Therefore, forming a school district police department and employing peace officers is an entirely discretionary activity on the part of all school districts. Claimant acknowledges this point in written comments dated December 24, 2003:

> 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 who have first hand knowledge of what is necessary for their respective communities. Whether to satisfy this duty by the utilization of a school district police department or by contracting with another local agency to provide the service is a local decision based upon the historical needs of that community.[20]

Claimant's essential argument is that once a school district has decided to provide a service in a particular manner, in this case providing safe schools by operating a police department, the local determination should not be disturbed, and any mandates that then follow are reimbursable. This analysis does not comport with the case law the Commission must follow when making a mandate determination. In a 2003 California Supreme Court mandates decision, the Court found (affirming the holding in *City of Merced v. State of California* (1984) 153 Cal.App.3d 777):

> [I]f a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation

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

[20] Claimant's comments, page 26. (Exh. E.)

to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate. [Footnote omitted.]

We therefore reject claimants' assertion that merely because they participate in one or more of the various education-related funded programs here at issue, the costs they incurred in complying with program conditions have been legally compelled and hence constitute reimbursable state mandates. We instead agree with the Department of Finance, and with *City of Merced, supra,* 153 Cal.App.3d 777, that *the proper focus under a legal compulsion inquiry is upon the nature of claimants' participation in the underlying programs themselves.*[21] [Emphasis added.]

The court also 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.]

In addition, the Court found:

... As we explain *post,* part III.A.3.a., however, the underlying program statutes at issue in this case (with one possible exception--see *post,* pt. III.A.3.b.) make it clear that school districts retain the discretion not to participate in any given underlying program--and, as we explain *post,* footnote 22, the circumstance that the notice and agenda requirements of these elective programs were enacted *after* claimants first chose to participate in the programs does not make claimants' choice to continue to participate in those programs any less voluntary.[22]

Likewise, the claimant's local decision to provide its own police department and thus requiring itself to comply with both prior and later-enacted laws impacting the operation of law enforcement agencies does not make compliance with those laws *reimbursable* state mandates.

The decision of the California Supreme Court interpreting the issue of voluntary or compelled underlying programs is highly relevant to this test claim. However, claimant argues *Department of Finance* "was limited by the court to the facts presented."[23] Staff disagrees and finds that the Commission is not free to disregard clear statements of the California Supreme Court on the grounds that they are dicta. In *Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1168–1169, the court explains why even a footnote from a California Supreme Court decision cannot be dismissed as dicta:

The prosecution brushes aside the above language as dicta and an incorrect statement of the law. ¶ ... ¶ Mr. Witkin has summarized the distinction between

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

[22] *Id.* at page 743, footnote 12.

[23] Claimant's comments, page 35. (Exh. E.)

the holding of a case and dictum as follows: "The *ratio decidendi* is the principle or rule which constitutes the ground of the decision, and it is this principle or rule which has the effect of a precedent. It is therefore necessary to read the language of an opinion in the light of its facts and the issues raised, to determine (a) which statements of law were necessary to the decision, and therefore binding precedent, and (b) which were arguments and general observations, unnecessary to the decision, i.e., dicta, with no force as precedents. (Citations.)" (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 783, pp. 753; see also *Trope v. Katz* (1995) 11 Cal.4th 274, 287, 45 Cal.Rptr.2d 241, 902 P.2d 259.)

Footnote 14 of *Izazaga* must be read in connection to the text to which it is appended. ... Footnote 14 cannot reasonably be construed as being unnecessary to the *Izazaga* opinion.

Thus, the ruling of respondent court violates the well-known rule articulated in *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937. The Court of Appeal, the appellate department of the superior court, and the trial courts are required to follow the "statements of law" of the California Supreme Court. These "statements of law" "... must be applied wherever the facts of a case are not fairly distinguishable from the facts of the case in which ... [the California Supreme Court has] declared the applicable principle of law." (*People v. Triggs* (1973) 8 Cal.3d 884, 106 Cal.Rptr. 408, 506 P.2d 232, 891.)

"*Even if properly characterized as dictum, statements of the Supreme Court should be considered persuasive.* (Citation.)" (*United Steelworkers of America v. Board of Education* (1984) 162 Cal.App.3d 823, 835, 209 Cal.Rptr. 16.) Twenty years ago, Presiding Justice Otto M. Kaus gave some sage advice to trial judges and intermediate appellate court justices: *Generally speaking, follow dicta from the California Supreme Court.* (*People v. Trice* (1977) 75 Cal.App.3d 984, 987, 143 Cal.Rptr. 730.) That was good advice then and good advice now. Unfortunately, this advice was lost upon respondent court. [Emphasis added.]

When the Supreme Court has conducted a thorough analysis of the issues or reflects compelling logic, its dictum should be followed. (*United Steelworkers of America v. Board of Education, supra*, 162 Cal.App.3d at p. 835, 209 Cal.Rptr. 16.) The language of footnote 14 in *Izazaga* was carefully drafted. It was not "... inadvertent, ill-considered or a matter lightly to be disregarded." (*Jaramillo v. State of California* (1978) 81 Cal.App.3d 968, 971, 146 Cal.Rptr. 823; see also *In re Brittany M.* (1993) 19 Cal.App.4th 1396, 1403, 24 Cal.Rptr.2d 57.)

In *Department of Finance*, the Court stated:

> We conclude, contrary to the Court of Appeal, that claimants are not entitled to reimbursement under the circumstances presented here. *Our conclusion is based on the following determinations*: First, *we 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 the* notice and agenda *provisions are mandatory elements of* education-related *programs in which claimants have participated, without regard to whether a*

> *claimant's participation in the underlying program is voluntary or compelled.* Second, we conclude that as to eight of the nine underlying funded programs here at issue, claimants have not been legally compelled to participate in those programs, and hence cannot establish a reimbursable state mandate as to those programs based upon a theory of legal compulsion.[24] [Emphasis added.]

Thus, the Court's statements regarding discretion and legal compulsion in finding a reimbursable state-mandated program cannot be dicta, because the conclusion is premised on those assessments. And, as established in *Hubbard*, even if language is properly characterized as dicta, statements of the California Supreme Court are persuasive and should be followed.

Claimant also argues that the controlling case law is the decision in *City of Sacramento v. State of California* (1990) 50 Cal.3d 51.[25] In *Department of Finance*, the California Supreme Court, when considering the practical compulsion argument raised by the school districts, reviewed its earlier decision in *City of Sacramento*.[26] The *City of Sacramento* case involved test claim legislation that extended mandatory coverage under the state's unemployment insurance law to include state and local governments and nonprofit corporations. The state legislation was enacted to conform to a 1976 amendment to the Federal Unemployment Tax Act, which required for the first time that a "certified" state plan include unemployment coverage of employees of public agencies. States that did not comply with the federal amendment faced a loss of a federal tax credit and an administrative subsidy.[27] The local agencies, knowing that federally mandated costs are not eligible for state subvention, argued against a federal mandate. The local agencies contended that article XIII B, section 9 requires clear legal compulsion not present in the Federal Unemployment Tax Act.[28] The state, on the other hand, contended that California's failure to comply with the federal "carrot and stick" scheme was so substantial that the state had no realistic "discretion" to refuse. Thus, the state contended that the test claim statute merely implemented a federal mandate and that article XIII B, section 9 does not require strict legal compulsion to apply.[29]

The Supreme Court in *City of Sacramento* concluded that although local agencies were not strictly compelled to comply with the test claim legislation, the legislation constituted a federal mandate. The Supreme Court concluded 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.[30]

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[24] *Department of Finance v. Commission on State Mandates, supra*, 30 Cal.4th at page 731.

[25] Claimant's comments, pages 32-34. (Exh. E.)

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

[27] *City of Sacramento, supra*, 50 Cal.3d at pages 57-58.

[28] *Id.* at page 71.

[29] *Ibid.*

[30] *Id.* at pages 73-76.

The California Supreme Court applied the same analysis in the *Department of Finance* case and found that the practical compulsion finding for a state mandate requires a showing of "certain and severe penalties" such as "double taxation" and other "draconian" consequences. The Court stated the following:

> Even assuming, for purposes of analysis only, that our construction of the term "federal mandate" in *City of Sacramento* [citation omitted], applies equally in the context of article XIII B, section 6, for reasons set below we conclude that, contrary to the situation we described in that case, claimants here have not faced "certain and severe ... penalties" such as "double ... taxation" and other "draconian" consequences . . .[31]

Staff finds that there is no evidence of "certain and severe penalties" or other "draconian" consequences here. Requiring those community college and K-12 school districts operating police departments on their campuses to either discontinue their historical practice or to absorb the costs of complying with the new Penal Code statute does not in and of itself impose the kind of "certain and severe penalties" described by the California Supreme Court. Nor does claimant provide adequate evidence that those districts that have opted to operate their own law enforcement agencies are practically compelled to continue to do so in order to provide safe schools.

Thus, pursuant to statutory law, school districts and community college districts are neither legally compelled to initially form their own police departments, nor to continue to provide their own police departments and employ peace officers. That decision is solely a local decision. Pursuant to the California Supreme Court, any statutory duties imposed by Penal Code section 148.6 that follow from such voluntary underlying activities do not impose a reimbursable state mandate. In conclusion, the test claim legislation is not subject to article XIII B, section 6 of the California Constitution for school district peace officer employers, and school districts are not eligible claimants for the test claim statutes.

Prior Commission Decisions

Claimant also argues that the Commission has previously approved reimbursement for school peace officers, and to change now would be "arbitrary and unreasonable," citing a list of mandate claims: *Peace Officer Procedural Bill of Rights* (CSM-4499, decision adopted Nov. 30, 1999); *Threats Against Peace Officers* (CSM-96-365-02, Apr. 24, 1997); *Health Benefits for Peace Officers' Survivors* (97-TC-25, Oct. 26, 2000); *Law Enforcement Sexual Harassment Training* (97-TC-07, Sept. 28, 2000); *Photographic Record of Evidence* (98-TC-07, Oct. 26, 2000); *Law Enforcement College Jurisdiction Agreements* (98-TC-20, Apr. 26, 2001); and *Sex Offenders: Disclosure by Law Enforcement Officers* (97-TC-15, Aug. 23, 2001.)[32]

Preliminarily, staff notes that the Commission only specifically referenced school districts as eligible claimants in three of the seven Statements of Decision named by claimant.[33] In the remainder, the determination that school districts were eligible claimants was made in the

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[31] *Department of Finance, supra*, 30 Cal.4th at page 751.

[32] Claimant comments, pages 29-31. (Exh. E.)

[33] CSM-4499, CSM-96-365-02 and 98-TC-20.

parameters and guidelines and was not supported by any legal analysis or conclusion in the respective Statements of Decision.

Regardless, prior Commission decisions are not controlling in this case. Since 1953, the California Supreme Court has held 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. (*Weiss v. State Board of Equalization* (1953) 40 Cal.2d 772.) In *Weiss*, the plaintiffs brought mandamus proceedings to review the refusal of the State Board of Equalization to issue them 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. (*Id.* at 776.)

In 1989, an Attorney General's opinion, citing the *Weiss* case, agreed 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]." (72 Ops.Cal.Atty.Gen. 173, 178, fn. 2 (1989).)

Thus, prior Commission decisions are not controlling here. Rather, the merits of each test claim 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. (*City of San Jose, supra,* 45 Cal.App.4th at pages 1816-1817; *County of Sonoma, supra,* 84 Cal.App.4th at pages 1280-1281.) The analysis in this test claim complies with these principles, particularly when recognizing the recent California Supreme Court statements on the issue of voluntary versus compulsory programs that the Commission must now follow. Claimant correctly asserts that the Commission must have a rational or compelling reason for deviating from prior decisions. Following controlling case law is such a reason. In addition, the Commission followed this same analysis in its most recent decision regarding the issue of school districts as eligible claimants for peace officer test claims.[34]

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[34] The Statement of Decision on *Peace Officer Personnel Records: Unfounded Complaints and Discovery* (00-TC-24, 00-TC-25, 02-TC-07, 02-TC-08) was adopted on September 25, 2003. This decision denied reimbursement for two test claims on behalf of school district peace officer employers filed by Santa Monica Community College District.

CONCLUSION

Staff concludes that Penal Code section 148.6, as added or amended by Statutes 1995, chapter 590, Statutes 1996, chapter 586, and Statutes 2000, chapter 289, is not subject to article XIII B, section 6 of the California Constitution in regard to this test claimant, and thus does not constitute a reimbursable state-mandated program for school districts. No legal determination is made regarding the test claim statutes as they apply to city and county peace officer employers.

PAGES 15-100 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)

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EXHIBIT A

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SEP 16 2002

COMMISSION ON STATE MANDATES

TEST CLAIM FORM

Claim No. 02-TC-09

Local Agency or School District Submitting Claim

SANTA MONICA COMMUNITY COLLEGE DISTRICT

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

Claimant Address
Cheryl Miller
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.

False Reports of Police Misconduct (K-14)

Chapter 289, Statutes of 2000
Chapter 586, Statutes of 1996
Chapter 590, Statues of 1995

Penal Code Section 148.6

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	FAX	(310) 434-9221 (310) 434-3607

Signature of Authorized Representative	Date
x Cheryl Miller	August 30, 2002

Claim Prepared By:
Keith B. Petersen
SixTen and Associates
5252 Balboa Avenue, Suite 807
San Diego, CA 92117
Voice: (858) 514-8605
Fax: (858) 514-8645

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

Test Claim of:	No. CSM. _____
Santa Monica Community College District	Chapter 289, Statutes of 2000 Chapter 586, Statutes of 1996 Chapter 590, Statutes of 1995
Test Claimant.	Penal Code Section 148.6
	False Reports of Police Misconduct (K-14)
	TEST CLAIM FILING

PART I. 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 establish policies and procedures to be followed upon receipt of a report alleging misconduct against a district peace officer and to require each complainant, who files an allegation of misconduct against a district peace officer, to read and sign an advisory available in multiple languages in statutory format.

SECTION 1. LEGISLATIVE HISTORY PRIOR TO JANUARY 1, 1975

Prior to January 1, 1975 there was no requirement that school districts establish or follow policies and procedures upon receipt of a report alleging misconduct against a district peace officer. In addition there was no requirement for each complainant, who files an allegation of misconduct against a district peace officer, to read and sign an advisory, which shall be available in multiple languages in statutory format.

SECTION 2. LEGISLATIVE HISTORY AFTER JANUARY 1, 1975

Chapter 590, Statutes of 1995, Section 1, added Penal Code Section 148.6[2]

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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]Penal Code Section 148.6, added by Chapter 590, Statutes of 1995, Section 1:

"(a) Every person who files any report of misconduct against any peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, knowing

which provides that every person who files a report of misconduct against a peace officer, knowing the allegation to be false, is guilty of a misdemeanor. Subdivision (b) requires all law enforcement agencies accepting an allegation of misconduct against a peace officer to require the complainant to read and sign an advisory of their rights and of the criminal consequences of a false complaint. Therefore, for the first time, each school district which has peace officers[3] is required to obtain from a complainant, who files an allegation of misconduct against a district peace officer, to read and sign an advisory of their rights and the criminal consequences of a false complaint.

---

the allegation to be false, is guilty of a misdemeanor.

(b) Any law enforcement agency accepting an allegation of misconduct against a peace officer shall require the complainant to read and sign the following advisory, all in boldface type:

YOU HAVE THE RIGHT TO MAKE A COMPLAINT AGAINST A POLICE OFFICER FOR ANY IMPROPER POLICE CONDUCT. CALIFORNIA LAW REQUIRES THIS AGENCY TO HAVE A PROCEDURE TO INVESTIGATE CITIZENS' COMPLAINTS. THIS AGENCY MAY FIND AFTER INVESTIGATION THAT THERE IS NOT ENOUGH EVIDENCE TO WARRANT ACTION ON YOUR COMPLAINT; EVEN IF THAT IS THE CASE, YOU HAVE THE RIGHT TO MAKE THE COMPLAINT AND HAVE IT INVESTIGATED IF YOU BELIEVE AN OFFICER BEHAVED IMPROPERLY. CITIZEN COMPLAINTS AND ANY REPORTS OR FINDINGS RELATING TO COMPLAINTS MUST BE RETAINED BY THIS AGENCY FOR AT LEAST FIVE YEARS. IT IS AGAINST THE LAW TO MAKE A COMPLAINT THAT YOU KNOW TO BE FALSE. IF YOU MAKE A COMPLAINT AGAINST AN OFFICER KNOWING THAT IT IS FALSE, YOU CAN BE PROSECUTED ON A MISDEMEANOR CHARGE.

I have read and understood the above statement.

_____

Complainant"

[3] Members of a community college police department and persons employed as members of a school district police department are peace officers. Penal Code Section 830.32

Chapter 586, Statutes of 1996, Section 1, amended Penal Code Section 148.6[4] to add subdivision (b) which provides that any person who files a false civil claim or lien against a peace officer's property with the intent to harass or dissuade, is guilty of a misdemeanor and made technical changes.

---

[4]Penal Code Section148.6, added by Chapter 590, Statutes of 1995, Section 1, as amended by Chapter 586, Statutes of 1996, Section 1:

"(a) (1) Every person who files any ~~report~~ allegation of misconduct against any peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, knowing the allegation to be false, is guilty of a misdemeanor.

(2) Any law enforcement agency accepting an allegation of misconduct against a peace officer shall require the complainant to read and sign the following advisory, all in boldface type:

YOU HAVE THE RIGHT TO MAKE A COMPLAINT AGAINST A POLICE OFFICER FOR ANY IMPROPER POLICE CONDUCT. CALIFORNIA LAW REQUIRES THIS AGENCY TO HAVE A PROCEDURE TO INVESTIGATE CITIZENS' COMPLAINTS. YOU HAVE A RIGHT TO A WRITTEN DESCRIPTION OF THIS PROCEDURE. THIS AGENCY MAY FIND AFTER INVESTIGATION THAT THERE IS NOT ENOUGH EVIDENCE TO WARRANT ACTION ON YOUR COMPLAINT; EVEN IF THAT IS THE CASE, YOU HAVE THE RIGHT TO MAKE THE COMPLAINT AND HAVE IT INVESTIGATED IF YOU BELIEVE AN OFFICER BEHAVED IMPROPERLY. CITIZEN COMPLAINTS AND ANY REPORTS OR FINDINGS RELATING TO COMPLAINTS MUST BE RETAINED BY THIS AGENCY FOR AT LEAST FIVE YEARS. IT IS AGAINST THE LAW TO MAKE A COMPLAINT THAT YOU KNOW TO BE FALSE. IF YOU MAKE A COMPLAINT AGAINST AN OFFICER KNOWING THAT IT IS FALSE, YOU CAN BE PROSECUTED ON A MISDEMEANOR CHARGE.

I have read and understood the above statement.

_____

Complainant

(b) Every person who files a civil claim against a peace officer or a lien against his or her property, knowing the claim or lien to be false and with the intent to harass or dissuade the officer from carrying out his or her official duties, is guilty of a misdemeanor. This section applies only to claims pertaining to actions that arise in the course and scope of the peace officer's duties."

Chapter 289, Statutes of 2000, Section 1, amended Penal Code Section 148.6[5] to add subparagraph (3) to subdivision (a) to require that the advisory be available in multiple languages. Therefore, for the first time, school districts are required to provide advisories in multiple languages.

PART III. STATEMENT OF THE CLAIM

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[5]Penal Code Section 148.6, added by Chapter 590, Statutes of 1995, Section 1, as amended by Chapter 289, Statutes of 2000, Section 1:

"(a) (1) Every person who files any allegation of misconduct against any peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, knowing the allegation to be false, is guilty of a misdemeanor.

(2) Any law enforcement agency accepting an allegation of misconduct against a peace officer shall require the complainant to read and sign the following advisory, all in boldface type:

YOU HAVE THE RIGHT TO MAKE A COMPLAINT AGAINST A POLICE OFFICER FOR ANY IMPROPER POLICE CONDUCT. CALIFORNIA LAW REQUIRES THIS AGENCY TO HAVE A PROCEDURE TO INVESTIGATE CITIZENS' COMPLAINTS. YOU HAVE A RIGHT TO A WRITTEN DESCRIPTION OF THIS PROCEDURE. THIS AGENCY MAY FIND AFTER INVESTIGATION THAT THERE IS NOT ENOUGH EVIDENCE TO WARRANT ACTION ON YOUR COMPLAINT; EVEN IF THAT IS THE CASE, YOU HAVE THE RIGHT TO MAKE THE COMPLAINT AND HAVE IT INVESTIGATED IF YOU BELIEVE AN OFFICER BEHAVED IMPROPERLY. CITIZEN COMPLAINTS AND ANY REPORTS OR FINDINGS RELATING TO COMPLAINTS MUST BE RETAINED BY THIS AGENCY FOR AT LEAST FIVE YEARS. IT IS AGAINST THE LAW TO MAKE A COMPLAINT THAT YOU KNOW TO BE FALSE. IF YOU MAKE A COMPLAINT AGAINST AN OFFICER KNOWING THAT IT IS FALSE, YOU CAN BE PROSECUTED ON A MISDEMEANOR CHARGE.

I have read and understood the above statement.

_____

Complainant

(3) The advisory shall be available in multiple languages.

(b) Every person who files a civil claim against a peace officer or a lien against his or her property, knowing the claim or lien to be false and with the intent to harass or dissuade the officer from carrying out his or her official duties, is guilty of a misdemeanor. This section applies only to claims pertaining to actions that arise in the course and scope of the peace officer's duties."

SECTION 1. COSTS MANDATED BY THE STATE

The Statutes and Penal Code Section referenced in this test claim result in school districts incurring costs mandated by the state, as defined in Government Code Section 17514[6], 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 not apply generally to all residents and entities in the state[7].

The new duties mandated by the state upon school districts, community offices of education and community colleges require state reimbursement of the direct and indirect costs of labor, material 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 establish written policies and procedures, and periodically update those

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[6]Government Code Section 17514, as added by Chapter 1459, Statutes of 1984:

"'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 in 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 XIII B of the California Constitution."

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

policies and procedures, concerning the requirement to have citizens filing complaints of peace officer misconduct to sign a required advisory, pursuant to Penal Code Section 148.6, subdivision (a).

B) To require each person making a complaint of peace officer misconduct to read and sign a prescribed advisory statement advising them of their rights and of the criminal consequences of a false report, pursuant to Penal Code Section 148.6, subdivision (a).

C) To transcribe and make available the prescribed advisory in multiple languages, pursuant to Penal Code Section 148.6, subdivision (a)(3).

D) To train district peace officers and district police officer personnel in the policies and procedures of the district in receiving complaints alleging peace officer misconduct, pursuant to Penal Code Section 148.6.

SECTION 2. EXCEPTIONS TO MANDATE REIMBURSEMENT

None of the Government Code Section 17556[8] statutory exceptions to a finding of

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[8]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 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 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.

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 sections, 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.[9]

SECTION 3. FUNDING PROVIDED FOR THE MANDATED PROGRAM

No funds are appropriated by the state for reimbursement of these costs mandated by the state and there is no other provision of law for recovery of costs from

---

(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."

[9]Government Code Section 17565:

"If a local agency or school district, at its option, had 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."

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 Eileen Miller, Chief of Police
Santa Monica Community College District
and

Declaration of Greg Bass, Director of Child Welfare and Attendance
Clovis Unified School District

Exhibit 2: Copies of Code Sections Cited

Penal Code Section 148.6

Exhibit 3: Copies of Statutes Cited

Chapter 289, Statutes of 2000

Chapter 586, Statutes of 1996

Chapter 590, Statutes of 1995

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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 August 30, 2002, at Santa Monica, California, by:

Cheryl Miller

Cheryl Miller
Associate Vice President
Business Services

Voice: (310) 434-4224
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

Aug 30, 2002
Date

EXHIBIT 1
DECLARATIONS

DECLARATION OF EILEEN MILLER

Santa Monica Community College District

Test Claim of Santa Monica Community College District

COSM No. _____

Chapter 289, Statutes of 2000
Chapter 586, Statutes of 1996
Chapter 590, Statutes of 1995

Penal Code Section 148.6

False Reports of Police Misconduct

I, Eileen Miller, Chief of Police, Santa Monica Community College District, make the following declaration and statement.

In my capacity as Chief of Police of the Santa Monica Community College District, I am responsible for supervising the handling of citizens' complaints alleging misconduct by peace officers employed by the school district. I am familiar with the provisions and requirements of the Penal Code Section enumerated above.

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

1) Pursuant to Penal Code Section 148.6, subdivision (a), to establish written policies and procedures, and periodically update those policies and procedures, concerning the requirement to have citizens who file complaints of peace officer misconduct to sign a required advisory.

2) Pursuant to Penal Code Section 148.6, subdivision (a), to require each person making a complaint of peace officer misconduct to read and sign a prescribed statement advising them of their rights and of the criminal consequences of a

false report.

3) Pursuant to Penal Code Section 148.6, subdivision (a)(3), to make the prescribed advisory available in multiple languages.

4) Pursuant to Penal Code Section 148.6, to train district peace officers and district police officer personnel in the policies and procedures of the district in receiving complaints alleging peace officer misconduct.

It is estimated that the Santa Monica Community College District, to the extent citizen complaints occur, will incurr approximately $200, or more, In staffing and other costs 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 30 day of Aug., 2002, at Santa Monica, California

Eileen Miller
Chief of Police
Santa Monica Community College District

DECLARATION OF GREG BASS

CLOVIS UNIFIED SCHOOL DISTRICT

Test Claim of Santa Monica Community College District

COSM No. _____

Chapter 289, Statutes of 2000
Chapter 586, Statutes of 1996
Chapter 590, Statutes of 1995

Penal Code Section 148.6

False Reports of Police Misconduct

I, Greg Bass, Director of Child Welfare and Attendance, Clovis Unified School District , make the following declaration and statement.

In my capacity as Director of Child Welfare and Attendance for Clovis Unified School District, I am the supervisor of the District Police Department and responsible for supervising the handling of citizens' complaints alleging misconduct by peace officers employed by the school district. I am familiar with the provisions and requirements of the Penal Code Section enumerated above.

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

1) Pursuant to Penal Code Section 148.6, subdivision (a), to establish written policies and procedures, and periodically update those policies and procedures, concerning the requirement to have citizens who file complaints of peace officer misconduct to sign a required advisory.

2) Pursuant to Penal Code Section 148.6, subdivision (a), to require each person making a complaint of peace officer misconduct to read and sign a prescribed statement advising them of their rights and of the criminal consequences of a

false report.

3) Pursuant to Penal Code Section 148.6, subdivision (a)(3), to make the prescribed advisory available in multiple languages.

4) Pursuant to Penal Code Section 148.6, to train district peace officers and district police officer personnel in the policies and procedures of the district in receiving complaints alleging peace officer misconduct.

It is estimated that the Clovis Unified School District, to the extent citizen complaints occur, will incurr approximately $200, or more, in staffing and other costs 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 28 day of Aug., 2002 at Clovis, California

Greg Bass
Director of Child Welfare and Attendance
Clovis Unified School District

EXHIBIT 2
COPIES OF CODE SECTIONS CITED

arrest in a motor vehicle. People v. Hustead (App. 5 Dist. 1999) 87 Cal.Rptr.2d 875, 74 Cal.App.4th 410.

§ 148.6. False allegations of misconduct against peace officers; advisory form; signature; civil claims intended to harass or dissuade officer

(a)(1) Every person who files any allegation of misconduct against any peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, knowing the allegation to be false, is guilty of a misdemeanor.

(2) Any law enforcement agency accepting an allegation of misconduct against a peace officer shall require the complainant to read and sign the following advisory, all in boldface type:

YOU HAVE THE RIGHT TO MAKE A COMPLAINT AGAINST A POLICE OFFICER FOR ANY IMPROPER POLICE CONDUCT. CALIFORNIA LAW REQUIRES THIS AGENCY TO HAVE A PROCEDURE TO INVESTIGATE CITIZENS' COMPLAINTS. YOU HAVE A RIGHT TO A WRITTEN DESCRIPTION OF THIS PROCEDURE. THIS AGENCY MAY FIND AFTER INVESTIGATION THAT THERE IS NOT ENOUGH EVIDENCE TO WARRANT ACTION ON YOUR COMPLAINT; EVEN IF THAT IS THE CASE, YOU HAVE THE RIGHT TO MAKE THE COMPLAINT AND HAVE IT INVESTIGATED IF YOU BELIEVE AN OFFICER BEHAVED IMPROPERLY. CITIZEN COMPLAINTS AND ANY REPORTS OR FINDINGS RELATING TO COMPLAINTS MUST BE RETAINED BY THIS AGENCY FOR AT LEAST FIVE YEARS.

IT IS AGAINST THE LAW TO MAKE A COMPLAINT THAT YOU KNOW TO BE FALSE. IF YOU MAKE A COMPLAINT AGAINST AN OFFICER KNOWING THAT IT IS FALSE, YOU CAN BE PROSECUTED ON A MISDEMEANOR CHARGE.

I have read and understood the above statement.

_____

Complainant

(3) The advisory shall be available in multiple languages.

(b) Every person who files a civil claim against a peace officer or a lien against his or her property, knowing the claim or lien to be false and with the intent to harass or dissuade the officer from carrying out his or her official duties, is guilty of a misdemeanor. This section applies only to claims pertaining to actions that arise in the course and scope of the peace officer's duties.

(Amended by Stats.2000, c. 259 (S.B.2133), § 1.)

EXHIBIT 3
COPIES OF STATUTES CITED

Section 25354, notice of the request or proposal shall be provided to the person submitting the information. The notice shall indicate the form in which the information is to be released. Upon receipt of notice, the person submitting the information shall have 10 working days in which to respond to the notice to justify the claim of confidentiality on each specific item of information covered by the notice on the basis that public disclosure of the specific information would result in unfair competitive disadvantage to the person supplying the information.

(2) The commission shall consider the respondent's submittal in determining whether to publicly disclose the information submitted to it to which a claim of confidentiality is made. The commission shall issue a written decision which sets forth its reasons for making the determination whether each item of information for which a claim of confidentiality is made shall remain confidential or shall be publicly disclosed.

(d) The commission shall not make public disclosure of information submitted to it pursuant to Section 25354 within 10 working days after the commission has issued its written decision required in this section.

(e) No information submitted to the commission pursuant to Section 25354 shall be deemed confidential if the person submitting the information or data has made it public.

(f) With respect to petroleum products and blendstocks reported by type pursuant to paragraph (1) or (2) of subdivision (a) of Section 25354 and information provided pursuant to subdivision (h) of Section 25354, neither the commission nor any employee of the commission may do any of the following:

(1) Use the information furnished under paragraph (1) or (2) of subdivision (a) of Section 25354 or under subdivision (h) of Section 25354 for any purpose other than the statistical purposes for which it is supplied.

(2) Make any publication whereby the information furnished by any particular establishment or individual under paragraph (1) or (2) of subdivision (a) of Section 25354 or under subdivision (h) of Section 25354 can be identified.

(3) Permit anyone other than commission members and employees of the commission to examine the individual reports provided under paragraph (1) or (2) of subdivision (a) of Section 25354 or under subdivision (h) of Section 25354.

(g) Notwithstanding any other provision of law, the commission may disclose confidential information received pursuant to subdivision (a) of Section 25310.4 or Section 25354 to the State Air Resources Board if the state board agrees to keep the information confidential. With respect to the information it receives, the state board shall be subject to all pertinent provisions of this section.

PEACE OFFICERS—MISCONDUCT ALLEGATIONS—ADVISORY

CHAPTER 289

S.B. No. 2133

AN ACT to amend Section 148.6 of the Penal Code, relating to law enforcement.

[Filed with Secretary of State September 1, 2000.]

LEGISLATIVE COUNSEL'S DIGEST

SB 2133, Polanco. Law enforcement: complaints of misconduct.

(1) Existing law provides that every person who files any allegation of misconduct against any peace officer, as defined, knowing the allegation to be false, is guilty of a misdemeanor, and requires any law enforcement agency accepting an allegation of misconduct against a peace officer to require the complainant to read and sign a specified advisory.

This bill would require this advisory to be available in multiple languages. By increasing duties imposed on local law enforcement agencies, this bill would impose a state-mandated local program.

(2) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

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

SECTION 1. Section 148.6 of the Penal Code is amended to read:

148.6. (a)(1) Every person who files any allegation of misconduct against any peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, knowing the allegation to be false, is guilty of a misdemeanor.

(2) Any law enforcement agency accepting an allegation of misconduct against a peace officer shall require the complainant to read and sign the following advisory, all in boldface type:

YOU HAVE THE RIGHT TO MAKE A COMPLAINT AGAINST A POLICE OFFICER FOR ANY IMPROPER POLICE CONDUCT. CALIFORNIA LAW REQUIRES THIS AGENCY TO HAVE A PROCEDURE TO INVESTIGATE CITIZENS' COMPLAINTS. YOU HAVE A RIGHT TO A WRITTEN DESCRIPTION OF THIS PROCEDURE. THIS AGENCY MAY FIND AFTER INVESTIGATION THAT THERE IS NOT ENOUGH EVIDENCE TO WARRANT ACTION ON YOUR COMPLAINT; EVEN IF THAT IS THE CASE, YOU HAVE THE RIGHT TO MAKE THE COMPLAINT AND HAVE IT INVESTIGATED IF YOU BELIEVE AN OFFICER BEHAVED IMPROPERLY. CITIZEN COMPLAINTS AND ANY REPORTS OR FINDINGS RELATING TO COMPLAINTS MUST BE RETAINED BY THIS AGENCY FOR AT LEAST FIVE YEARS.

IT IS AGAINST THE LAW TO MAKE A COMPLAINT THAT YOU KNOW TO BE FALSE. IF YOU MAKE A COMPLAINT AGAINST AN OFFICER KNOWING THAT IT IS FALSE, YOU CAN BE PROSECUTED ON A MISDEMEANOR CHARGE.

I have read and understood the above statement.

_____

Complainant

(3) The advisory shall be available in multiple languages.

(b) Every person who files a civil claim against a peace officer or a lien against his or her property, knowing the claim or lien to be false and with the intent to harass or dissuade the officer from carrying out his or her official duties, is guilty of a misdemeanor. This section applies only to claims pertaining to actions that arise in the course and scope of the peace officer's duties.

SEC. 2. 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.

BILL NUMBER: AB 2637 CHAPTERED 09/17/96

CHAPTER 586
FILED WITH SECRETARY OF STATE SEPTEMBER 17, 1996
APPROVED BY GOVERNOR SEPTEMBER 15, 1996
PASSED THE SENATE AUGUST 15, 1996
PASSED THE ASSEMBLY MAY 29, 1996
AMENDED IN ASSEMBLY APRIL 29, 1996

INTRODUCED BY Assembly Member Bowler

FEBRUARY 21, 1996

An act to amend Section 148.6 of the Penal Code, relating to peace officers.

LEGISLATIVE COUNSEL'S DIGEST

AB 2637, Bowler. Peace officers: false claims.

Existing law makes it a misdemeanor to file an allegation of misconduct against any peace officer, knowing the allegation to be false.

This bill would make it a misdemeanor to file a civil action against any peace officer or a lien against his or her property, knowing the claim or lien to be false and with the intent to harass or dissuade the officer from carrying out his or her official duties.

The bill would provide that this provision applies only to claims pertaining to actions that arise in the course and scope of the peace officer's duties. By creating a new crime, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 148.6 of the Penal Code is amended to read:

148.6. (a) (1) Every person who files any allegation of misconduct against any peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, knowing the allegation to be false, is guilty of a misdemeanor.

(2) Any law enforcement agency accepting an allegation of misconduct against a peace officer shall require the complainant to read and sign the following advisory, all in boldface type:
YOU HAVE THE RIGHT TO MAKE A COMPLAINT AGAINST A POLICE OFFICER FOR ANY IMPROPER POLICE CONDUCT. CALIFORNIA LAW REQUIRES THIS AGENCY TO HAVE A PROCEDURE TO INVESTIGATE CITIZENS' COMPLAINTS. YOU HAVE A RIGHT TO A WRITTEN DESCRIPTION OF THIS PROCEDURE. THIS AGENCY MAY FIND AFTER INVESTIGATION THAT THERE IS NOT ENOUGH EVIDENCE TO WARRANT ACTION ON YOUR COMPLAINT; EVEN IF THAT IS THE CASE, YOU HAVE THE RIGHT TO MAKE THE COMPLAINT AND HAVE IT INVESTIGATED IF YOU BELIEVE AN OFFICER BEHAVED IMPROPERLY. CITIZEN COMPLAINTS AND ANY REPORTS OR FINDINGS RELATING TO COMPLAINTS MUST BE RETAINED BY THIS AGENCY FOR AT LEAST FIVE YEARS.
IT IS AGAINST THE LAW TO MAKE A COMPLAINT THAT YOU KNOW TO BE FALSE. IF YOU MAKE A COMPLAINT AGAINST AN OFFICER KNOWING THAT IT IS FALSE,

YOU CAN BE PROSECUTED ON A MISDEMEANOR CHARGE.

I have read and understood the above statement.

_____

Complainant

(b) Every person who files a civil claim against a peace officer or a lien against his or her property, knowing the claim or lien to be false and with the intent to harass or dissuade the officer from carrying out his or her official duties, is guilty of a misdemeanor. This section applies only to claims pertaining to actions that arise in the course and scope of the peace officer's duties.

SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIIIB of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIIIB of the California Constitution.

Notwithstanding Section 17580 of the Government Code, unless otherwise specified, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution.

BILL NUMBER: AB 1732 CHAPTERED 10/04/95

CHAPTER 590
FILED WITH SECRETARY OF STATE OCTOBER 4, 1995
APPROVED BY GOVERNOR OCTOBER 4, 1995
PASSED THE ASSEMBLY SEPTEMBER 5, 1995
PASSED THE SENATE AUGUST 24, 1995
AMENDED IN SENATE JULY 19, 1995

INTRODUCED BY Assembly Member Boland

FEBRUARY 24, 1995

An act to add Section 148.6 to the Penal Code, relating to false reports of police misconduct.

LEGISLATIVE COUNSEL'S DIGEST

AB 1732, Boland. False reports of police misconduct.

Existing law makes it a misdemeanor to knowingly make a false report that a felony or misdemeanor has been committed to specified peace officers or employees of specified state and local agencies assigned to accept reports from citizens.

This bill would make it a misdemeanor to file an allegation of misconduct against any peace officer, knowing the report to be false. Any law enforcement agency accepting an allegation of misconduct would be required to have the complainant read and sign a specified information advisory. The bill would impose a state-mandated local program by creating a new crime and imposing additional duties on local agencies.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that with regard to certain mandates no reimbursement is required by this act for a specified reason.

With regard to any other mandates, this bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 148.6 is added to the Penal Code, to read:

148.6. (a) Every person who files any allegation of misconduct against any peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, knowing the report to be false, is guilty of a misdemeanor.

(b) Any law enforcement agency accepting an allegation of misconduct against a peace officer shall require the complainant to read and sign the following information advisory, all in boldface type:

YOU HAVE THE RIGHT TO MAKE A COMPLAINT AGAINST A POLICE OFFICER FOR ANY IMPROPER POLICE CONDUCT. CALIFORNIA LAW REQUIRES THIS AGENCY TO HAVE A PROCEDURE TO INVESTIGATE CITIZENS' COMPLAINTS. YOU HAVE A RIGHT TO A WRITTEN DESCRIPTION OF THIS PROCEDURE. THIS AGENCY MAY

FIND AFTER INVESTIGATION THAT THERE IS NOT ENOUGH EVIDENCE TO WARRANT ACTION ON YOUR COMPLAINT; EVEN IF THAT IS THE CASE, YOU HAVE THE RIGHT TO MAKE THE COMPLAINT AND HAVE IT INVESTIGATED IF YOU BELIEVE AN OFFICER BEHAVED IMPROPERLY. CITIZEN COMPLAINTS AND ANY REPORTS OR FINDINGS RELATING TO COMPLAINTS MUST BE RETAINED BY THIS AGENCY FOR AT LEAST FIVE YEARS.
IT IS AGAINST THE LAW TO MAKE A COMPLAINT THAT YOU KNOW TO BE FALSE. IF YOU MAKE A COMPLAINT AGAINST AN OFFICER KNOWING THAT IT IS FALSE, YOU CAN BE PROSECUTED ON A MISDEMEANOR CHARGE.

I have read and understood the above statement.

_____
Complainant

SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIIIB of the California Constitution for certain costs that may be incurred by a local agency or school district because in that regard this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIIIB of the California Constitution.

However, notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains other 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, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution.

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

September 20, 2002

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: *False Reports of Police Misconduct (K-14)*, 02-TC-09
Santa Monica Community College District, Claimant
Penal Code Section 148.6
Statutes 1995, Chapter 590 (AB 1732)
Statutes 1996, Chapter 586 (AB 2637)
Statutes 2000, Chapter 289 (SB 2133)

Dear Mr. Petersen:

Commission staff has reviewed the above-named test claim and determined that it is complete. A copy of the test claim is being provided to affected state agencies and interested parties because of their interest in the Commission's determination.

The key issues before the Commission are:

- Do the provisions listed above impose a new program or higher level of service within an existing program upon local entities within the meaning of section 6, article XIII B of the California Constitution and costs mandated by the state pursuant to section 17514 of the Government Code?
- Does Government Code section 17556 preclude the Commission from finding that any of the test claim provisions impose costs mandated by the state?

The Commission requests your participation in the following activities concerning this test claim:

- **Informal Conference.** An informal conference may be scheduled if requested by any party. See Title 2, California Code of Regulations, section 1183.04 (the regulations).
- **State Agency Review of Test Claim.** State agencies receiving this letter are requested to analyze the merits of the test claim and to file written comments on the key issues before the Commission. Alternatively, if a state agency chooses not to respond to this request, please submit a written statement of non-response to the Commission. Requests for extensions of time may be filed in accordance with sections 1183.01 (c) and 1181.1 (g) of the regulations. State agency comments are due 30 days from the date of this letter.

- **Claimant Rebuttal.** The claimant and interested parties may file rebuttals to state agencies' comments under section 1183.02 of the regulations. The rebuttal is due 30 days from the service date of written comments.
- **Hearing and Staff Analysis.** A hearing on the test claim will be set when the draft staff analysis of the claim is being prepared. At least eight weeks before a hearing is conducted, the draft staff analysis will be issued to parties, interested parties, and interested persons for comment. Comments are due at least five weeks prior to the hearing or on the date set by the Executive Director, pursuant to section 1183.07 of the Commission's regulations. Before the hearing, a final staff analysis will be issued.
- **Mailing Lists.** Under section 1181.2 of the Commission's regulations, the Commission will promulgate a mailing list of parties, interested parties, and interested persons for each test claim and provide the list to those included on the list, and to anyone who requests a copy. Any written material filed on that claim with the Commission shall be simultaneously served on the other parties listed on the mailing list provide by the Commission.
- **Dismissal of Test Claims.** Under section 1183.09 of the Commission's regulations, test claims may be dismissed if postponed or placed on inactive status by the claimant for more than one year. Prior to dismissing a test claim, the Commission will provide 150 days notice and opportunity for other parties to take over the claim.

If the Commission determines that a reimbursable state mandate exists, the claimant is responsible for submitting proposed parameters and guidelines for reimbursing all eligible local entities. All interested parties and affected state agencies will be given an opportunity to comment on the claimant's proposal before consideration and adoption by the Commission.

Finally, the Commission is required to adopt a statewide cost estimate of the reimbursable state-mandated program within 12 months of receipt of an amended test claim. This deadline may be extended for up to six months upon the request of either the claimant or the Commission.

Please contact Nancy Patton at (916) 323-8217 if you have any questions.

Sincerely,

SHIRLEY OPIE
Assistant Executive Director

Enclosure: Copy of Test Claim

MAILED: Mail List FAXED:
DATE: 9/20/02 INITIAL: VS
CHRON: FILE:
WORKING BINDER:

:teltr.doc

Commission on State Mandates

Original List Date: 09/19/2002 **Mailing Information** Completeness Determination

Last Updated: 09/19/2002

List Print Date: 09/20/2002

Mailing List

Claim Number: 02-TC-09

Issue: False Reports of Police Misconduct (K-14)

Ms. Harmeet Barkschat,
Mandate Resource Services

5325 Elkhorn Blvd. #307
Sacramento CA 95842
Tel: (916) 727-1350 *Fax:* (916) 727-1734

Ms. Susan Geanacou, Senior Staff Attorney (A-15)
Department of Finance

915 L Street, Suite 1190
Sacramento CA 95814
Tel: (916) 445-3274 *Fax:* (916) 327-0220

Dr. Carol Berg,
Education Mandated Cost Network

1121 L Street Suite 1060
Sacramento CA 95814
Tel: (916) 446-7517 *Fax:* (916) 446-2011

Mr. Keith Gmeinder, Principal Analyst (A-15)
Department of Finance

915 L Street, 6th Floor
Sacramento CA 95814
Tel: (916) 445-8913 *Fax:* (916) 327-0225

[redacted]ette Chinn,
C[redacted]ecovery Systems

705-2 East Bidwell Street #294
Folsom CA 95630
Tel: (916) 939-7901 *Fax:* (916) 939-7801

Mr. Michael Havey, Bureau Chief (B-8)
State Controller's Office
Division of Accounting & Reporting
3301 C Street Suite 500
Sacramento CA 95816
Tel: (916) 445-8757 *Fax:* (916) 323-4807

Mr. Mark Cousineau,
County of San Bernardino
Office of the Auditor/Controller-Recorder
222 West Hospitality Lane
San Bernardino CA 92415-0018
Tel: (909) 386-8850 *Fax:* (909) 386-8830

Ms. Beth Hunter, Director
Centration, Inc.

8316 Red Oak Street Suite 101
Rancho Cucamonga CA 91730
Tel: (866) 481-2642 *Fax:* (866) 481-5383

Executive Director,
California Peace Officers' Association

1455 Response Road Suite 190
Sacramento CA 95815
Tel: (916) 263-0541 *Fax:* (916) 000-0000

Mr. Leonard Kaye, Esq.,
County of Los Angeles
Auditor-Controller's Office
500 W. Temple Street, Room 603
Los Angeles CA 90012
Tel: (213) 974-8564 *Fax:* (213) 617-8106

Commission on State Mandates

Original List Date: 09/19/2002 **Mailing Information** Completeness Determination

Last Updated: 09/19/2002

List Print Date: 09/20/2002

Mailing List

Claim Number: 02-TC-09

Issue: False Reports of Police Misconduct (K-14)

Mr. Patrick Lenz, Executive Vice Chancellor
California Community Colleges

1102 Q Street Suite 300
Sacramento CA 95814-6549
Tel: (916) 445-2738 *Fax:* (916) 323-8245

Ms. Sandy Reynolds, President
Reynolds Consulting Group, Inc.

P.O. Box 987
Sun City CA 92586
Tel: (909) 672-9964 *Fax:* (909) 672-9963

Ms. Cheryl Miller, Associate Vice President - Business Services
Santa Monica Community College District

1900 Pico Blvd.
Santa Monica CA 90405-1628
Tel: (310) 434-9221 *Fax:* (310) 434-3607 Claimant

Ms. Gerry Shelton, Administrator (E-8)
Department of Education
School Fiscal Services
560 J Street Suite 150
Sacramento CA 95814
Tel: (916) 323-2068 *Fax:* (916) 322-5102

Mr. Paul Minney,
Spector, Middleton, Young & Minney, LLP

7 Park Center Drive
Sacramento CA 95825
Tel: (916) 646-1400 *Fax:* (916) 646-1300

Mr. Steve Shields,
Shields Consulting Group, Inc.

1536 36th Street
Sacramento CA 95816
Tel: (916) 454-7310 *Fax:* (916) 454-7312

Mr. Arthur Palkowitz, Legislative Mandates Specialist
San Diego Unified School District

4100 Normal Street Room 3159
San Diego CA 92103-8363
Tel: (619) 725-7565 *Fax:* (619) 725-7569

Mr. Steve Smith, CEO
Mandated Cost Systems, Inc.

11130 Sun Center Drive Suite 100
Rancho Cordova CA 95670
Tel: (916) 669-0888 *Fax:* (916) 669-0889

Mr. Keith B. Petersen, President
SixTen & Associates

5252 Balboa Avenue Suite 807
San Diego CA 92117
Tel: (858) 514-8605 *Fax:* (858) 514-8645 Claimant

Ms. Pam Stone, Legal Counsel
MAXIMUS

4320 Auburn Blvd. Suite 2000
Sacramento CA 95841
Tel: (916) 485-8102 *Fax:* (916) 485-0111

Commission on State Mandates

Original List Date: 09/19/2002 **Mailing Information** Completeness Determination

Last Updated: 09/19/2002

List Print Date: 09/20/2002

Mailing List

Claim Number: 02-TC-09

Issue: False Reports of Police Misconduct (K-14)

Mr. David Wellhouse,
David Wellhouse & Associates, Inc.

9175 Kiefer Blvd Suite 121
Sacramento CA 95826

Tel: (916) 368-9244 *Fax:* (916) 368-5723

TO ALL PARTIES AND INTERESTED PARTIES h 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.)

DEPARTMENT OF FINANCE

GRAY DAVIS, GOVERNOR

915 L STREET ■ SACRAMENTO CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

October 21, 2002

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 September 20, 2002, 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 Penal Code Section 148.4, as added or amended by Chapter 590, Statutes of 1995; Chapter 586, Statutes of 1996; and Chapter 289, Statutes of 2000, are reimbursable State mandated costs (Claim No. CSM-02-TC-09 "False Reports of Police Misconduct"). Commencing with page 2, Part 2, of the test claim, the claimant has identified the following new duties, which it asserts are reimbursable State mandates:

- Establishing and updating written policies and procedures relating to having citizens filing complaints of peace officer misconduct sign an advisory form.
- Requiring each complainant to read and sign a prescribed advisory statement.
- Transcribing and making that form available in multiple languages.
- Training district police officers and personnel on the policies and procedures related to receiving complaints of police misconduct.

As the result of our review of this test claim and Section 148.6 of the Penal Code, we have concluded that a reimbursable State mandate has not been created by the amendments in Chapter 590, Statutes of 1995; Chapter 586, Statutes of 1996; and Chapter 289, Statutes of 2000.

Section 148.6 of the Penal Code does not require school districts to establish and update written policies and procedures related to advisory forms related to complaints against peace officers, therefore, such costs are not reimbursable.

Education Code Section 72330 states "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....**may** employ personnel as necessary to enforce the law on or near the campus of the community college." Since the establishment of a community college police department is undertaken at the discretion of the governing board of a community college district, any new requirements and associated costs imposed upon community college police departments are not reimbursable because the community college police department was created at the discretion of the community college district.

The claimant asserts that Chapter 590, Statutes of 1995; Chapter 586, Statutes of 1996; and Chapter No. 289, Statutes of 2000, created new duties related to the uniquely governmental

function of providing public services to students and do not apply generally to all residents and entities in the state. Although Section 148.6 of the Penal Code may result in additional costs to school districts, those costs are not reimbursable because they do apply generally to all residents and entities in the state. Section 1 (a) (2) of the test claim statute reads, in part: "**Any** law enforcement agency accepting an allegation of misconduct against a peace officer shall require the complainant to read and sign the following advisory..." [emphasis added]. Numerous local government agencies including cities, counties, and special districts employ personnel classified as peace officers. Therefore, we believe the test claim statutes do not result in reimbursable State-mandated costs.

Section 148.6 of the Penal Code does not require school districts to train district police officers and personnel on the policies and procedures related to receiving complaints of police misconduct, therefore, such costs are not reimbursable.

Therefore, although Chapter 590, Statutes of 1995; Chapter 586, Statutes of 1996; and Chapter 289, Statutes of 2000, may result in additional costs to school districts, those costs are not reimbursable.

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 September 20, 2002, 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 Matt Paulin, Principal Program Budget Analyst, at (916) 322-2263 or Keith Gmeinder, State mandates claims coordinator for the Department of Finance, at (916) 445-8913.

Sincerely,

Connie Squires
Program Budget Manager

Attachments

Attachment A

DECLARATION OF MATT PAULIN
DEPARTMENT OF FINANCE
CLAIM NO. CSM—02-TC-09

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 Chapter 289, Statutes of 2000, (SB 2133-Polanco), 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.

3. Attachment B is a true copy of Finance's analysis of SB 2133 prior to its enactment as Penal Code Section 148.6, as added or amended by Chapter 590, Statutes of 1995; Chapter 586, Statutes of 1996; and Chapter 289, Statutes of 2000.

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.

Matt Paulin

10/18/02
at Sacramento, CA

PROOF OF SERVICE

Test Claim Name: False Reports of Police Misconduct
Test Claim Number: CSM-02-TC-09

I, 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, 8 Floor, Sacramento, CA 95814.

On October 17, 2002, 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, 8 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

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

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

Dr. Carol Berg
School Services of California
1121 L Street, Suite 160
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 October 17, 2002, at Sacramento, California.

Meredith Campbell

STATE OF CALIFORNIA ARNOLD SCH

COMMISSION ON STATE MANDATES

980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
P[illegible]: (916) 323-3562
FA[illegible]16) 445-0278
E-mail: csminfo@csm.ca.gov

November 26, 2003

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

And Interested Parties and Affected State Agencies (See Enclosed Mailing List)

Re: **Draft Staff Analysis and Hearing Date**
False Reports of Police Misconduct (K-14), 02-TC-09
Santa Monica Community College District, Claimant
Penal Code Section 148.6; Statutes 1995, Chapter 590 (AB 1732); Statutes 1996, Chapter 586 (AB 2637); Statutes 2000, Chapter 289 (SB 2133)

Dear Mr. Petersen:

The draft staff analysis of 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 **Friday, December 26, 2003**. You are advised that comments filed with the Commission are required to be simultaneously served on the other interested parties on the mailing list, and to be accompanied by a proof of service. (Cal. Code Regs., tit. 2, § 1181.2.) 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 on **Thursday, January 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 Friday, January 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 Katherine Tokarski at (916) 323-3562 with any questions regarding the above.

Sincerely,

Paula Higashi

PAULA HIGASHI
Executive Director

Enc. Draft Staff Analysis

MAILED: Mail List ✓ FAXED: _____
DATE: 11/26/03 INITIAL: VS
CHRON: _____ FILE: ✓
WORKING BINDER: _____

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

EXHIBIT E

December 24, 2003

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

Re: CSM No. 02-TC-09
Test Claim of Santa Monica Community College District
False Reports of Police Misconduct (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.

The sole reason for Staff's recommendation to the Commission that it deny the test claim is that:

> "... forming a school district police department and employing[1] peace officers is an entirely discretionary activity on the part of all school districts..." (Draft Staff Analysis, at page 7)

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..." (Id., emphasis supplied)

---

[1] Test claimant is not seeking reimbursement for "employing peace officers". Test claimant seeks reimbursement only for complying with the test claim legislation.

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 6 of the Draft Analysis, Staff refers to Article 1, section 28, subdivision (c)[2] (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 "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 by the operation of a law enforcement agency and the employment of peace officers independent of the public safety services provided by cities and counties.[3]

Staff has not considered the fact that there was an obligation to provide safe schools before the 1982 Initiative. The people of the State of California, in the "Victims Bill of Rights" affirmed that the right to safe schools is an "inalienable right", which means it is a right that has always existed.[4] Education Code Section 44807[5] requires school

---

[2] 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."

[3] Staff does not offer any answer to the next question, that is, how are budget strapped cities and counties going to come up with funding to assume those duties.

[4] "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights..." The Declaration of Independence, Action of the Second Continental Congress, July 4, 1776

[5] Education Code 44807, added by Chapter 1010, Statutes of 1976 (derived from as far back as Political Code Section 1696, as amended by Code Amendment 1873-4):

"Every teacher in the public schools shall hold pupils to a strict account for their conduct on the way to and from school, on the playgrounds, or during recess. A teacher, vice principal, principal, or any other certificated employee of a school district, shall not be subject to criminal prosecution or criminal penalties for the exercise, during the performance of his duties, of the same degree of physical control over a pupil that a

personnel to protect the health and safety of pupils and to maintain proper and appropriate conditions conducive to learning. The California Supreme Court has indicated that this Education Code section codified the traditional common law doctrine of *in loco parentis*, under which school employees stand "in the place of the parent." *In re William G* (1985) 40 Cal.3d 550, 571 (diss.op.)

As support for its self-serving conclusion that there is no constitutional requirement to maintain school police departments, Staff, at page 6, cites *Leger v. Stockton Unified School District* (1988) 202 Cal.App.3d 1448 and quotes[6] 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*[7], 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)

---

parent would be legally privileged to exercise but which in no event shall exceed the amount of physical control reasonably necessary to maintain order, protect property, or protect the health and safety of pupils, or to maintain proper and appropriate conditions conducive to learning. The provisions of this section are in addition to and do not supersede the provisions of Section 49000."

[6] 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.

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

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

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.'[8] (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

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[8] In fact, under this provision, "discontinuing" campus police departments may be unconstitutional.

> 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, quoting *In re William G.* (supra, at 563, emphasis supplied)

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 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 recognized that pupils and staff of public schools have always had

the inalienable right to safe schools, and that police departments are an appropriate method of securing that right.

History of Campus Police Departments

A. Community Colleges

In 1970, former Education Code Section 25429[9] 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[10].

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[9]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."

[10]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 ~~13580~~ 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,

Chapter 1340, Statutes of 1980, Section 9, added Penal Code Section 830.31[11],

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operated, controlled, or administered by the community college, or the state on behalf of the community college."

[11]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 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

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[12] 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

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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."

[12]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:

"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."

employment.

Chapter 945, Statutes of 1982, Section 5, amended Education Code Section 72330[13] 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.

Chapter 1165, Statutes of 1989, Section 3, amended Education Code Section 72330[14]

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[13]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~~."

[14]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 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.

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[15] which defines "peace officers". 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[16] to

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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."

[15]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."

[16]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

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[17] 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, in attempting to make community colleges safe, secure and peaceful, has expanded the role of peace officers from "only in or about the campus and other grounds or properties owned by the college" since 1970, in the following 33 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 1961, Education Code Section 15831[18] provided that the governing board of any

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for the community college chief of police, 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 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."

[17]Penal Code Section 830.32, added by Chapter 1165, Statutes of 1989, Section 1, 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."

[18]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

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[19].

Chapter 306, Statutes of 1977, Section 2, amended Education Code Section 39670[20] to

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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."

[19]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."

[20]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

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

Chapter 945, Statutes of 1982, Section 1, amended Education Code Section 39670[21] 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[22] which defines "peace officers".

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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 circumstances be vested with general police powers."

[21]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."

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

Subdivision (b) includes members of a school district police department employed pursuant to Education Code Section 39670.

Chapter 277, Statutes of 1996, Section 5, added Education Code Section 38000[23]

"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."

[23]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

which substantially restates former Education Code Section 39670 (which was then repealed by Section 6) except, now, a school district may 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[24] to 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[25] 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 42 years into full-fledged police departments with police officers whose authority extends to any place in the state.

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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."

[24]Penal Code Section 830.32, added by Chapter 1165, Statutes of 1989, Section 1, 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."

[25]Penal Code Section 830.32, added by Chapter 1165, Statutes of 1989, Section 1, as amended by Chapter 135, Statutes of 2000, Section 135:

"(b) Persons employed as members of a police department of a school district pursuant to Section ~~39670~~ 38000 of the Education Code, if the primary duty of the police officer is the enforcement of the law as prescribed in Section ~~39670~~ 38000 of the Education Code."

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

Chapter 659, Statutes of 1999, Section 1, amended Family Code Section 6240[26] to 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[27] allows a judicial officer to issue an ex

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[26] 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.
(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."

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

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 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,[28] which

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"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.]

[28] 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."

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[29] to add

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[29] 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:

(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

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 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 (l) requires the peace offer 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

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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."

those firearms. Chapter 659, Statutes of 1999, Section 3, amended Section 12028.5[30],

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[30] 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

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.

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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 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."

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[31] to include

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[31] 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 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)

community college and school district peace officers within the definition of peace officers subject to the Title on Responses to Domestic Violence. Section 13701[32], at 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

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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."

[32] 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 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."

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, time and time again, in an attempt to make schools safe, secure and peaceful, 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

School districts have always had the duty to provide safe schools. In 1982, the people of the State of California acknowledged that the right 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 legislature has not directly specified how the constitutional duty to provide safe schools is to be accomplished. They left this decision to local agencies 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 historical needs of that community. To say that districts are "free to discontinue" providing their own police department is another way of saying that their collective judgment on how to fulfill their duty can be ignored. Staff suggests that a constitutional duty to protect an inalienable right can be satisfied by using a means that has been considered and discarded on a local level as unsatisfactory.

The Staff Analysis Errs in Other Respects

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

Staff places a different standard on school districts and community college districts than it does on other police departments. At page 5 of its draft, staff states:

> "But, school districts and community colleges districts are not required by state law to maintain a law enforcement agency or employ peace officers. Unlike counties and cities that are required by the California Constitution to maintain a police force, no such requirement exists for school districts.
>
> "Article XI, Local Government, provides for the formation of cities and counties. Section 1, Counties, states that the Legislature shall provide for an elected county sheriff, and section 5, City Charter provision, specified that city charters are to provide for the 'government of the city police force'."

Again, staff uses very selective interpretation and redaction. Article XI, section 1,[33] 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 (in the words of Staff) "maintain a law enforcement agency or employ peace officers." There is nothing in the 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, Staff redacts the actual language of the Constitution to serve

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[33] 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."

its own purposes. Article 11, section 5,[34] subdivision (b) actually 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..." Contrary to the selective interpretation of Staff, cities are not required "to maintain a police force." The constitution merely states that it shall be competent to provide for the government of a city police force in city charters. Using the usual meaning of the English language, "shall be competent" 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 observes a different standard 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 to read that cities are "required" to maintain a police force.

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[34] 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."

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.[35] In its prior Final Staff Analysis,[36] 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 Staff also cited an opinion of the California Attorney General.[37] (72 Ops.Cal.Atty.Gen. 173, 178 (1989), which cites *Weiss*)

The *Weiss* opinion states the whole rule:

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

[36] 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.

[37] 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. *Unger v. Superior Court* (supra, at page 688)

> "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)

The rule of law which is the subject of this objection is the rule of *"stare decisis"*.[38] 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 an answer to the question presented here is not satisfactory when it merely says that a court case says so, when that very same 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)

A satisfactory answer, then, needs to concentrate on the facts before coming to a

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[38] "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

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 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 will 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 1995) 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.

The Staff has offered no compelling reason (because there is none) why mandated activities of district peace officers are 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:

> "In a 2003 California Supreme Court mandates decision, the Court found...'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")

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 has sought to maintain federal compliance ever since.

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).[39]

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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[39] 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 42 year history of police departments on community college and school district campuses, detailed above, coupled with the strong showing that the legislature has vastly increased the duties and responsibilities of district police departments is similar to the history of unemployment insurance in California. The argument that school districts and community college districts "discontinue" their campus police is strikingly similar to the state's argument in *Sacramento II* that California could terminate its own unemployment insurance system. As in *Sacramento II*, test claimant cannot imagine the drafters and adopters of article XIII B intended to force districts to such draconian ends. This alternative is so far beyond the realm of practical reality that it leaves districts without any real discretion to change course at this late stage of history.

Staff badly misconstrues the scope of "Kern" by its failure to recognize that "Kern" is a case limited by the court to the facts presented,

> "...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..." (Opinion, at 736, emphasis in the original, underlining added),

and by its failure to apply the true test, as announced in *Sacramento II*:

> "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)

Here, the nature and purpose of the test claim legislation is to improve the efficiency of school police when complying with the constitutional requirement that schools be safe. School district and community college district participation began as long as 42 years ago and there is no compelling reason to change the status quo. And the legal and practical consequence of withdrawal is that the districts would be abdicating their constitutional duty to properly provide students and staff with safe, secure and peaceful schools.

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. In re William G (1985) 40 Cal.3d 550
   221 Cal.Rptr. 118; 709 P.2d 11287

2. Leger v. Stockton Unified School District (1988) 202 Cal.App.3d 1448
   249 Cal.Rptr. 688

3. Brosnahan v. Brown (1982) 32 Cal.3d 236
   186 Cal.Rptr. 30; 651 P.2d 274

4. Unger v. Superior Court (Marin County Democratic Central Com.) (1980)
   102 Cal.App.3d 681; 162 Cal.Rptr. 611

5. Porten v. University of San Francisco (1976) 64 Cal.App.3d 825
134 Cal.Rptr. 839

6. Laguna Publishing Co. v. Golden Rain Foundation (1982) 131 Cal.App.3d 816
182 Cal.Rptr. 813

7. Weiss v. State Board of Equalization (1953) 40 Cal.2d 772
256 P.2d 1

8. 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: False Reports of Police Misconduct 02-TC-09
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 December 24, 2003, 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 12/24/03, at San Diego, California.

Diane Bramwell

Commission on State Mandates

Original List Date: 9/19/2002
Last Updated: 10/31/2003
List Print Date: 11/26/2003
Claim Number: 02-TC-09
Issue: False Reports of Police Misconduct (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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[Crim. No. 22945. Dec. 5, 1985.]

In re WILLIAM G., a Person Coming Under the Juvenile Court Law.
THE PEOPLE, Plaintiff and Respondent, v.
WILLIAM G., Defendant and Appellant.

SUMMARY

The juvenile court entered an order declaring a high school student a ward of the juvenile court pursuant to Welf. & Inst. Code, § 602. The order was based on the court's finding that the student unlawfully possessed marijuana for sale in violation of Health & Saf. Code, § 11359. This finding was based on a quantity of marijuana found in a calculator case being carried by the student on the high school campus after a search by the high school assistant principal. (Superior Court of Los Angeles County, No. J 405121, Irwin J. Nebron, Judge.)

The Supreme Court reversed. The court first held that public school officials such as the assistant principal are governmental agents within the purview of both U.S. Const., 4th Amend., and Cal. Const., art. I, § 13, and must therefore respect the constitutional rights of students in their charge against unreasonable searches and seizures. Next, the court held that, balancing students' privacy interests with governmental interests in promoting a safe learning environment, searches of students by public school officials must be based on a reasonable suspicion that the student or students to be searched have engaged, or are engaging, in a proscribed activity (that is, a violation of a school rule or regulation, or a criminal statute), that there must be articulable facts supporting that reasonable suspicion, and that neither indiscriminate searches of lockers nor more discreet individual searches of a locker, a purse or a person can take place absent the existence of reasonable suspicion. Finally, the court held that the search conducted by the assistant principal did not meet the standard of reasonable suspicion, that the assistant principal's search of the calculator case was conducted illegally, and that the evidence obtained thereby was inadmissible in the proceedings of the juvenile court. (Opinion by Reynoso, J., with Broussard, Grodin, JJ., and Kaus, J.,* concurring. Separate concurring and

*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council.

dissenting opinion by Bird, C. J. Separate dissenting opinion by Mosk, J.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) **Infants § 1—Constitutional Rights.**—Minor students are "persons" under the state and federal Constitutions and therefore possess fundamental constitutional rights which the state must respect.

(2) **Searches and Seizures § 9—Constitutional and Statutory Provisions—Applicability to Minor Students.**—Among the constitutional rights possessed by minor students is the guarantee of freedom from unreasonable searches and seizures contained in U.S. Const., 4th Amend., and Cal. Const., art. I, § 13. This guarantee is inferable from minors' constitutional rights to privacy, and their guarantee under U.S. Const., 14th Amend., against deprivation of liberty without the process of law.

(3) **Schools § 52—Parents and Students—Constitutional Rights of Public School Students.**—Public school students do not shed their constitutional rights upon reaching the schoolhouse door. The authority possessed by the state to proscribe and enforce standards of conduct in its schools, although concededly very broad, must be exercised consistently with constitutional safeguards.

(4) **Infants § 1—Constitutional Rights.**—The constitutional rights of minors need not always be coextensive with those of adults. Minors' rights may be legitimately restricted to serve the state's interest in promoting the health and welfare of children. Even where there is an invasion of protected freedoms, the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.

(5) **Searches and Seizures § 14—Constitutional and Statutory Provisions—Searches by Persons Other Than Law Enforcement Officers.**—The protection against unreasonable searches and seizures contained in U.S. Const., 4th Amend., and Cal. Const., art. I, § 13, applies only to governmental action. Thus, while the protection of the Fourth Amendment and art. I, § 13, is not limited to action by law enforcement, but extends to all governmental action, it does not extend to searches conducted by private persons.

(6) **Searches and Seizures § 14—Constitutional and Statutory Provisions—Searches by Persons Other Than Law Enforcement Officers—Public School Officials.**—Public school officials are governmental agents within the purview of both U.S. Const., 4th Amend., and Cal. Const., art. I, § 13, and must therefore respect the constitutional rights of students in their charge against unreasonable searches and seizures.

(7a-7d) **Searches and Seizures § 14—Constitutional and Statutory Provisions—Searches by Persons Other Than Law Enforcement Officers—Public School Officials.**—Balancing public school students' privacy interests with the governmental interests in promoting a safe learning environment, searches of students by public school officials must be based on a reasonable suspicion that the student or students to be searched have engaged, or are engaging, in a proscribed activity (that is, a violation of a school rule or regulation, or a criminal statute). There must be articulable facts supporting that reasonable suspicion. Neither indiscriminate searches of lockers nor more discreet individual searches of a locker, a purse, or a person can take place absent the existence of reasonable suspicion. Respect for privacy is the rule—a search is the exception. The corollary to this rule is that a search of a student by a public school official is unlawful if predicated on mere curiosity, rumor, or hunch.

[Admissibility, in criminal case, of evidence obtained by search conducted by school official or teacher, note, 49 **A.L.R.3d** 978. See also **Cal.Jur.3d (Rev)**, Criminal Law, § 2554; **Am.Jur.2d**, Searches and Seizures, § 13.5.]

(8) **Searches and Seizures § 9—Constitutional and Statutory Provisions—General Application and Exceptions.**—U.S. Const., 4th Amend., and Cal. Const., art. I, § 13, protect the people against unreasonable searches and seizures by governmental officials. Under ordinary circumstances, a search is per se unreasonable unless conducted pursuant to a judicial warrant issued on the basis of probable cause and describing with particularity the items to be seized. Probable cause depends upon facts and circumstances which are reasonably trustworthy and sufficient to warrant a prudent person to believe that a violation of the law is being or has been committed. This general rule is subject to a few specifically established and well-delineated exceptions. These exceptions include searches incident to a lawful arrest; searches made under exigent circumstances; where the police are in "hot pursuit"; pursuant to a "stop and frisk" for weapons; where the evidence is in plain view; or with the consent of the individual whose person or

property is searched. The warrant and probable cause requirements have also been relaxed for searches conducted in unique settings, such as military installations; at the national border; aboard vessels within the United States or its coastal waters; pursuant to certain administrative inspections of licensed businesses; or at the situs of other regulated activities.

(9) **Privacy § 1—Constitutional Provisions.**—The right of privacy is vitally important. It derives, in California, not only from the protections against unreasonable searches and seizures guaranteed by U.S. Const., 4th Amend., and Cal. Const., art. I, § 13, but also from Cal. Const., art. I, § 1. Homage to personhood is the foundation for individual rights protected by our state and national Constitutions.

(10) **Searches and Seizures § 54—Without Warrant—Test of Reasonableness.**—Whether a particular search is reasonable depends on a balancing of the nature and quality of the intrusion on the individual's U.S. Const., 4th Amend., interests against the importance of the governmental interests alleged to justify the intrusion.

(11) **Searches and Seizures § 14—Constitutional and Statutory Provisions—Searches by Persons Other Than Law Enforcement Officers—Public School Officials.**—A search of public school students by school officials under the reasonable suspicion standard will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

(12) **Searches and Seizures § 53—Without Warrant—When Warrant Not Required—Searches by Public School Officials.**—Public school officials are not required to obtain a warrant before conducting searches of students which are based on the standard of reasonable suspicion.

(13) **Searches and Seizures § 57—Without Warrant—Search of Person—Search of High School Student by School Official.**—An assistant principal's search of a high school student's calculator case was conducted illegally and the evidence obtained thereby—marijuana—was inadmissible in juvenile court proceedings, where the search did not meet the standards of reasonable suspicion. The assistant principal articulated no facts to support a reasonable suspicion that the student was engaged in a proscribed activity justifying a search. The record reflected a complete lack of any prior knowledge or information on the part of the assistant relating the student to the possession, use, or sale of illegal drugs or other contraband. His suspicion that the student was

tardy or truant from class provided no reasonable basis for conducting a search of any kind. The record was also devoid of evidence of exigent circumstances requiring an immediate nonconsensual search. Moreover, the student's "furtive gestures" in attempting to hide the calculator case from the assistant principal's view could not, standing alone, furnish sufficient cause to search, nor did not student's demand for a warrant create a reasonable suspicion upon which to base the search.

COUNSEL

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Robert H. Philibosian, District Attorney (Los Angeles), Harry B. Sondheim and Donald J. Kaplan, Deputy District Attorneys, as Amici Curiae on behalf of Plaintiff and Respondent.

OPINION

REYNOSO, J.—William G. appeals from an order declaring him a ward of the juvenile court pursuant to section 602 of the Welfare and Institutions Code. This order was based on the court's finding that William unlawfully possessed marijuana for purposes of sale in violation of section 11359 of the Health and Safety Code. William was placed on probation for a period of three years.

The issue presented is one of first impression for this court: What standard is required under article I, section 13, of the California Constitution and the Fourth Amendment to the United States Constitution to determine the legality of a search by a public school official of a minor student? Given the unique characteristics of the school setting and the important responsibilities that school officials have to all students, we conclude that the applicable

standard is reasonable suspicion. We further conclude that the instant search did not meet the reasonable suspicion standard, requiring reversal of the trial court's judgment.

I.

On the date of the alleged offense, October 1, 1979. William was 16 years of age and a student at Chatsworth High School in Los Angeles. At approximately 1:10 p.m., Reno Lorenz, the assistant principal at Chatsworth, noticed William and two other male students walking through the center of campus. The assistant principal was at that time approximately 35 yards away from the students. As Lorenz proceeded toward the students, he noticed that William was carrying a small black bag, later identified as a vinyl calculator case, to which the students' attention was momentarily drawn. The case had what Lorenz thought was an odd-looking bulge.

Upon reaching the students, Lorenz asked where they were heading and why they were late for class. William did not have any classes after 12 noon. As Lorenz spoke, William placed the case in a palmlike gesture to his side and then behind his back. Lorenz asked William what he had in his hand, to which William replied, "Nothing." When Lorenz attempted to see the case, William said "You can't search me," and then, "You need a warrant for this." Following more discussion, Lorenz took William by the arm and escorted him to the assistant principal's office.

Lorenz sought a noon recreational aide to act as a witness. After repeated unsuccessful efforts to convince William to hand over the case, Lorenz forcefully took and unzipped it. Inside were four baggies of marijuana weighing a total of less than one-half ounce, a small metal gram weight scale, and some Zigzag cigarette papers. William stated that he was holding the contents of the case for someone else.

Lorenz immediately telephoned the police. Los Angeles Police Officer Stephen Henderson responded and placed William under arrest. The officer conducted a pat-down search for weapons and any additional contraband, and found $135 in William's pockets. This money was never introduced into evidence.

At the adjudication hearing William, through his attorney, moved to suppress the evidence obtained from his calculator case on the ground that the search was conducted illegally. William argued that public school officials should be subject to the constitutional proscriptions against unreasonable searches and seizures and that there was no reasonable basis for the instant search.

At the hearing Lorenz testified that he was employed by the Los Angeles City Board of Education and that his duties as assistant principal included assisting the school security agent, whom he supervised, in arresting juveniles for narcotics violations. He testified that it was usual for him to call in the police after making such arrests. While Lorenz had no prior information which led him to believe that William was in possession of marijuana, or that William had otherwise violated the law or a school rule, it was his standard procedure to question students who were not in class during regular class periods. Lorenz further testified that he would have called the school security agent, rather than the recreational aide, to assist him in searching William but the agent was not on duty that day. Officer Henderson testified that he had previously arrested many Chatsworth students for narcotics violations who had been turned over by Lorenz and the school security agent.

The juvenile court denied William's motion to suppress, based on a finding that the search conducted by Lorenz was reasonable under the circumstances, and that Lorenz would have been derelict in his duties had he not "done what he did." On appeal, William contends this ruling is reversible error.

William claims that Lorenz is a government agent to whom the constitutional limitations on searches and seizures should apply; that while searches conducted solely for school purposes may be subject to a reasonable suspicion standard, searches which are conducted for the purpose of juvenile adjudication or criminal prosecution must be based on probable cause; that the search conducted by Lorenz was not supported by probable cause or reasonable suspicion; and, therefore, that the evidence obtained by Lorenz is inadmissible under the exclusionary rule. The People argue that searches of students on public school grounds need be supported by only a "reasonable suspicion," even if conducted for law enforcement purposes, and that the search conducted by Lorenz met this standard.

II.

(1) It is well settled that minor students are "persons" under our state and federal Constitutions and therefore possess fundamental constitutional rights which the state must respect. (*Tinker* v. *Des Moines School Dist.* (1969) 393 U.S. 503, 511 [21 L.Ed.2d 731, 740, 89 S.Ct. 733].) "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are

protected by the Constitution and possess constitutional rights."[1] (*Planned Parenthood of Missouri* v. *Danforth* (1976) 428 U.S. 52, 74 [49 L.Ed.2d 788, 808, 96 S.Ct. 2831].)

(2) Among these rights is the guarantee of freedom from unreasonable searches and seizures contained in the Fourth Amendment to the United States Constitution and article I, section 13, of the California Constitution. (*In re Scott K.* (1979) 24 Cal.3d 395, 400-403 [155 Cal.Rptr. 671, 595 P.2d 105], cert. den., 444 U.S. 973 [62 L.Ed.2d 388, 100 S.Ct. 468].) As we have previously noted, this guarantee is inferable from minors' constitutional rights to privacy,[2] and their guarantee under the Fourteenth Amendment against deprivation of liberty without due process of law.[3] (*In re Scott K., supra*, 24 Cal.3d 395, 401, 402.)[4]

As noted above, this court has not previously considered the scope of Fourth Amendment[5] protections that should be accorded minors subject to

[1]For example, the United States Supreme Court has held that minors are constitutionally entitled to freedom of speech and expression (*Tinker* v. *Des Moines School Dist., supra*, 393 U.S. 503; *Board of Education* v. *Barnette* (1943) 319 U.S. 624 [87 L.Ed. 1628, 63 S.Ct. 1178, 147 A.L.R. 674]); equal protection against racial discrimination (*Brown* v. *Board of Education* (1954) 347 U.S. 483 [98 L.Ed. 873, 74 S.Ct. 686]); and due process before being suspended from school (*Goss* v. *Lopez* (1975) 419 U.S. 565 [42 L.Ed.2d 725, 95 S.Ct. 729]).

[2]See *Planned Parenthood of Missouri* v. *Danforth, supra*, 428 U.S. 52 (upholding minor's right to an abortion without parental consent); and *Carey* v. *Population Services International* (1977) 431 U.S. 678 [52 L.Ed.2d 675, 97 S.Ct. 2010] (upholding minor's right to obtain contraceptives).

[3]The United States Supreme Court has held that minors facing criminal charges in juvenile proceedings are constitutionally entitled to notice, counsel, confrontation and cross-examination of witnesses, and protection against self-incrimination (*In re Gault* (1967) 387 U.S. 1 [18 L.Ed.2d 523, 87 S.Ct. 1428]); are protected against coerced confessions (*Gallegos* v. *Colorado* (1962) 370 U.S. 49 [8 L.Ed.2d 325, 82 S.Ct. 1209, 87 A.L.R.2d 614]); that the Fifth Amendment prohibition against double jeopardy precludes criminal prosecution of a juvenile subsequent to commencement of juvenile court adjudication involving the same offense (*Breed* v. *Jones* (1975) 421 U.S. 519 [44 L.Ed.2d 346, 95 S.Ct. 1779]); and that proof of guilt beyond a reasonable doubt is required in delinquency adjudications (*In re Winship* (1970) 397 U.S. 358 [25 L.Ed.2d 368, 90 S.Ct. 1068]).

[4]Accord, *Brown* v. *Fauntleroy* (D.C. Cir. 1971) 442 F.2d 838, 840-841; *In re Harvey* (1972) 222 Pa.Super. 222 [295 A.2d 93, 96-97]; *In re Morris* (1971) 29 Ohio Misc. 71 [278 N.E.2d 701, 702]; *Ciulla* v. *State* (Tex.Civ.App. 1968) 434 S.W.2d 948, 950; *In re Williams* (1966) 49 Misc.2d 154, 169-170 [267 N.Y.S.2d 91].)

[5]We rest our decision on both state and federal law. Unless otherwise indicated, references to the Fourth Amendment are also intended to refer to article I, section 13, of the California Constitution. Similarly, the federal cases upon which we rely are intended to also support certain aspects of the independent state grounds of our decision, as the federal cases prescribe the minimum standards that may not be violated. (See *In re Scott K., supra*, 24 Cal.3d at pp. 400-401.) "This court has always assumed the independent vitality of our state Constitution. In the search and seizure area our decisions have often comported with federal law, yet there has never been any question that this similarity was a matter of choice and not compulsion." (*People* v. *Brisendine* (1975) 13 Cal.3d 528, 548 [119 Cal.Rptr. 315, 531

searches by public school officials. (3), (4) While we recognize that the constitutional rights of minors need not always be coextensive with those of adults,[6] it is well established that public school students do not shed their constitutional rights upon reaching the schoolhouse door. (*Tinker* v. *Des Moines School Dist.*, *supra*, 393 U.S. 503, 506 [21 L.Ed.2d 731, 737].) "The authority possessed by the State to prescribe and enforce standards of conduct in its schools, although concededly very broad, must be exercised consistently with constitutional safeguards." (*Goss* v. *Lopez*, *supra*, 419 U.S. 565, 574 [42 L.Ed.2d 725, 734].)

III.

(5) The Fourth Amendment's protection against unreasonable searches and seizures applies only to governmental action. (*Coolidge* v. *New Hampshire* (1971) 403 U.S. 443, 487 [29 L.Ed.2d 564, 595, 91 S.Ct. 2022].) The origin and history of the Fourth Amendment "clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies . . . ." (*Burdeau* v. *McDowell* (1921) 256 U.S. 465, 475 [65 L.Ed. 1048, 1051, 41 S.Ct. 574, 13 A.L.R. 1159]; see also *Stapleton* v. *Superior Court* (1968) 70 Cal.2d 97, 100 [73 Cal.Rptr. 575, 447 P.2d 967].) Thus, while the protection of the Fourth Amendment is not limited to action by law enforcement, but extends to all governmental action (see *New Jersey* v. *T.L.O.* (1985) 469 U.S. 325 [83 L.Ed.2d 720, 730, 105 S.Ct. 733, 740]), it does not extend to searches conducted by private persons.

(6) Our initial determination is therefore whether public school officials such as Lorenz are agents of the government to whom the constitutional proscriptions against unreasonable searches and seizures apply. Consistent with the United States Supreme Court's recent ruling in *New Jersey* v. *T.L.O.*, *supra*, that public school officials are subject to the Fourth Amendment's proscription against unreasonable searches and seizures, we con-

P.2d 1099]; see also art. I, § 24, Cal. Const.: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.") We are not concerned in this case with the application of article I, section 28, subdivision (d), of the California Constitution (Prop. 8, Primary Elec. (June 8, 1982)), as the instant search was conducted before the effective date of that provision. (See *People* v. *Smith* (1983) 34 Cal.3d 251, 262 [193 Cal.Rptr. 692, 667 P.2d 149].)

[6]See *In re Scott K.*, *supra*, 24 Cal.3d 395, 401, and *In re Roger S.* (1977) 19 Cal.3d 921, 928 [141 Cal.Rptr. 298, 569 P.2d 1286]. Minors' rights may be legitimately restricted to serve the state's interest in promoting the health and welfare of children. (*Prince* v. *Massachusetts* (1944) 321 U.S. 158, 168 [88 L.Ed. 645, 653-654, 64 S.Ct. 438].) "[E]ven where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults'." (*Ginsberg* v. *New York* (1968) 390 U.S. 629, 638 [20 L.Ed.2d 195, 203, 88 S.Ct. 1274] quoting *Prince* v. *Massachusetts*, *supra*, 321 U.S. 158, 170 [88 L.Ed 645, 654].)

clude that California public school officials are further subject to this proscription under article I, section 13, of the California Constitution.

The state Court of Appeal to first consider this issue concluded that public school officials are private persons and therefore outside the scope of the Fourth Amendment. In the case of *In re Donaldson* (1969) 269 Cal.App.2d 509 [75 Cal.Rptr. 220], marijuana seized by a high school vice principal pursuant to a warrantless search of a student's locker was held admissible in a subsequent juvenile proceeding. The court found the vice principal to be a nongovernmental agent because "the primary purpose of the school official's search was not to obtain convictions, but to secure evidence of student misconduct." (*Id.*, at p. 511.)[7] The court relied on the in loco parentis responsibility of school officials to maintain discipline upon school premises. (*Id.*, at p. 513.) Although noting that the "acquisition of property by a private citizen from another person cannot be deemed reasonable or unreasonable," the court determined "[t]hat [because] evidence of crime is uncovered and prosecution results therefrom should not of itself make the search and seizure unreasonable." (*Id.*, at pp. 511-512.)[8]

We find this reasoning and the conclusion that public school officials are not governmental agents untenable on two grounds. First, public school officials are clearly agents of the government by the very nature of their employment. They are employees of the state through its local school boards (Ed. Code, §§ 1040 et seq., 14000 et seq., 41000 et seq., and 45020 et seq.).[9] Their qualifications, licensing and certification are controlled by state statute (§ 44000 et seq.). They are accountable to the State Board of Edu-

[7]The *Donaldson* court explicitly found "no joint operation by police and the school official" in that case. (*Id.*, at p. 511.) This finding apparently played an insignificant role in the court's determination that public school officials are private persons for purposes of the Fourth Amendment, but was critical to its determination of whether such cooperative efforts by a school official, whom the court otherwise perceived to be a private person, are thereby "tainted with state action [which] consequently violate the Fourth Amendment's prohibition." (*Ibid.*) While we believe that the existence of formal cooperative activities between law enforcement and public school officials in effecting searches of minor students may be an important consideration in determining the standard to be applied to these activities under the Fourth Amendment (see fn. 12, *post*), we do not find this inquiry relevant to the initial determination of whether this constitutional provision applies.

[8]Relevant Court of Appeal decisions since *Donaldson* have similarly continued to determine the reasonableness of searches by public school officials. (See, *In re Christopher W.* (1973) 29 Cal.App.3d 777, 780-782 [105 Cal.Rptr. 775] [explicit application of Fourth Amendment, although adopted *Donaldson* view that public school officials are not governmental officials]; *In re Fred C.* (1972) 26 Cal.App.3d 320, 323-326 [102 Cal.Rptr. 682] [assumed sub silentio that Fourth Amendment applies]; *In re Thomas G.* (1970) 11 Cal.App.3d 1193, 1196-1199 [90 Cal.Rptr. 361] [explicit application of Fourth Amendment].) None of these decisions addressed the inherent conflict in applying both the Fourth Amendment and the *Donaldson* holding that school officials are not governmental officials.

[9]All further statutory references are to the Education Code unless otherwise noted.

cation (§ 33000 et seq.) to implement state-prescribed policies and curricula (§§ 51000 et seq., 8000 et seq.). Moreover, public school officials are charged with the education and supervision of children whose education is primarily funded by the state (§§ 14000 et seq., 41000 et seq.). These children, if between the ages of 6 and 16 and not within an exempted class, are compelled by the state to attend school (§ 48200 et seq.); their conduct is statutorily circumscribed (§§ 48900 et seq., 44807); and their discipline by school officials must conform to state statute (§ 49000 et seq.). The very nature of these responsibilities renders public school officials agents of our state and local governments.

The second basis for rejecting the *Donaldson* court's conclusion that school officials are private persons for purposes of the Fourth Amendment is that court's reliance on the in loco parentis doctrine. At common law, this doctrine was based on the individual delegation of parental authority to the private tutor or schoolmaster of one's child. This delegation was "such a fraction of the power of the parent committed to his charge, viz., that of restraint and correction, as may be necessary to answer the purposes for which he is employed." (1 Blackstone's Commentaries 453.)

An overemphasis of this doctrine ignores the realities of modern public school education. It can no longer be said that parents voluntarily delegate a portion of their authority to school officials, as parents are required under penalty of criminal sanctions to enroll their children in school (§ 48291). Moreover, the common law doctrine of in loco parentis has given way in this state to a statutory directive.[10] Thus, public school officials act pursuant to statutory or governmental, rather than privately delegated, authority. As the United States Supreme Court reasoned, "[t]oday's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies . . . In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents . . ." (*New Jersey* v. *T.L.O.*, *supra*, 469 U.S. 325 [83 L.Ed.2d at p. 731, 105 S.Ct. at p. 741].) (See also *Gordon J.* v. *Santa Ana Unified School Dist.* (1984) 162 Cal.App.3d 530, 533-538 [208 Cal.Rptr. 657].)

[10]Section 44807 provides: "Every teacher in public schools shall hold pupils to a strict account for their conduct on the way to and from school, on the playgrounds, or during recess. A teacher, vice principal, principal or any other certificated employee of a school district shall not be subject to criminal prosecution or criminal penalties for the exercise, during the performance of his duties, of the same degree of physical control over a pupil that a parent would be legally privileged to exercise but which in no event shall exceed the amount of physical control reasonably necessary to maintain order, protect property, or protect the health and safety of pupils, or to maintain proper and appropriate conditions conducive to learning. The provisions of this section are in addition to and do not supersede the provisions of Section 49000 [governing scope of permissible disciplinary actions]."

Finally, that public school officials are governmental agents is underscored by the United States Supreme Court's application to such officials of constitutional restraints relevant only to state action. (See, e.g., *Tinker, supra*, 393 U.S. 503 [First Amendment]; *Goss* v. *Lopez, supra*, 419 U.S. 565 [due process clause of the Fourteenth Amendment].) "If school authorities are state actors for purposes of the constitutional guarantees of freedom of expression and due process, it is difficult to understand why they should be deemed to be exercising parental rather than public authority when conducting searches of their students." (*New Jersey* v. *T.L.O., supra*, 469 U.S. 325 [83 L.Ed.2d at p. 731, 105 S.Ct. at p. 741].) As the Supreme Court has stated, "[t]he Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted." (*Board of Education* v. *Barnette, supra*, 319 U.S. at p. 637 [87 L.Ed. at p. 1637].)

Given these considerations, we conclude that public school officials are governmental agents within the purview of both the Fourth Amendment and article I, section 13, and must therefore respect the constitutional rights of students in their charge against unreasonable searches and seizures.[11]

[11]Accord, *State* v. *Baccino* (Del.Super. 1971) 282 A.2d 869, 870-871 [49 A.L.R.3d 973]; *People* v. *Scott D.* (1974) 34 N.Y.2d 483 [358 N.Y.S.2d 403, 315 N.E.2d 466, 468]; *Doe* v. *State* (1975) 88 N.M. 318 [540 P.2d 827, 831]; *State* v. *Walker* (1974) 19 Ore.App. 420 [528 P.2d 113, 115]; *State* v. *Mora* (La. 1975) 307 So.2d 317, 319, vacated and remanded (1975) 423 U.S. 809 [46 L.Ed.2d 29, 96 S.Ct. 20], modified 330 So.2d 900, certiorari denied 429 U.S. 1004 [50 L.Ed.2d 616, 97 S.Ct. 538]. See also Comment, *Students and the Fourth Amendment: "The Torturable Class"* (1983) 16 U.C. Davis L.Rev. 709, 713-714.

Justice Mosk's dissent mistakenly concludes that our opinion equates public school officials with peace officers. It is precisely because we do not equate these two types of governmental officials that we have concluded that a standard of suspicion less than probable cause must apply to searches by officials of the public schools. The distinction we draw between public school officials and peace officers is underscored by our refusal to now decide what standard should apply in determining the reasonableness of searches by school officials who act in cooperation with law enforcement officers. (See fns. 7, *ante*, and 12, *post*.)

As earlier noted, the proscriptions of the Fourth Amendment are not properly limited to agents of law enforcement. As the United States Supreme Court has recognized in the administrative law context, "the Fourth Amendment prohibition against unreasonable searches protects against warrantless intrusions during civil as well as criminal investigations . . . If the government intrudes on a person's property, the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards." (*Marshall* v. *Barlow's, Inc.* (1978) 436 U.S. 307, 312-313 [56 L.Ed.2d 305, 311, 98 S.Ct. 1816].) "The basic purpose of this [Fourth] Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by *governmental* officials." (Italics added.) (*Camara* v. *Municipal Court* (1967) 387 U.S. 523, 528 [18 L.Ed.2d 930, 935, 87 S.Ct. 1727].)

Justice Mosk's characterization of our holding is rather attenuated. It is not generally the responsibility of governmental secretaries, librarians, gardeners or janitors to keep a vigilant and watchful eye over public school students. Nor is it their duty to conduct searches of such students when needed to ensure the students' health and safety. However, if these governmental employees worked for a public school and conducted student searches, they

IV.

(7a) We next consider what standard should apply in determining the reasonableness of searches by public school officials.[12] As will be seen, we conclude that the unique characteristics of the school setting require that the applicable standard be reasonable suspicion. The governmental interests in providing an environment which will protect the health and welfare of all students must be balanced with the privacy interests of individual students. (8) (See fn. 13.) That weighing process convinces us that the standard is appropriately less than probable cause.[13]

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would then be held to the same constitutional standard we have established for all public school officials. Additionally, in evaluating the reasonableness of the instant search without determining that the Fourth Amendment applies, the dissent makes the same analytical error as prior Court of Appeal decisions. (See fn. 8, *ante*.)

[12]Under the facts of this case, we do not reach the issue of what standard should apply where law enforcement officials are involved at the outset of a student search, or where a school official acts in cooperation with, or as an agent of, law enforcement. (See fn. 7, *ante*; cf., e.g., *Picha* v. *Wieglos* (N.D.Ill. 1976) 410 F.Supp. 1214, 1219-1221 [school officials' cooperative efforts with law enforcement held to require probable cause to search].) Nor do we adopt the distinction, urged by William and initially drawn in *Donaldson*, between searches conducted solely for school purposes and searches resulting in, or conducted for the purpose of, juvenile adjudication or criminal prosecution.

[13]An overview of the Fourth Amendment's general application and exceptions places our discussion in context. The Fourth Amendment protects "the people" against "unreasonable searches and seizures" by governmental officials. Under ordinary circumstances, a search is per se unreasonable unless conducted pursuant to a judicial warrant issued on the basis of probable cause and describing with particularity the items to be seized. (*United States* v. *Place* (1983) 462 U.S. 696, 701 [77 L.Ed.2d 110, 701-702, 103 S.Ct. 2637, 2641].) Probable cause depends upon facts and circumstances which are reasonably trustworthy and sufficient to warrant a prudent person to believe that a violation of law is being, or has been, committed. (*Beck* v. *Ohio* (1964) 379 U.S. 89, 91 [13 L.Ed.2d 142, 145, 85 S.Ct. 223].)

This general rule is subject to "a few specifically established and well-delineated exceptions." (*Katz* v. *United States* (1967) 389 U.S. 347, 357 [19 L.Ed.2d 576, 585, 88 S.Ct. 507].) These exceptions include searches incident to a lawful arrest (*Illinois* v. *Lafayette* (1983) 462 U.S. 640 [77 L.Ed.2d 65, 103 S.Ct. 2605, 2608-2609]); searches made under exigent circumstances (*United States* v. *Jeffers* (1951) 342 U.S. 48, 52 [96 L.Ed. 59, 64, 72 S.Ct. 93]); where the police are in "hot pursuit" (*Warden* v. *Hayden* (1967) 387 U.S. 294, 298-300 [18 L.Ed.2d 782, 787-788, 87 S.Ct. 1642]); pursuant to a "stop and frisk" for weapons (*Terry* v. *Ohio* (1968) 392 U.S. 1, 30 [20 L.Ed.2d 889, 911, 88 S.Ct. 1868]); where the evidence is in plain view (*Coolidge* v. *New Hampshire*, *supra*, 403 U.S. 443, 465-468 [29 L.Ed.2d 564, 582-584]); or with the consent of the individual whose person or property is searched (*Zap* v. *United States* (1946) 328 U.S. 624, 628-630 [90 L.Ed. 1477, 1481-1483, 66 S.Ct. 1277]).

The warrant and probable cause requirements have also been relaxed for searches conducted in unique settings, such as military installations (*United States* v. *Grisby* (4th Cir. 1964) 335 F.2d 652); at the national border (*United States* v. *Jaime-Barrios* (9th Cir. 1974) 494 F.2d 455, cert. den. 417 U.S. 972 [41 L.Ed.2d 1143, 94 S.Ct. 3178]); aboard vessels within the United States or its coastal waters (*United States* v. *Villamonte-Marquez* (1983) 462 U.S. 579 [77 L.Ed.2d 22, 103 S.Ct. 2573]); pursuant to certain administrative inspections of licensed businesses (*United States* v. *Biswell* (1972) 406 U.S. 311 [32 L.Ed.2d 87, 92 S.Ct. 1593]); or at the situs of other regulated activities (*Camara* v. *Municipal Court*, *supra*, 387 U.S. 523, but see *Donovan* v. *Dewey* (1980) 452 U.S. 594, 606-607 [69 L.Ed.2d 262, 273-274, 101 S.Ct. 2534]).

(9) The right of privacy is vitally important. It derives, in this state, not only from the protections against unreasonable searches and seizures guaranteed by the Fourth Amendment and article I, section 13, but also from article I, section 1, of our state Constitution. Homage to personhood is the foundation for individual rights protected by our state and national Constitutions. (7b) The privacy of a student, the very young or the teenager, must be respected. By showing that respect the institutions of learning teach constitutional rights and responsibilities by example. "That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." (*Board of Education* v. *Barnette*, *supra*, 319 U.S. at p. 637 [87 L.Ed. 1628, 1637].)

At the same time, 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. As the Fifth Circuit Court of Appeals stated in *Horton* v. *Goose Creek Ind. Sch. Dist.* (5th Cir. 1982) 690 F.2d 470, 480, certiorari denied 463 U.S. 1207 [77 L.Ed.2d 1387, 103 S.Ct. 3536]: "When society requires large groups of students, too young to be considered capable of mature restraint in their use of illegal substances or dangerous instrumentalities [to congregate in the public schools], it assumes a duty to protect them from dangers posed by anti-social activities—their own and those of other students—and to provide them with an environment in which education is possible. To fulfill that duty, teachers and school administrators must have broad supervisory and disciplinary powers." (Fn. omitted.)

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. Thus, students' zones of privacy are considerably restricted as compared to the relation of a person to the police—whether on the street or at home. 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. Thus, the approaches of the law, including constitutional law, must vary. That they must vary in no wise means that student privacy interests are less important or that school officials may be less sensitive to them. Thus, a student always has the highest privacy interests in his or her own person, belongings, and physical enclaves, such as lockers.

The balancing of competing interests to determine the scope of Fourth Amendment protections in a particular setting is well settled. (10)

Whether a particular search is reasonable depends on a balancing of "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." (*United States* v. *Place*, *supra*, 462 U.S. 696, 703 [77 L.Ed.2d 110, 118 103 S.Ct. 2637, 2642].) **(7c)** In balancing students' privacy interests with the governmental interests in promoting a safe learning environment, we conclude that searches of students by public school officials must be based on a reasonable suspicion that the student or students to be searched have engaged, or are engaging, in a proscribed activity (that is, a violation of a school rule or regulation, or a criminal statute). There must be articulable facts supporting that reasonable suspicion. Neither indiscriminate searches of lockers nor more discreet individual searches of a locker, a purse or a person, here a student, can take place absent the existence of reasonable suspicion. Respect for privacy is the rule—a search is the exception.

In sum, this standard requires articulable facts, together with rational inferences from those facts, warranting an objectively reasonable suspicion that the student or students to be searched are violating or have violated a rule, regulation, or statute. (Cf. *People* v. *Loewen* (1983) 35 Cal.3d 117, 123 [196 Cal.Rptr. 846, 672 P.2d 436], and *In re Tony C.* (1978) 21 Cal.3d 888, 893-894 [148 Cal.Rptr. 366, 582 P.2d 957] [investigative detentions]; *Terry* v. *Ohio*, *supra*, 392 U.S. 1, 21-22 [20 L.Ed.2d 889, 905-906] [stop and frisk for weapons].) The corollary to this rule is that a search of a student by a public school official is unlawful if predicated on mere curiosity, rumor, or hunch. (Cf. *In re Tony C.*, *supra*, at p. 893.)

This standard is consistent with that recently adopted by the United States Supreme Court in *New Jersey* v. *T.L.O.*: "Under ordinary circumstances, a search of a student by a teacher or other school official will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." (469 U.S. 325 [83 S.Ct. at pp. 734-735, 105 S.Ct. at p. 744], fns. omitted.) **(11)** We also adhere to the court's limitations on the scope of permissible searches under this standard: "Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." (*Ibid.*, fn. omitted.)

(12) Like the United States Supreme Court, we do not require that school officials obtain a warrant before conducting the types of searches herein described. "The warrant requirement . . . is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a

child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools." (469 U.S. 325 [83 S.Ct. at p. 733, 105 S.Ct. at p. 743].)

(7d) A majority of courts in other jurisdictions have also adopted a standard of suspicion lower than probable cause in order to determine the legality of a student search by a public school official. (See *Bilbrey* v. *Brown* (9th Cir. 1984) 738 F.2d 1462, 1466; see also Comment, *supra*, 16 U.C. Davis L.Rev. 709, 723.) While the standard adopted by most of these decisions is "reasonable suspicion,"[14] some courts have adopted the standard of "reasonable cause to believe" (see, e.g., *M.* v. *Bd. of Ed. Ball-Chatham C.U.S.D. No. 5* (S.D.Ill. (1977) 429 F.Supp. 288, 292), "reasonable grounds to believe" (see, e.g., *State in the Interest of T.L.O.*, *supra*, 463 A.2d 934, 941-942), or simply require that the search be "reasonable" (see, e.g., *State* v. *Young* (1975) 234 Ga. 488, 496, 498 [216 S.E.2d 586], cert. den. 423 U.S. 1039 [46 L.Ed. 413, 96 S.Ct. 576]). While most of these decisions balance the interests of the student against in loco parentis responsibilities of school officials,[15] we prefer, for the reasons previously discussed, to view these countervailing governmental interests as statutorily, rather than common law, based.[16] (Accord, *State* v. *Mora*, *supra*, 307 So.2d

[14]See, e.g., *Bellnier* v. *Lund* (N.D.N.Y. 1977) 438 F.Supp. 47, 53-54; *Nelson* v. *State* (Fla.App. 1975) 319 So.2d 154, 156; *Doe* v. *State*, *supra*, 540 P.2d 827, 832; *State* v. *Baccino*, *supra*, 282 A.2d 869, 872; *People* v. *Jackson* (1971) 65 Misc.2d 909 [319 N.Y.S.2d 731, 733-736]. Cf. *State* v. *Mora*, *supra*, 307 So.2d 317, 320 (applying full Fourth Amendment protections).

[15]See, e.g., *M.* v. *Bd. of Ed. Ball-Chatham C.U.S.D. No. 5*, *supra*, 429 F.Supp. at page 292; *Bellnier* v. *Lund*, *supra*, 438 F.Supp. 47, 53-54; *Nelson* v. *State*, *supra*, 31 So.2d 154, 156; *State* v. *Baccino*, *supra*, 282 A.2d 869, 872; *People* v. *Jackson*, *supra*, 319 N.Y.S.2d 731, 733-736.

[16]As discussed earlier, the in loco parentis doctrine has been used to underscore the responsibility of school officials to maintain order and discipline in the school and to insure the health, morals, and safety of all students. (See, e.g., *In re Donaldson*, *supra*, 269 Cal.App.2d 509, 512-513; *In re Christopher W.*, *supra*, 29 Cal.App.3d 777, 780-782.) However, under the doctrine at common law, the disciplinary powers delegated to the schoolmaster were limited to the individual child and not, as many courts have assumed, to the protection of the entire student body. (See, Buss, *The Fourth Amendment and Searches of Students in Public Schools* (1974) 59 Iowa L.Rev. 739, 768.) Moreover, the in loco parentis doctrine cannot be extended to justify searches by school officials which would not be legal although approved by a parent. (*In re Scott K.*, *supra*, 24 Cal.3d 395, 404-405; see also dis. opn. by Justice Hughes in *Mercer* v. *State* (Tex.Civ.App. 1970) 450 S.W.2d 715, 720-721.)

Finally, the in loco parentis doctrine was apparently not meant to apply to criminal conduct:

"The Latin phrase [parens patriae] proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance. The phrase was taken from chancery practice, where, however, it was used to describe the power of the state to act *in loco parentis* for the purpose of protecting the property interests and the person of the child.

317, 319; *Doe* v. *State, supra,* 540 P.2d 827; *People* v. *Ward* (1975) 62 Mich.App. 46 [233, N.W.2d 180]; *Horton* v. *Goose Creek Ind. Sch. Dist., supra,* 690 F.2d 470, 480-481, fn. 18.)

The reasonable suspicion standard is more stringent than other "less than probable cause" standards for public school searches because it depends on objective and articulable facts. We thus reject those standards previously articulated by this state's Courts of Appeal (see *In re Thomas G., supra,* 11 Cal.App.3d 1193, 1196, 1199 ["reasonable"] and *In re Fred C., supra,* 26 Cal.App.3d 320, 324, 326 ["good cause"]), including the two-prong test apparently applied the instant case: "The first requirement is that the search be within the scope of the school's duties. The second requirement is that the action taken, the search, be reasonable under the facts and circumstances of the case." (*In re Christopher W., supra,* 29 Cal.App.3d 777, 782.)

V.

(13) Finally, we must determine whether the search conducted by Lorenz met the standard of reasonable suspicion.

Lorenz articulated no facts to support a reasonable suspicion that William was engaged in a proscribed activity justifying a search. The record reflects a complete lack of *any prior* knowledge or information on the part of Lorenz relating William to the possession, use, or sale of illegal drugs or other contraband. (Accord, *Bilbrey* v. *Brown, supra,* 738 F.2d at pp. 1467, 1468; cf., *In re Donaldson, supra,* 269 Cal.App.2d 509 [student informant made purchase of illegal drugs from defendant at direction of school official]; *In re Thomas G., supra,* 11 Cal.App.3d 1192 [student informed school official that he had seen defendant ingest illegal drug and was acting "intoxicated"]; *In re Fred C., supra,* 26 Cal.App.3d 320 [student informant told school official that defendant was selling illegal drugs on campus]; and *In re Christopher W., supra,* 29 Cal.App.3d 777 [four students informed school official that defendant's locker contained a sack of marijuana].) Lorenz' suspicion that William was tardy or truant from class provided no reasonable basis for conducting a search of any kind. The record is also devoid of evidence of exigent circumstances requiring an immediate nonconsensual search.

But there is no trace of the doctrine in the history of criminal jurisprudence." (*In re Gault, supra,* 387 U.S. at p. 16 [18 L.Ed.2d at p. 540].)

As this court has previously stated, "California law has long imposed on school authorities a duty to 'supervise at all times the conduct of the children on the school grounds and to enforce those rules and regulations necessary to their protection. [Citations.]'" (*Dailey* v. *Los Angeles Unified Sch. District* (1970) 2 Cal.3d 741, 747 [87 Cal.Rptr. 376, 470 P.2d 360], quoting *Taylor* v. *Oakland Scavenger Co.* (1941) 17 Cal.2d 594, 600 [110 P.2d 1044].)

Moreover, William's "furtive gestures" in attempting to hide his calculator case from Lorenz' view cannot, standing alone, furnish sufficient cause to search. (See *People* v. *Superior Court (Kiefer)* (1970) 3 Cal.3d 807, 817-818 [91 Cal.Rptr. 729, 478 P.2d 449, 45 A.L.R.3d 559]; *Sibron* v. *New York* (1968) 392 U.S. 40, 66-67 [20 L.Ed.2d 917, 937, 88 S.Ct. 1889].) Similarly, William's demand for a warrant did not create a reasonable suspicion upon which to base the search. Such conduct merely constitutes William's legitimate assertion of his constitutional right to privacy and to be free from unreasonable searches and seizures. There are many reasons why a student might assert these rights, other than an attempt to prevent disclosure of evidence that one has violated a proscribed activity. A student cannot be penalized for demanding respect for his or her constitutional rights. (Cf. *Tompkins* v. *Superior Court* (1963) 59 Cal.2d 65, 68 [27 Cal.Rptr. 889, 378 P.2d 113].) If a student's limited right of privacy is to have any meaning, his attempt to exercise that right—by shielding a private possession from a school official's view—cannot in itself trigger a "reasonable suspicion." A contrary conclusion would lead to the anomalous result that a student would retain a right of privacy only in those matters that he willingly reveals to school officials.

We therefore conclude that Lorenz' search of William's calculator case was conducted illegally, and that the evidence obtained thereby was inadmissible in the proceedings of the juvenile court. (See *People* v. *Cahan* (1955) 44 Cal.2d 434, 445 [282 P.2d 905, 50 A.L.R.2d 513]; *Mapp* v. *Ohio* (1960) 367 U.S. 643, 655 [6 L.Ed.2d 1081, 1090, 81 S.Ct. 1684, 84 A.L.R.2d 933].)[17]

[17]The United States Supreme Court did not need to decide whether the exclusionary rule applies to the fruits of unlawful searches conducted by school authorities since it concluded that the search of T.L.O. was legally valid. (See 469 U.S. 325 fn. 3 [83 L.Ed.2d at p. 729, 105 S.Ct. at p. 739].) However, the court properly noted that "[t]he question whether evidence should be excluded from a criminal proceeding involves two discrete inquiries: whether the evidence was seized in violation of the Fourth Amendment, and whether the exclusionary rule is the appropriate remedy for the violation." (*Ibid.*)

Having concluded that the evidence in the instant case was seized in violation of the Fourth Amendment and article I, section 13, we further determine that the exclusionary rule is the only appropriate remedy for this violation when, as in the instant case, the evidence is sought to be admitted in a juvenile or criminal prosecution. (Cf. *Gordon J.* v. *Santa Ana Unified School Dist.*, *supra*, 162 Cal.App.3d at pp. 542-546 [holding that the exclusionary rule does not apply to school disciplinary proceedings, an issue not presented by the case at bar].) The exclusionary rule is intended not only to have a deterrent effect on police misconduct, but to preserve the integrity of the judicial system. "When, as in the present case, the very purpose of an illegal search and seizure is to get evidence to introduce at a trial, the success of the lawless venture depends entirely on the court's lending its aid by allowing the evidence to be introduced. It is no answer to say that a distinction should be drawn between the government acting as law enforcer and the gatherer of evidence and the government acting as judge." (*People* v. *Cahan*, *supra*, 44 Cal.2d at p. 445.) As the United States Supreme Court has said, the exclusionary rule "gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law

The order of the superior court declaring appellant a ward of the juvenile court pursuant to section 602 of the Welfare and Institutions Code is reversed.

Broussard, J., Grodin, J., and Kaus, J.,* concurred.

BIRD, C. J., Concurring and Dissenting.—I write separately to express my own views on this important issue.

I.

I cannot join in the abandonment of traditional Fourth Amendment analysis which today's majority opinion embraces. Both the balancing test employed by my colleagues and the "reasonable suspicion" standard which they ultimately enunciate are at odds with well-established search and seizure doctrine.

This court should, under the state constitutional search and seizure provision (art. I, § 13), adhere to the standard of probable cause in the school setting. The reasonable suspicion standard should be the standard only where the intrusion by the school official falls substantially short of a full-scale search or seizure. (See *Terry* v. *Ohio* (1968) 392 U.S. 1 [20 L.Ed.2d 889, 88 S.Ct. 1868]; *In re Tony C.* (1978) 21 Cal.3d 888 [148 Cal.Rptr. 366, 582 P.2d 957].)

As Justice William Brennan so aptly observed in his dissent in *New Jersey* v. *T.L.O.* (1985) 469 U.S. 325, 357 [83 L.Ed.2d 720, 745, 105 S.Ct. 733, 752], to "cast aside the constitutional probable-cause standard when assessing the constitutional validity of a schoolhouse search . . . on the basis of [a] Rohrschach-like 'balancing test[]' . . . represents a sizable innovation in Fourth Amendment analysis.

"This innovation finds support neither in precedent nor policy and portends a dangerous weakening of the purpose of the Fourth Amendment to protect the privacy and security of our citizens. Moreover, even if this Court's historic understanding of the Fourth Amendment were mistaken and a balancing test of some kind were appropriate, any such test that gave adequate weight to the privacy and security interests protected by the Fourth Amendment would not reach the preordained result [of reasonableness which] the Court's conclusory analysis reaches today." I stand with Justice

enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice." (*Mapp* v. *Ohio*, *supra*, 367 U.S. at p. 660 [6 L.Ed.2d at p. 1093].)

*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council.

Brennan's view. I would require the search in this case to be evaluated under the probable cause standard.

II.

I recognize full well that Justice Brennan's position was rejected by the majority in *T.L.O.* and is rejected by today's majority in favor of a "reasonable suspicion" standard. It is gratifying that in enunciating that standard, my colleagues require that reasonable suspicion be directed toward a specific student. (Majority opn., *ante*, at p. 564.)

A rule requiring individualized suspicion discourages searches of a group, class, or entire student body where the school official has reasonable suspicion that there has been a violation of the law but is unable to focus that suspicion on a particular individual. The constitutional rights of the many do not automatically disappear simply because there are reasonable grounds for violating the constitutional rights of one. "Our state and federal Constitutions were written precisely to outlaw . . . unrestricted general sweeps and searches." (*People* v. *Aldridge* (1984) 35 Cal.3d 473, 480 [198 Cal.Rptr. 538, 674 P.2d 240].)

An "individualized suspicion" rule is fully consistent with the philosophy of the detention cases (*Aldridge*, *supra*, 35 Cal.3d 473; *People* v. *Loewen* (1983) 35 Cal.3d 117 [196 Cal.Rptr. 846, 672 P.2d 436]; *In re Tony C.*, *supra*, 21 Cal.3d 888) on which the majority opinion bases its holding. (Majority opn., *ante*, at p. 564.) Those decisions require that a temporary detention be based on evidence that activity relating to crime has taken place or is occurring or about to occur, *and* that "*the person [whom the officer] intends to stop or detain is involved in that activity.*" (*Id.*, at p. 893, italics added.) Thus, the doctrinal underpinnings of the "reasonable suspicion" standard enunciated today provide ample response to this very important question.

Moreover, although the *T.L.O.* court declined to decide this question, it hinted strongly that individualized suspicion would be required even under the Fourth Amendment. "Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field."' [Citation.]" (*T.L.O.*, *supra*, 469 U.S. at p. 342, fn. 8 [83 L.Ed. at p. 735, 105 S.Ct. at p. 744].)

The need for such a rule is poignantly demonstrated by a school search conducted only 10 days after the decision in *T.L.O.* was announced. This incident was described by Nat Hentoff in a recent article in the Village

Voice. (Hentoff, *The Day the Girls of Elyria Were Strip-Searched* (June 18, 1985) The Village Voice, at p. 25.)

After finishing first-period gym class at the Westwood Junior High School in Elyria, Ohio, one of the girls in the class told her teacher that her watch and ring—which she thought she had left in the locker room—were missing. Acting on what the school superintendent would later claim was "'reasonable deliberation of the critical issues at hand,'" the gym teacher proceeded to search the lockers and purses of each of the 20 girls in the class, without success. Two other female school officials then joined the gym teacher in conducting a body search of each student, again without producing the stolen goods. The local newspaper criticized the action, observing that "'. . . Theft is serious business—but to ask 20 girls to take off most of their clothing in the hope that one guilty party will be found, goes beyond common sense, and is an affront to the innocent. . . .'" (*Id.*, at p. 25, col. 3.) The requirement of individualized suspicion may very well prevent such offensive intrusions from occurring on our school campuses.

In this case, even though Lorenz had an individualized suspicion, it is clear that his search of William's calculator case was predicated on neither probable cause nor reasonable suspicion. Therefore, the evidence seized was erroneously admitted and the order of wardship cannot stand. For this reason, I concur.

MOSK, J.—I dissent.

I do not quarrel with the "reasonable suspicion" test adopted by the majority, but I cannot subscribe to their grounds for that holding or their disposition of this appeal. As will appear, I would rely instead on an interpretation of the duties imposed by statute on school officials, and I would find there clearly was reasonable suspicion on this record. Thus there is no need to reverse and remand the matter to the juvenile court.

My colleagues rely on two bases for their conclusion. First, they equate school officials with peace officers; second, they overrule a controlling Court of Appeal decision because it relies on the doctrine of in loco parentis. I believe they err on both points.

The majority stress that "public school officials are governmental agents" by the very nature of their employment. (*Ante*, p. 560.) True. Of course public school officials work for the government. But so do the secretary who types this opinion, the librarian who catalogues our law books, the gardener who tends the courthouse lawn, the janitor who cleans the building in which this court sits, and, in California, more than 200,000 other state employees. The test is not whether a person gets a paycheck from a gov-

ernment agency; the test is whether that person is an agent of *law enforcement* and subject to the restraints imposed on peace officers.

It is untenable to deem the hundreds of thousands of federal, state, and local government employees to be agents of law enforcement. One becomes a law enforcement agent only when directly assigned to so act by authorized personnel, or when one volunteers to serve. In the absence of such an assignment by direction or by choice, school teachers and officials have no obligation to adhere to the rules governing law enforcement or to protect criminal defendants.

The majority reject the well-reasoned opinion in *In re Donaldson* (1969) 269 Cal.App.2d 509 [75 Cal.Rptr. 220], and its progeny (e.g., *In re Guillermo M.* (1982) 130 Cal.App.3d 642 [181 Cal.Rptr. 856] (hg. den.); *In re Christopher W.* (1973) 29 Cal.App.3d 777 [105 Cal.Rptr. 775]; *In re Fred C.* (1972) 26 Cal.App.3d 320 [102 Cal.Rptr. 682]; *In re Thomas G.* (1970) 11 Cal.App.3d 1193 [90 Cal.Rptr. 361]) because of reliance on the doctrine of in loco parentis, which, they suggest, "ignores the realities of modern public school education." In fact, their quarrel is not with those who fail to recognize such "realities," but with the Legislature of the State of California.

Regardless of how it fares elsewhere, the basic doctrine of in loco parentis is not dead in California. (Accounts of its demise in *Gordon J.* v. *Santa Ana Unified School Dist.* (1984) 162 Cal.App.3d 530 [208 Cal.Rptr. 657], are, as Mark Twain would have put it, grossly exaggerated.) The concept is alive and well, and is codified by the Legislature in Education Code section 44807. In loco parentis means, precisely, "in the place of a parent" (Black's Law Dict. (4th ed. 1951) p. 896); it originated in the text of Blackstone's Commentaries.

Section 44807 provides that teachers, vice principals, and other certificated employees of a school district may exercise "*the same degree of physical control over a pupil that a parent would be legally privileged to exercise* . . . ." (Italics added.) In other words, the enumerated employees of a school district stand in loco parentis—in place of the parent—for purposes of physical control on school grounds, in order "to maintain order, protect property, or protect the health and safety of pupils, or to maintain proper and appropriate conditions conducive to learning." (*Ibid.*) In the same section, the Legislature has required that "Every teacher in the public schools shall hold pupils to a strict account for their conduct on the way to and from school, on the playgrounds, or during recess."

Although, as indicated above, school officials are not law enforcement agents, they have the foregoing statutory duties. Implicit in their obligation to maintain order, protect school property, and protect the health and safety

of pupils, is the right of school officials to search pupils and their property on reasonable suspicion of misconduct and a sincere belief that the search is necessary to maintain "conditions conducive to learning." Such searches "Primarily . . . are not undertaken in any law enforcement capacity but are designed to allow enforcement of multiple rules, regulations and prohibitions which are imposed to maintain an atmosphere of security and calm necessary to allow education to take place. This may and does involve controlling students' behavior, and it may and does involve controlling the deleterious items they are allowed to possess on the premises." (*State* v. *Young* (1975) 234 Ga. 488 [216 S.E.2d 586, 592] cert. den. *sub nom. Young* v. *Georgia* (1975) 423 U.S. 1039 [46 L.Ed.2d 413, 96 S.Ct. 576].)

The majority in the instant case create a dilemma for school officials. If the authorities vigilantly protect their classrooms and school grounds from students' improper conduct, they are likely to run afoul of the majority's expansive concept of unlawful searches; yet if they fail to act diligently, they assume the risk of civil liability. This court held in *Dailey* v. *Los Angeles Unified Sch. Dist.* (1970) 2 Cal.3d 741, 747 [87 Cal.Rptr. 376, 470 P.2d 360], that "California law has long imposed on school authorities a duty to 'supervise at all times the conduct of the children on the school grounds and to enforce those rules and regulations necessary to their protection.'" Inadequate supervision was held to justify tort liability.

The reliance of the majority on the opinion of Justice White in *New Jersey* v. *T.L.O.* (1985) 469 U.S. 325, 327 [83 L.Ed.2d 720, 725, 105 S.Ct. 733, 736], is puzzling. First of all, it was a plurality opinion; it did not command a clear majority.[1] Second, the court held the search of the schoolgirl and her possessions was justified, and affirmed the admission of the evidence and the conviction. From that result, the majority here should draw little comfort.

In upholding the search and conviction, the plurality opinion in *T.L.O.* made it clear that public school officials "act in furtherance of publicly mandated educational and disciplinary policies" and statutes "establishing the authority of school officials over their students." (*Id.* at p. 336 [83 L.Ed.2d at p. 731, 105 S.Ct. at p. 741].) As I relate above, our Legislature has likewise made clear California's publicly mandated educational and disciplinary policies.

Justices Powell and O'Connor, while concurring in the majority result, added this significant caveat: "The special relationship between teacher and

[1]One problem with the *T.L.O.* analysis is its apparent underlying assumption that many high school pupils are now adults, since the lowering of the age of majority. What the opinion unfortunately overlooks is that delinquent and criminal conduct among juveniles often begins in the lower grades of high school, in middle school, and even in elementary school.

student also distinguishes the setting within which school children operate. Law enforcement officers function as adversaries of criminal suspects. These officers have the responsibility to investigate criminal activity, to locate and arrest those who violate our laws, and to facilitate the charging and bringing of such persons to trial. Rarely does this type of adversarial relationship exist between school authorities and pupils. Instead, there is a commonality of interests between teachers and their pupils. The attitude of the typical teacher is one of personal responsibility for the student's welfare as well as for his education.

"The primary duty of school officials and teachers, as the Court states, is the education and training of young people. A state has a compelling interest in assuring that the schools meet this responsibility. Without first establishing discipline and maintaining order, teachers cannot begin to educate their students. And apart from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern. For me, it would be unreasonable and at odds with history to argue that the full panoply of constitutional rules applies with the same force and effect in the schoolhouse as it does in the enforcement of criminal laws." (Fn. omitted; *id.* at p. 350 [83 L.Ed.2d at p. 740, 105 S.Ct. at p. 748].)

On the other hand, if evidence should disclose that a school official was working at the direction of, in cooperation with, or under the authority of law enforcement officers, the exclusionary rule would apply. (See, e.g., *Dyas* v. *Superior Court* (1974) 11 Cal.3d 628, 633, fn. 2 [114 Cal.Rptr. 114, 522 P.2d 674].) There was no such evidence in this case; indeed, the evidence is to the contrary.

Here, the vice principal acted after seeing three students on the school grounds at a time when they should presumably have been in a classroom. When approached, the minor involved herein attempted to conceal a bag he was holding and refused to permit the school official to examine it or its contents. The boy's conduct was comparable to that of the girl in *T.L.O.* The vice principal promptly took the minor to his office, called in an observer because he feared the minor might flee, and proceeded to investigate further. Only after finding what appeared to be marijuana in the bag did he call law enforcement officials. It was among the vice principal's usual duties to ascertain whether students who were not in class possessed the necessary permission to be elsewhere. He testified that his routine responsibilities involved "Supervision basically more than security per se."

The vice principal was thus clearly acting in a supervisory role and pursuant to his statutory authority when he stopped the minor and proceeded to investigate. The latter's evasive responses and evident recalcitrance gave

him reasonable suspicion justifying the search. There was no evidence that the vice principal acted in furtherance of law enforcement goals. His concerns and actions were fully appropriate to and consistent with his position as a school official. Indeed, they were consistent with the concerns and actions of the school authorities in *T.L.O.*

Of course we must be alert to protecting the legitimate rights of students who are suspected of criminal activity or violation of school regulations. However, we must also realize that innocent, law-abiding students have a constitutional right to protection from crime and criminals, and are entitled to a safe school environment. The people of California made that clear when they adopted article I, section 28, subdivision (c), of the Constitution: it provides that "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." In addition, the Code of Ethics of the Teaching Profession provides that the teacher "protects the health and safety of students." (Cal. Admin. Code, tit. 5, § 80130.) This is both a moral duty and a legal obligation.

The majority opinion in this case will arouse apprehension and cause uncertainty in communities and in school districts. We live in troublesome, indeed hazardous, times. A decade or two ago the potential delinquent pupil was merely truant, smoked cigarettes, and drove hot rod cars. Today the delinquent of the same age is often violent, and some use drugs and deadly weapons.

If we are not to have countless future generations of adult criminals, we must make as certain as possible that we do not permit criminality to begin with juveniles in public schools. We do not have police officers in our classrooms. We do not have parents in our classrooms. Therefore we must give to teachers and principals all the tools they reasonably need to preserve order in classrooms and school grounds.

The juvenile court did not err in denying the motion to suppress the evidence. I would affirm its adjudication of wardship.

[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. *Arcade 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.

[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.

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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.

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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.)

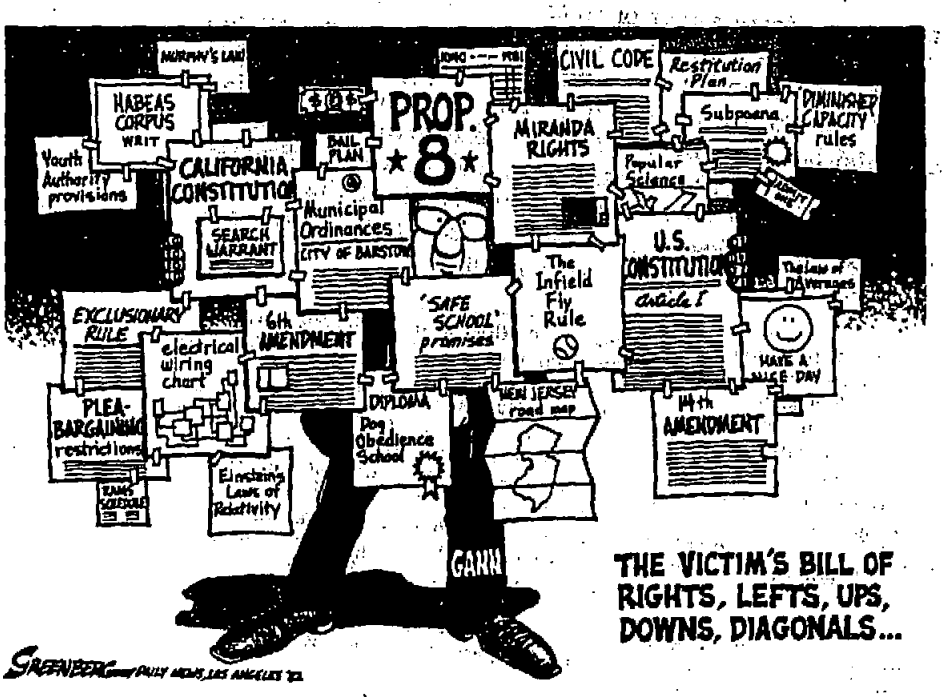
The single-subject requirement thus operates not as a limit on the people's reserved power to legislate by initiative, but as a *limit* on the *draftsmen* of *initiative measures*. The rule demands that initiative proposals be presented to the voters in a format that ensures the *integrity* of the cherished 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.



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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

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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; *McFaddeh* 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 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. 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 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.

(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, as well as 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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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 18 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 the article shall continue to apply in 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-

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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. The 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 Effects

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 3,600 higher than under existing law. In addition, the state might need to spend up to $280 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. RODEN
District Attorney, Santa Barbara County

TERRY COGGIN
Member of the Assembly, 66th 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

[Sept. 1982]

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, 65th 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

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[Sept. 1982]

[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. (*Zeilenga* 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.

[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.

[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* purpose.'" (*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.

[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.

[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

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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.

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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

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December 24, 2003

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

Re: CSM No. 02-TC-09
Test Claim of Santa Monica Community College District
False Reports of Police Misconduct (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.

The sole reason for Staff's recommendation to the Commission that it deny the test claim is that:

> "... forming a school district police department and employing[1] peace officers is an entirely discretionary activity on the part of all school districts..." (Draft Staff Analysis, at page 7)

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..." (Id., emphasis supplied)

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[1] Test claimant is not seeking reimbursement for "employing peace officers". Test claimant seeks reimbursement only for complying with the test claim legislation.

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].)

personnel to protect the health and safety of pupils and to maintain proper and appropriate conditions conducive to learning. The California Supreme Court has indicated that this Education Code section codified the traditional common law doctrine of *in loco parentis*, under which school employees stand "in the place of the parent." *In re William G* (1985) 40 Cal.3d 550, 571 (diss.op.)

As support for its self-serving conclusion that there is no constitutional requirement to maintain school police departments, Staff, at page 6, cites *Leger v. Stockton Unified School District* (1988) 202 Cal.App.3d 1448 and quotes[6] 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*[7], 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)

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parent would be legally privileged to exercise but which in no event shall exceed the amount of physical control reasonably necessary to maintain order, protect property, or protect the health and safety of pupils, or to maintain proper and appropriate conditions conducive to learning. The provisions of this section are in addition to and do not supersede the provisions of Section 49000."

[6] 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.

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

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.